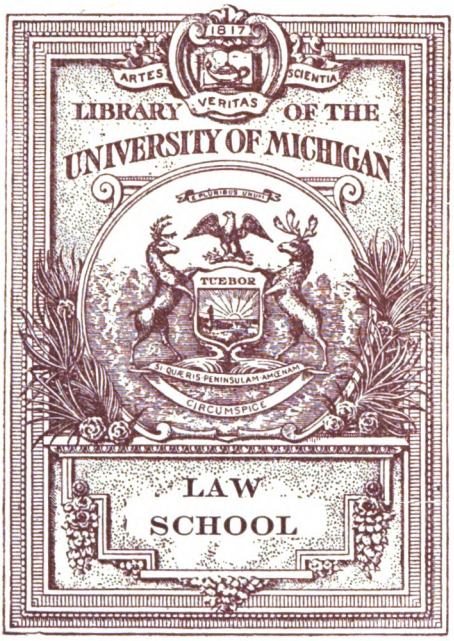

THE

UNITED STATES

LAW INTELLIGENCER

AND REVIEW.

"Multo utilius est pauca ideona effundere, quam multis inutilibus homines gravari."

VOLUME I.—FOR 1829.

EDITED BY JOSEPH K. ANGELL.

PROVIDENCE:
1829.

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LAW INTELLIGENCER.

VOL. I. JANUARY. No. 1.

The first number of the "LAW INTELLIGENCER," is now submitted by the Editor, to the attention of his professional brethren in the United States. As the design has been to commence the work with the new year, the present number bears date the first of January, 1829, and the reason of its having been issued thus prematurely is, that an opportunity may be seasonably afforded of obtaining a knowledge as to its reception, and the expediency of continuing it. Should the specimen here submitted be sufficiently well received to encourage the editor to proceed in his undertaking, the work will be regularly issued on the first of each succeeding month. The following is the Prospectus which has already been publicly exhibited.

Proposals for the United States Law Intelligencer.—The general plan of the Publication here proposed, may be briefly explained. It is to notice the cases which may in future be decided both in England and the United States; and which may be of sufficient novelty, or importance to interest the practical Lawyer; to give early information of such cases as may hereafter be wholly or partially overruled, and thus to constitute a journal of the alterations and modifications of the law brought about in ordinary course of judicial decision; to point out the judgment of one State Court when it is found to differ materially from the judgment of another State Court; and to furnish an outline of the argument pursued by the Judges in each; to notice all the new *treatises, digests, &c.* both English and American; in relation to the science and practice of the law, explaining the manner in which they are arranged and conducted, and hazarding an opinion as to their merits and probable usefulness; to mention all alterations in the judiciary of the respective States, and of the United States, and in fine, to afford seasonable and accurate intelligence of whatever may be interesting relative to the science of Law, and the practice and constitution of Courts of Justice.

In most sciences, there are regular journals of the discoveries and improvements which result from experiment, investigation and time. This, however, cannot be

said of the Law. The profession, it is true, have had the advantage of a Law Journal, of which, considering its plan, nothing can certainly be said in disparagement. And, it is understood that a periodical, under the name of the JURIST, is about to make its appearance in Boston. There is every reason to expect that this publication will be extremely useful and interesting. But the plan of the Jurist differs essentially from the work here proposed—since it is intended to be a quarterly publication, and instead of being devoted to the minutiæ of legal intelligence, will, like that of the same name in London, be confined almost exclusively to the discussion of general topics, which, however interesting to the Lawyer, are not immediately connected with his wants and practice. The Law Intelligencer, on the other hand, although it may be occasionally devoted to the discussion of subjects of more than common importance, is intended more as a synopsis or abridged record of the changes and progress of the Law. It is, in fine, designed to be to the Lawyer what a Journal of medical discoveries and improvements is to the Physician, what a Mechanics' Register is to the Mechanic, what an Agricultural Journal is to the Farmer. The plan, as above delineated, has been submitted to several of the most eminent jurists in the country, who concur in the opinion, that it is adapted to render the work highly useful and who have recommended the editor to proceed in its publication without delay.

Terms.—The above work will be published at Providence, R. I. Monthly; each number to contain not less than *twenty pages* octavo; and will be offered to subscribers at the rate of three Dollars per annum, payable on the delivery of the third number.

RESTRICTIONS UPON STATE POWER,

IN RELATION TO PRIVATE PROPERTY.

NO. 1.

It cannot have escaped the attention of the profession, that in the greater number of suits which have originated, in relation to the authority of a State. to pass laws affecting the right of private property, the result has been unfavourable to the State. This fact must certainly be esteemed as tolerably good evidence of some degree of fault in the legislative department; and yet there is no one who will pretend, that the fault consists in a deliberate and settled design to exercise mal-administration. On the contrary, every dispassionate person will be inclined to apply to most cases of the above description, the construction which was given by an eminent Judge of the state of New-York, when overruling an act of the Legislature of that state, which he thought inconsistent with a prior public grant to an individual citizen. The Legislature, he said, "must have been *uninformed* as to the terms and extent of the grant; and was the question propounded to them, whether they intended to invade private rights, it could not be doubted they would indignantly disavow any such intention."[1] Indeed, the numerous examples of judicial interposition in favour of the citizen against the attempted encroachments upon private property by a State, may be satisfactorily accounted for upon a ground far more creditable to the legislative department, and that is—

[1] Mr. J. Spencer in People vs. Platt, 17 Johns, 195.

a disposition to promote general improvement and provide for the public good. These great and highly interesting objects, it it certain, fall peculiarly within the design and jurisdiction of the lawgiver. The misfortune, however, has been, that in providing for their accomplishment (either from the want of sufficient knowledge, or due attention) the remote bearing and effect of legislative provisions have been frequently overlooked. The truth is, the authority of making laws is a most important trust, and so important that it should always be bestowed upon those only who are conspicuous, at least, for solid judgment, as well as untarnished political reputation. It is necessary, according to Cicero, for a a senator to be thoroughly *acquainted with the constitution*, which he says is a matter of science, dilligence and reflection.[1] The same opinion seems to have influenced the late Emperor of the French, in the establishment of the justly celebrated code which bears his name. This remarkable person, though often inclined to violate the rules of international law, was sensible, that the greatest support of his ascendency in France would be a system of just and equal laws which should be generally and uniformly administered. He was equally sensible that, in order to accomplish this object the office of revising, amending and codifying the ordinances and customs of the country, should be committed to such persons only as were conspicuous for their legal attainments, and for metaphysical and historical knowledge. And it was declared by Sir Edward Coke, "that if acts of Parliament were after the old fashion, penned, by such only as perfectly knew what the common law was before the making of any act concerning that matter, there would be very few questions in law arise."[2] If the inconvenience here alluded to was experienced in the reign of Elizabeth, its existence is to be expected in an age and in a country where the expediency, if not the necessity, of public improvements is constantly presenting itself to the attention of the legislative bodies, and constantly demanding their concurrence and agency. Such has been the case in the United States, for many years past; and at no time has there been such a spirit of improvement pervading the country, as at the present.—The vast plans, indeed, which are now in embryo in most of the States for *turnpikes*, *canals*, *railways*, *bridges*, and other means to facilitate internal communication, are almost without number. These plans before they can be carried into effect must receive the attention and approval of the legislature, and must then be prosecuted and completed, if at all, by virtue of such powers and in obedience to such regulations as the same department may concede and prescribe. This department is usually composed of men of various professions and occupations—of men, who, in most cases, are generally and justly esteemed for their understanding and integrity in the more private walks of life, but of men who (with the exception of the lawyer) have never served any thing like an apprenticeship in the most important of all business—that of *legislation*. And although the major part of a legislative assembly may comprehend and be disposed to respect the true limits of their authority, yet in the excitement of political contentions they are in dan-

[1] De Leg. 18. [2] 1 Bla. Com.

ger of losing sight of what is their proper aim, and of being misled by artful and influential partizans, who too often avail themselves of circumstances to direct, at pleasure, the general resolutions. These, it is apprehended, are the principal causes of those attempted inroads and innovations upon the majestic simplicity of our republican institutions which have so happily been defeated by the discernment and independence of our Courts of Justice.

As human nature is imperfect, the most unexceptionable political constitution which philosophy, with all the aids of experience, will ever succeed in devising, must necessarily partake of the same character. The government which approaches the nearest to perfection, is undoubtedly that which preserves the inalienable rights of the subject to the utmost extent, which is consistent with its own existence and energy. The free states of antiquity evinced sincere, though unsuccessful endeavours for the attainment of this end. They were like a traveller, unacquainted with the localities of the country, through which he is passing; and whose attention is caught by a distant and beautiful summit—which he attempts to reach, by a path seemingly direct, but which, in reality, conducts him to a position, distant from the object of pursuit. The people, it is true, had a right to participate in the business of legislation, but it was only to give the final sanction to that which was propounded to them for laws. It was the Senate of the Roman Republic, which had the office of suggesting laws, so that although they were made *populi jussu*, they proceeded *ex auctoritate senatus*. But under our constitution, the people by means of their representatives, not only have the power of giving the final sanction to laws—but they also possess what is called the *initiative* in legislation, that is, the power of proposing or starting them. The people have also, previously adopted certain rules in reference to which, all future laws are to be made; and to determine whether or not they are made conformably to such rules, is an office assigned to the Judges. Whenever, therefore, a legislative enactment is made, which is deemed by a citizen, whose interests are affected by it, hostile to the popular will as expressed in the constitution, he is enabled by a course of litigation, to obtain relief, if he is entitled to it, by a judicial decision in his favour. This is one of the most prominent and admirable features in our institutions. The only thing objectionable which accompanies it, is the necessity of protracted, or at least expensive litigation. To avoid this inconvenience, is certainly a desideratum, provided it can be done without disturbing the harmony of the general system. Now, as it is the province of the Courts to decide, whenever the question is brought before them by the usual formalities of a suit, as to the constitutionality or unconstitutionality of a legislative measure; why not obtain the advice of the Judges of those Courts, at the time when a proposed law is under debate; and if they deem it repugnant to the constitution, have it abandoned? This would be assigning to the Judges no more power than they already possess,—would assist in stopping, at the source, most disputes as to State sovereignty—and relieve individuals from the perplexity and suspense, as well as the serious expenditure of money and time, attending a law suit. Such an ex-

periment seems to have been adopted and attended with very beneficial effects in the state of New-York, by the establishment of what was called a "Council of Revision." This Council consisted of those who composed the judicial power, and who, before the year 1823, controlled the passage of such laws as they thought unconstitutional and inoperative. The records of this Council, says the learned author of Commentaries on American Law, "will show, that many a bill that had heedlessly passed the two houses of the Legislature, was objected to and defeated, on constitutional grounds;" and the author continues to observe, "that these records are replete with the assertion of salutary and sound principles of public law and constitutional policy; and will forever remain a monument of the wisdom, firmness, and integrity, and of the great value and benign influence of that institution."[1]

[1] 1 Kent's Commentaries, 426.

The number of bills objected to by this Council, from the time of its establishment, will average about three per year, as appears by the following abstract in the form of a schedule, which was offered by Judge Platt, in the Convention in the State of New-York, in the year 1821:

Years.	Number of bills objected to.	As unconstitutional.	As inconsistent with public good only	On both grounds.	Years.	Number of bills objected to.	As unconstitutional.	As inconsistent with public good only.	On both grounds.
1778	6	5	1	4	1801	2	-	1	-
1779	4	1	3	1	1802	-	-	1	1
1780	4	2	2	2	1803	1	-	1	-
1781	3	3	-	3	1804	2	1	1	-
1782	3	1	2	1	1805	3	1	3	2
1783	4	3	1	3	1806	5	3	2	2
1784	7	5	2	5	1807	4	4	-	2
1785	16	10	6	9	1808	2	2	-	2
1786	2	1	1	1	1809	3	3	-	2
1787	3	1	2	1	1810	4	4	-	4
1788	4	1	3	1	1811	2	2	-	-
1789	2	2	-	2	1812	4	2	2	-
1790	1	-	1	-	1813	5	4	1	4
1791	3	2	1	2	1814	2	2	-	2
1792	3	3	-	3	1815	1	1	-	-
1793	1	1	-	1	1816	1	-	1	-
1794	2	-	2	-	1817	1	1	-	-
1795	2	2	-	-	1818	1	1	-	1
1796	1	2	-	1	1819	1	-	1	-
1797	4	1	3	1	1820	2	2	-	1
1798	4	1	3	1	1821	2	2	-	1
1799	-	-	-	-					
1800	1	-	1	-		128	83	45	67

Whole number of votes passed - - - - 6690
do. do. objected to - - - 128
do. do. passed notwithstanding - 17

In the Speech of Judge Platt, in which this statement was introduced, he says, "It is important to realize the distinction between the actual power of legislation, and a mere *negative veto*. The power of making or altering the law, ought unquestionably to be left to the two Houses of the Legislature exclusively. That, however, expands itself to all objects not forbidden by the Constitution, or the fundamental and universal principles of justice. Such vast powers are obviously liable to great abuse: and if abused the injurious effects are permanent, and in a

The above remarks were commenced by an allusion to the fact, that the suits which have originated from public laws, on the ground of their supposed repugnance to the constitutional rights of the citizen, have in general, been terminated in favour of these rights. This fact, it would seem, has either failed in being an admonition to the government, or else it has operated to encourage an indiscreet resistance to public measures; and one which must eventually terminate in discomfiture. For, according to authentic information, two very important questions, which for some time past, have been the subject of discussion, are now in train for a final settlement. before the Supreme Court of the United States. One of these is, the "Free Bridge" question in Massachusetts, and the other, the "Bank Tax" question, in Rhode-Island. Both of these have arisen under the constitution of the country, as to the extent of sovereign prerogative, on the one hand, and as to the inviolability of private property on the other. It must be conceded that all questions of this kind are more than ordinarily interesting. Indeed, every citizen, however indigent, or however opulent, must view them with no inconsiderable measure of concern, inasmuch as they involve not only his interests as an individual, but also the tranquillity of the country at large; and it may even be added, the duration of our present free institutions. These considerations may lead to an enquiry in the future numbers of the "Intelligencer," as to the restrictions which are necessarily incident to all governments; and which are more especially imposed upon the respective State Governments in this country, in relation to the right of private property.

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great measure incurable. If the Legislature pass a law which is unconstitutional, the judicial tribunals, if the case be regularly presented to them, will declare it null and void. But in many cases a long time elapses between the passing of the act and the judicial interpretation of it; and what, let me ask, is the condition of the people during that interval? Who, in such a case, can safely regulate his conduct? In many cases, a person is compelled to act in reference to such a statute, while he is necessarily involved in doubt as to its validity."

AMERICANA BIBLIOTHECA LEGUM.

As the plan of this periodical is to bestow some attention upon all the Digests, Treatises, &c. of this country, which may, in future, appear in relation to the law; it is proposed to give in the following Number, or the Number next succeeding it, a list those which have previously been published. By adopting this course, the Law Intelligencer may be referred to both for the past history

of the *Americana Bibliotheca Legum*, and for the continuation of it—That is, with exception of the Reports.

THIRD VOL. OF KENT'S COMMENTARIES ON AMERICAN LAW.

It is stated in the Proposals for the "Law Intelligencer," that in noticing all new works which relate to the science of the Law, an opinion would be hazarded, as to their merits and probable usefulness. It is deemed superfluous, however, to advance any opinion of this sort, respecting the Vol. above mentioned, which has lately issued from the press. And, indeed, it would be quite out of the question in a periodical as circumscribed as this is, to say all in commendation of the volume referred to, and of the importance of the subjects to which it has been devoted, which might with truth be said. But its learned and distinguished author is too well known to the profession, to render it necessary to attempt to augment their respect for him, or their partiality for his edifying productions. His luminous opinions, while a Judge, and while Chancellor in the State of New York, have already abundantly shown him to have arrived at what Lord Bacon calls "the vantage ground" of legal science; and have alone established for him a reputation which must always be a passport to favour, for whatever he may offer appertaining to that science. And all those who have perused the two preceding volumes of the work referred to, must regard them as a brilliant specimen of his perfect ability and faithfulness in commenting upon the extensive and interesting topic, *American Law*. An additional volume, it

seems, will be necessary, to complete the work, according to the plan of the learned author.

MATHEWS ON THE DOCTRINE OF PRESUMPTIVE EVIDENCE.

A work entitled "A Treatise on the Doctrine of Presumption and Presumptive Evidence, as affecting the title to Real and Personal Property, by John H. Mathews, Esq. of Lincoln's Inn, Barister at Law," has recently been published in London. Since the publication of this work in England, a copy of it has been received in this country; and there is little doubt, if it should be here re-published ; with references to the decisions of our own Courts, it would prove highly useful to the American practitioner; as the cases are so extremely common, in which, either the only question to be determined, depends upon the doctrine of presumptive evidence, or in which the law of presumption is relied on, together with other grounds, by one or other of the litigant parties. The above work is certainly the result of great labour and research; and the aim of the author seems to have been to collect and reduce to a system, all the authorities in relation to this branch of the law, which before, to use his own language, "were scattered up and down in some hundreds of volumes."— To those Lawyers, particularly, who are in the habit of practising in the Courts of Equity, the work must be a great acquisition, as it seems to treat so fully of the doctrine of presumption, as applied to *legacies, executors, outstanding legal estates, equities of redemption, satisfaction of mortgaged debts, devises in equity, trusts, &c.* The Treatise consists of 450 pages octavo, and there are between nine and ten hundred decided cases referred to.— The author after his introductory chapter, has made two general divisions of his subject, the first is, *Presumptions of Law;* and the other is, *Presumptions of Fact.*

Under the head of *Presumptions of Law*, in chapter 2, the author proceeds to give miscellaneous instances of the foundation of Presumptions of Law, upon one or other of the following grounds;—the laws of nature—the first principles of justice—the nature and general incidents of property—the innate principles of self-interest—the dictates of prudence, or discretion, and the policy of the law. In chapter 3, he treats particularly of the presumption with respect to the exoneration of Real Estates, from charges or encumbrances—first, where they are paid off by tenant for life—secondly, where they are paid off by tenant in tail. In chapter 4, he treats of the presumption with respect to the ben-

eficial ownership; as where a purchase made by one person, is completed in the name of another; and where an estate paid for by two or more, is conveyed to them as joint tenants. In chapter 5, he treats of the performance and presumed satisfaction of covenants for family provisions, in cases relating both to personal and real property. In chapter 6, he treats of the presumed satisfaction of debts by legacies, or portions, wherein he considers the limits and the application of the rule—*Debitor non præsumitur donare.* In chapter 7, he treats of the presumed satisfaction of portions, by legacies, or second portions. In chapter 8, he treats of the presumed ademption of legacies to children, by subsequent portions. In chapter 9, he treats of the presumption in cases of double legacies, and considers there are two classes of cases on the subject. The first, he says, comprises those in which both legacies are given by the same instrument; and the second those in which they are given by different instruments. And both these classes, he considers, are susceptible of a subdivision; the former is into cases where the same specific article is twice bequeathed—where sums of the same amount are given—and where the sums vary in amount; the latter into cases where the legacies are specific, and where they are general. In chapter 10, he treats of the exclusion of executors from the residuary estate.

Under the head of PRESUMPTIONS OF FACT, the author begins in chapter 11, by treating on the Presumption of Instruments of Assurance. In this chapter, he states that it will invariably be found, that as length of peaceable possession is for the most part the consequence only of rightful ownership, lapse of time since the first commencement of titles, which depend for their validity or the doctrine and presumption, is in all cases, an essential, and in some, the only inducement to the presumption, requisite for their support. And it is on this condition, he says, that the Courts in many cases, presume the *previous existence* of such instruments of assurance as are necessary to clothe the possession with the legal title. He then goes on to consider the two classes of cases on this subject; first, where the presumption is made without any specific evidence of those instruments; and secondly, where it is made upon evidence, which tends specifically to show that once they actually did exist, although they are not forthcoming. In chapter 12, he treats of Presumed Conveyances of outstanding Legal Estates, where he considers, that the relation between trustee and *cestui que trust* is regarded at law, precisely as that of landlord and tenant; and that the possession of the latter is consistent with, and not adverse to, the right of the former. In chapter 13, he treats of the presumed surrender of terms. It appears by this chapter, that there are few questions

which have given rise to more discussion, or which from the opposite determinations that have prevailed, have been kept longer in suspense, than that which relates to this subject. In chapter 14, he treats of the presumption of acts and solemnities in support of assurances and rights; as the admission of deeds of long standing, without proof of their execution. In chapter 15, he treats of presumptive evidence in matters of Pedigree, &c.; recitals in ancient deeds—memoranda in family bibles—monumental inscriptions—declarations by deceased relatives, &c. In chapter 16, he treats of presumed Grants of Commons, Lights, Ways, Water Courses, and other incorporeal hereditaments.—The latest cases which he cites on these subjects, are Moore vs. Rawson, 3 Barn & Cress. 332, Davis vs. Morgan 4 Barn, & Cress, 8. and to a decision of the Vice Chancellor in 1 Sim. & Stu. 203. In the conclusion of this chapter, the author shows, that where the acquisition of a right evidenced by long enjoyment, cannot, from peculiar circumstances, be properly referable to a grant, the Courts will adopt such other supposition as agreeing with the facts of the case, refers the alledged right to some other lawful origin. In chapter 17, he treats of the presumed Dedication of Roads and Streets, to the Public. The precise length of time which may be considered as demonstrative of the land owner's dedication, he thinks has not yet been determined. The authorities he cites are, 5 Tannt, 137. 1 Camp. 260. Stra. 1004. 11 East. 376. 5 B. & A. 454. [The American authorities are Ward vs. Folly, 2 Southard's R. 582. Gelatian vs. Gardner 7 Johns, 106. Todd vs. Inhabitants of Rome, 2 Greenleaf, 55. State vs. Town of Compton, 2 N. Hamp Rep. 513.] Whether a *cul de sac*, or street which is not a thoroughfare be a highway, the author says,is a point by no means settled; and that the dicta of judges who have mentioned the subject, are much at variance. Lords Kenyon and Ellenborough and Mr. J. Cambre, it seems, are on the one side opposed by Lord C. J. Abbott, by Sir J. Mansfield, C. J. and by Heath & Best, Jrs. on the other. The several judicial dicta on both sides of the question, the author has brought together in this chapter in order that the reader may determine for himself, to which the greater respect is due. But he observes, that if the dedication be, as it is imagined, a question of *intention*, superior weight appears from that consideration to attach to the opinions which negative the public right. The case most in favour of this construction, is Woodgen vs. Hadden 5 Taunt, 141. In chapter 18, the author has treated, in a very faithful and lucid manner, of the presumptive bar to Equities of Redemption. In chapter 19, he treats of the presumed satisfaction of Mortgaged Debts—Bonds—Judgments—Warrants to confess Judgment—Decrees—Statutes and Recognisances. In

chapter 20, he has treated of the presumed satisfaction of Annuities—Portions—Legacies—Liens for Purchase Money, and other demands, not within the Statute of Limitations. In chapter 21, he has treated of the presumed dereliction of the right to have Fraudulent Purchases—Purchases by Trustees, and Purchases of Reversions set aside in Equity. The established rule in Equity—viz: that no length of possession by a trustee, shall prejudice the right of the *cestui que trust*, he shows cannot be extended to all cases where, during the existence of an outstanding legal estate in a trustee, the beneficial enjoyment, for some considerable period, has been had by a stranger. And he renders it perfectly clear, by the authorities which he cites, that if an *equitable* title be not enforced within the same time, that would bar a legal title under corresponding circumstances, relief cannot be obtained in Equity. And it seems that on this very principle, in the recent case of Lord Cholmondeley vs Lord Clinton, before the House of Lords, twenty years exclusive possession of an equity of redemption was considered to operate as a bar to all adverse claimants, and to produce the same effect as disseisin, with regard to legal interests, 2 Jac. & Walk 1, and 191. In the 22d and last chapter, the author has treated of the presumed Waiver of Rights of Appropriation—of Resumption on Forfeiture, Pre-emption and Election—of Rights under executory trusts—devises in equity, arguments to purchase, and covenants for renewal—of the responsibility of executors, administrators and trustees—of the liability of purchasers to see to the application of the purchase money, and other miscellaneous rights and equities.

PETERSDORF'S ABRIDGMENT.

The publication of a work has been commenced some time, in London, entitled "A Practical and Elementary Abridgment of the Cases argued and determined in the Courts of King's Bench, Common Pleas, Exchequer, and at Nisi Prius, from the Restoration in 1660, to Mich. Term, 4 Geo. 4, with important manuscript cases, alphabetically and chronologically arranged and translated, with copious notes and references to the year books, analagous adjudications, text writers and statutes, specifying what decisions have been affirmed, recognized, qualified, or overruled, comprising under several titles, a Practical Treatise on the different branches of the Common Law, by Charles Petersdorf, Esq. of the Middle Temple." Several volumes of this work are now published, and have been received in New York, where it is proposed to re-publish the same. The following extract from the

advertisement to the first volume, will exhibit the plan of the work.

A Practical and Elementary Abridgment of the Common Law Reports, from the period they assumed a useful and intelligible form, has for a series of years been an increasing disideratum, a succinct statement of the mode in which the materials are collected and arranged will perhaps more satisfactorily evince the expediency of the publication.

First—The general arrangement is alphabetical, practical utility being the primary object of the present publication, anxious attention has been devoted to introduce every case under that division which will conduce to the most prompt and ready reference and most probably occur to the mind either of the most experienced or uninitiated practitioner.

Second—Although the principal divisions are alphabetical, their internal arrangement or subordinate parts are framed, and the materials consolidated analytically according to the models of the most approved writers upon each particular subject, the cases in each subdivision of a title, are inserted chronologically with a view of more effectually showing and illustrating the gradual progress of our judicial polity, where however a particular class of decisions consists of a variety of abstracts or abridgments, those most intimately connected are arranged in such a manner as to render their relative application more obvious. Where the same point has been determined in a series of cases, the one first mentioned is only abridged and the others referred to as confirmatory of the same principle. To increase the value of the work and add to its general utility, several distinct species of references or notes are subjoined to each decision:—

1st, A reference to the different books in which the same case is reported.

2d, A reference to the cases in which the same point has been determined or affirmed.

3d, A reference to such cases or elementary writers in which the same rule or principle is recognized or adverted to.

4th, A reference to those cases which are at variance with the decisions abridged, or to such as have expressly overruled it.

5th, A reference to Acts of Parliament connected with each case.

6th, A series of notes in which it has been attempted to connect the cases with the practice, and to explain their general effect, comprising such principles of the law extracted from the cases as are not included within the general scope of the abridgment. The author has thus essayed to make the whole as complete as possible, so that on the one hand the present practice may be readily ascertained, while on the other the ancient adjudications may admit of an immediate access, the latter will explain, elucidate and exemplify the former, and the reader have in one connected view the various modifications which the law has undergone.

Third—It has been endeavoured to frame the abstract of the decisions on a plan, simple, plain and perspicuous, in the present publication, so much only of the pleadings, the facts, and the arguments of counsel are introduced in a condensed form, as may be necessary to connect the facts with the decision of the courts, and the judgments are compressed into one concise statement including the most important observations, unless there be a difference of opinion on the bench, in which case the individual opinions are given Seriatem, to obviate the objection that an abridgment of the reports is not capable of being referred to with facility in consequence of the paging not corresponding with the original work, it is intended to prepare a table of parallel references by which means an inquirer will be enabled to discover any case with the same promptitude and facility as if he had the Report Book in his possession.

With the view of rendering the abridgment as complete a substitute for the reports as possible and avoiding the inconvenience to purchasers from the publications of new editions, it is proposed to prepare occasional Supplements.

ALPHABETICAL LIST OF REPORTS ABRIDGED.

Andrews	Reports	Espinasse	Reports	Pollexfin	Rep.
Anstruther	do	East's	do	Peere Williams	do
Barnardiston's	do	Fitzgibons	do	Practical Reg.	
Barnes'	do	Forrest's	do	Prices	do
Barnwell & Alderson	do	Fosters	do	Raymond, Thom.	do
Bingham	do	Fortescue	do	" Lord	do
Blackstone, Henry	do	Gowes	do	Salkeld	do
——— William	do	Hardress	do	Sayers	do
Bosanquet & Puller	do	Holt	do	Saunders	do
" new	do	Holts N. P. C.	do	Session Cases	do
Broderip & Bingham	do	Jones, William	do	Shower	do
Bunbury	do	Jones, Sir Thomas	do	Siderfin	do
Burrows	do	Keeble	do	Skinner	do
Caldecot	do	Kelyng	do	Smith	do
Carter	do	Kenyon	do	Starkie	do
Carthew	do	Leach	do	State Trials	do
Cases Practice	do	Levintz	do	Strange	do
Cases Temp. Hardwicke	do	Loft	do	Styles	do
Chittys	do	Lutwich	do	Taunton	do
Comberbacks	do	Marshal	do	Vaughans	do
Comyns	do	Modern	do	Ventris	do
Cowper	do	Moores'	do	Wightwick	do
Douglass	do	Nolan	do	Willes	do
Dowling & Ryalnd	do	Peak	do	Wilson	do
Durnford & East	do	Parker	do		

With a Chronological Table of the Reports Abridged, with the names of the Chief Justices and Chief Barons, in each year, beginning with the year 1660.—This work contains in addition to the authentic Law Reports from the restoration in 1660, to the present time, the whole of the practical and useful information to be found in the year books, Viners' Abridgment, Comyns' Digest, Bacon's Abridgment, Cruise Digest, and in the Equity, Admiralty, and Ecclesiastical Reports, and all the authentic Elementary Treatises arranged under such divisions as will conduce to the most prompt and ready reference, and under such titles as will most probably occur to the mind of the experienced or uninitiated practitioners.

The work will be comprised in 14 Royal Octavo Volumes, which contains from seven to eight hundred pages, closely printed. It is intended to re-print the work on a handsome paper and type, and to those who agree to take the volumes as they are published, which will be done with all practical speed, the price per volume will be but $4 50 in boards; handsomely bound in sheep, $4 75; elegantly bound in English calf, $5, payable on delivery of each volume. The price has been thus reduced, as the profession must be aware from the size of the volume and the quantity of matter they embrace, to elict the patronage of the Bar, for a work that requires a large investment of capital, and which will be of great practical utility.

A work upon a plan somewhat similar to the one above delineated, was published in London, in 1737. It was not continued, however, beyond three volumes, or the title of "*Extinguishment.*" The work was entitled "D'Anver's General Abridgement of the Common Law, alphabetically digested under popular titles."

EFFECT OF PREJUDICE AGAINST LAWYERS,

DRAFTING AND EXECUTION OF WILLS.

It is too often taken for granted, that a lawyer is never perfect in his calling until he is expert in the arts imposition and chicane, and that, at best, he is nothing beyond *leguleius quidem cautus, et cantor formularum.* This notion is as discreditable to the feelings and understanding of those who entertain it, as it is unjust with regard to the pretensions of that class of persons against whom the prejudice is directed. Was it only said, that among lawyers there are too frequently to be found such as are disqualified for their profession; and others, whose integrity is not as unblemished as it should be, no one will probably deny that position. But the same reproach unfortunately attaches to all pursuits, not even excepting the sacred one of the clergy.—And it would be quite as rational to denounce the latter, as a body, because they occasionally afford instances of impiety, as it is to conclude, that all lawyers are corrupt, because they are, some of them, who have been guilty of mal-practice. That there have been ignorant and dishonest lawyers, has never been denied. But to decide upon any picture by the imperfections which appear in the back ground, without reference to the parts which are boldly and brilliantly displayed in the foreground can only be attributed to a state of feeling, which to say the least of it, amounts to an absolute pre-determination to deny every exhibition of merit and excellence, however surpassing. What obligations has England been compelled to acknowledge to her Cokes—her Hales—her Mansfields, and her Ellenboroughs? And who have rendered greater and more permanent benefits to their country, than a Jay—a Marshall—a Story—a Kent—a Tilghman, or a Parsons? It is not hazarding too much to say, that the constitutions of two of the freest governments on earth (England and the United States) under which so many thousands are now secured in the enjoyment of life, liberty and the pursuit of happiness, are in a great measure, the result of the knowledge—the integrity—the independence, and the liberal and disinterested policy of lawyers.

The prejudice above alluded to, often carries with it, a sufficient punishment; and it not unfrequently happens, that it produces great and irremediable embarrassment in the affairs of those who have been misled by its influence. Such, especially, has been the case, with regard to the drafting of *last wills* and *testaments.* The policy of all laws has made some form necessary both in the phraseology of these important instruments, and in their attestation; and yet it is not unusual for a person, who has had no opportunity of knowing any thing of law, to attempt in such a case,

what he is incompetent to perform; and, so to prepare his last will, that he makes it a production entirely original and perfectly enigmatical. What is the consequence? Let those answer, who are in the habit of attending Courts of Justice. They, says Blackstone, "are the best witnesses of the confusion and distresses that are hereby occasioned for families; and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all, so that in the end, his estate may be vested quite contrary to his intentions."

A case is reported in the last volume of Mason's Rep. p. 493, in relation to the construction of a Will drawn by the testator himself, and who expressed in his Will a decided intention, that no lawyer should be employed in any affairs relating to the settlement of his estates. The view of the testator in thus excluding lawyers, had its origin in very laudable feelings, as his object was to prevent family litigation. The evil he was so solicitous to guard against, however, grew out of the injudicious measures he took to prevent it. Mr. J. Story, before whom the case was tried, very properly observed, "If instead of this cautionary clause, the testator had exercised the prudence which belongs to men of his own age and experience, he would have employed a lawyer to have drawn his Will and codicils; and thus stopped, in a great measure, at *the source*, the waters of bitterness. There probably have been few more striking examples of the infirmity of human judgment, or of the different manner of expressing intentions than these instruments afford. To say the least of them, they abound with provisions, which would puzzle the most sagacious judgment, to construe in an entirely satisfactory manner."

In a very late case, at New Castle, on Tyne in England, which is reported in late English newspapers, the testator undertook to be the author of his own Will, and to direct its attestation. The action was ejectment brought by the heir at law against the devisee under the supposed Will. The plaintiff having proved his pedigree as heir at law, the defendant produced the Will, and called upon one of the attesting witnesses to prove the execution. This witness stated that the testator desired her to provide him with pen and ink, and told her he had been making his Will, and desired her to go for three persons, whom he named to witness it. The witness was only able to find two of them, and on their coming into the room, the testator told her, she would do as well. He had so folded the paper for the signature of his witnesses, that there was no writing to be seen. The other two witnesses then signed the papers without knowing its contents, or that it was a Will. Brougham (for the devisee) cited several cases, to show that knowledge by the witnesses of the contents of the paper was unnecessary to make it a good execution. But Mr. J. Bayley

stated that he had not the least doubt that this execution was bad, and directed the Jury to find for the heir at law, giving Mr. Brougham, however, leave to move the Court, if he should think fit.

CASES OVERRULED RESPECTING ACKNOWLEDGMENT OF DEBTS, AND THE DOCTRINE OF ACKNOWLEDGMENT SETTLED.

It will be recollected that the first cases which arose in England after the passage of the act of Limitations 21 Jac. 1, as to the revival of debts barred by the act, it was held that, nothing less than an *express promise* would avoid it. Afterwards, it was held, that an acknowledgment was evidence of a promise to go to the jury, and still subsequently, that the slightest and most ambiguous expressions of the debtor have been construed to have the effect of depriving him of the benefit of the limitation. There is no subject, certainly, upon which the adjudged cases have been more oscillating and perplexing than the present. It is a great satisfaction, that such is no longer the case—and that the law on the subject of acknowledgment at the present time, is not only clearly settled, but that it is settled upon just and rational principles. In the case of A'Court vs. Cross (3 Bing. 329) which was tried at the Somersetshire Assizes in England, and brought before the Common Pleas, upon motion—the former cases, which went upon the ground that any recognition of the debt was an acknowledgment, were overruled by Mr. C. J. Best. The ground he took was, that where the inference of a promise is repelled at the time of the acknowledgment, the debt is not taken out of the statute. That is, that the acknowledgment is considered in the light of a *new promise* and not in the light of rebutting presumption of payment, which is supported in Ward vs. Hunter (6 Taunt. 210) and Pittam vs. Foster (1 B. & C. 248.)

The Courts of this country, are entitled to the credit of anticipating the English Courts in the adoption of this salutary construction The District Court for the city and county of Philadelphia as long since as 1811, adjudged that the acknowledgment must be such as is *consistent with a promise to pay;* Guier vs. Pearce (2 Browne's Rep. 35.) And this rule has, in repeated instances, been adhered to by the Pennsylvania Courts. The later cases are Fries vs. Bosselet (9 S. & Rawle, 128) and Bailey vs. Bailey (14 S. & Rawle, 195.) The same has been the established doctrine for some time, in New York—Sands vs. Gelston (15 Johns, 511;) Kane vs. Bloodgood (7 Johns, Ch. R. 90;) and in Massachusetts, Bangs vs. Hall (2 Pick. 368;) and in Connecti-

cut, Marshall vs. Dalliber (5 Conn. Rep. 480;) and in Maine, Purley vs. Little (3 Greenlea.'s Rep. 97.) The same subject came before the Supreme Court of the United States, as late as the last January Term, and received a very elaborate and interesting discussion from Mr. J. Story, who gave the opinion of the Court.—He adhered to the rule above laid down, and maintained that the acknowledgment must show positively, that the debt is due, either wholly, or in part, and must be unqualified. If there be no express promise, he said, "and the bar is sought to be removed by implication of law, from the acknowledgment of the party, such an acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and *willing* to pay. On the contrary, if there be accompanying circumstances, which repel the presumption of a promise, or intention to pay—if the expression be equivocal, vague and indeterminate, leading to no certain conclusion, but at best, to probable inferences, which may affect different minds, in different ways—they ought not to go to a jury as evidence of a new promise. Any other course, he thought, would open all the mischiefs, against which the statute was intended to guard innocent persons, and expose them to the danger of being entrapped in careless conversations, and betrayed by perjuries." Bell vs. Morrison (1 Peters' Rep. 351.)

The law, as it is now established, then is, 1st—that a debt barred by the Statute, may be revived by a new promise, either *express* or *implied.*

2d—That an implied promise may be created by the fact of a positive and unqualified admission of the debt.

3d—If the acknowledgment is accompanied by any circumstances, or expressions which repel the idea of an intention, or willingness to pay, no implied promise is created, and the debt is not revived.

The former cases in relation to receiving the admission of one partner, after the dissolution of the firm, to bind the other, are also overruled by the above case of Bell vs. Morrison, conformably to what had previously been decided in New York. As the admission must amount to a new promise—and as a partner after dissolution is not qualified to make any new promise which will bind his former copartner, the latter may avail himself of the statute, notwithstanding any such admission.

SAILING OF SHIPS.

The following case, lately decided in England, it is believed, is the first case which has been reported, recognising the rule, that a vessel sailing *with* the wind must give way to one sailing *by* the wind—and that the one sailing *by* the wind is not obliged to alter her course. A similar decision, it is said, however, was once made by Lord Stowell, though not reported; and it is also said, that the same rule has been recently recognised by one of the Courts in the city of New York.

Jones, Serjt. with whom was Stephen, stated that the plaintiffs in this case, were the owners of a brig called the Juno, burden 180 tons, and that the defendants were the owners of a smack called the Alert, belonging to the Leith and Berwick Navigation Company, of which the defendants were members. The action was brought to recover a compensation for the loss of the Juno, which it was alleged, had been occasioned by the negligence of the defendant's servants, who were entrusted with the care and management of the Alert. It appeared that on the 16th of January last, the Juno sailed from London, bound to Shields, and proceeded safely on her voyage, until the Sunday following, which was on the 20th of the month, when she had arrived off Whitby, on the coast of Yorkshire. At about 5 o'clock on the morning of that day, one of the seamen on deck perceived a vessel, about two cables' length ahead, bearing towards them. The Juno was at this time, sailing close hauled, in a N. N. W. direction, with a westerly wind; the other ship, which proved to be Alert, coming in a direction, S. W. The master of the Juno, upon being informed, that another vessel was close ahead of him, went forward, and having hailed her, desired her crew to luff; or, in other words, to put their helm a-lee, at the same time putting his own helm a-weather. By this arrangement, if the master of the Alert had followed the instructions of the master of the Juno, which, as a good seaman, it was insisted, he ought to have done, the vessels would have undoubtedly passed clear of each other, and no accident could possibly have arisen; but, instead of doing so, the master of the Alert kept on his former course until within a very short distance of the Juno, when, instead of putting his helm a-lee, which might even then have carried him clear, from some inexplicable reason, he put his helm a-weather, and ran aboard the Juno on her larboard bow, and became so much entangled with her, that both were in imminent danger of going down. The Alert, however, being the lighter vessel of the two, escaped without much damage, but the Juno sunk in about six or seven minutes after she was struck, her crew being compelled to save themselves on board the Alert. These were the facts of the case.

The ownership on both sides being admitted, the crew of the

Juno described the accident as stated by counsel, and gave it as their opinion, that it would certainly have been avoided if the captain of the Alert had acted in a seamanlike manner. Other persons, experienced seamen, stated that as the Juno was sailing close hauled, it was the duty of the master of the Alert, who had the wind free, to give way, in order to let the Juno pass.

Wilde, Serjt. with whom was Broderick, for the defendants, remarked upon what he conceived to be the weakness of the plaintiffs' case, and said that he should prove that the master and crew of the Alert, so far from having been guilty of neglect, had taken every possible pains in their power to prevent the accident, which in fact, had arisen from the improper course adopted by the master of the Juno. That the Alert first saw the Juno, and continued to hail her until they ran foul of each other; that she was to the leeward, and not to the windward; that the course adopted by the master of the Alert, of going to leeward, was perfectly correct, and could not have been the cause of the accident, if the Juno had not altered her course in the same direction, which, according to the rules of sailing, she had no right to do.

The crew of the Alert swore positively to these facts; and other witnesses were called, who stated that if the vessels were in the position described by the witnesses for the defendant, it was the duty of the master of the Alert to have sailed to the leeward, and that the Juno ought not to have altered her course. These witnesses concurred with those who had been examined on the other side, in stating that it was an established rule of the sea, that a ship sailing with the wind should in all cases give way for one sailing by the wind, whose duty it would be to keep straight on her course, in order that the ship sailing with the wind might not be deceived in the course she might choose. There was no fixed rule as to which side a vessel with the wind, should pass a vessel by the wind; that was left to the discretion of the captain to determine which should appear the best and safest, under existing circumstances.

Best C. J. told the jury, that the question for their consideration would be—first, whether the Alert was to the leeward of the Juno, as had been stated by the defendants' witnesses; and secondly, if they were of opinion that she was, whether there was any established rule among seamen, that a ship sailing with the wind, being to the leeward a-head of a ship by the wind, should continue her course to the leeward, and that the ship by the wind should pursue her course without any alteration? If their opinion should be in the affirmative of these questions, his lordship thought their verdict must be for the defendants; but if their opinion should be to the contrary, then he thought it should be for the plaintiffs.

The Jury, after a short deliberation, returned a verdict for the defendants.

Best C. J. then said, that as the decision of the jury might be of some importance upon one of the questions, he wished to know if they were of opinion that a rule had been established by seamen, that a vessel sailing with the wind should give way to one sailing by the wind, and that the ship by the wind should not alter her course.

To this question the jury replied in the affirmative.

LATE AND IMPORTANT DECISION UNDER THE PATENT LAW.

At the late term of the Circuit Court of the United States, held in the city of New-York, a case was decided in relation to a patented machine for making *Hat Bodies*. This machine is one of wonderful ingenuity, and has been of vast advantage to the public; and it is gratifying to learn, that its worthy and indefatigable inventor has been thus far successful in the recovery of exemplary damages for the violation of his just rights. The plaintiffs in the case were Messrs Grant & Townsend, of Providence—the former, the inventor of the said machine, and owning one half of the interest therein, and the other owning the remaining half, by virtue of an assignment from the said Grant. There can be no stronger evidence of the great value of this singular machine, than the circumstance of its having been pirated by different persons in the states of New-York, Massachusetts, Connecticut, and Pennsylvania. The plaintiffs had before succeeded in recovering a judgment and damages in several suits which they commenced before the Circuit Court, for the District of Connecticut, that were determined at the April Term, 1828, against certain violators within that District. And this they did, in opposition to one of the most ingenious and desperate defences which perhaps was ever made, and also in opposition to the positive testimony of a witness, who had been induced to swear that he was the inventor, prior to the date of the plaintiff's patent—which testimony appeared so improbable upon strict cross examination, that it was deemed unworthy of credit, by the Court and Jury. In the present trial, as well as in the one referred to, the defendants contended that a machine acting upon the same principle, and producing the same results, had been invented and put in operation by one Silas Mason, of Dedham (Mass.) long before the invention of the plaintiff's machine, and that therefore the plaintiffs, not being the true inventors, could not recover; but that their patent was void.

It also appeared, that the defendants purchased a right under Mason, and then put into operation one or more of Grant's ma-

chines. In 1825 they had four of the plaintiff's machines at work —in 1826 they employed six of these machines; and in 1827, seven.

But if the plaintiff, Grant, was the true inventor, the defendants contended that the patent was void, for the following reasons —That it was a patent, not for a machine, but for an *abstract principle*—That the specification was false, in claiming as an invention that which had been long before known; and that the specification and drawing deposited in the Secretary's office were insufficient, and would not give a mechanic sufficient *data* from which to make the machine. Upon this latter point, a host of witnesses were examined on both sides, but the decision of the Court rendered their testimony unimportant. A luminous charge was given to the jury, by his honour, Judge Thompson, in the course of which, he commented upon the various questions of law raised in the cause, and gave his opinion in relation to them.— The plaintiff, Grant, had obtained a patent in the year 1821, which he surrendered in 1825, and took out a new one. The Judge decided, that he had the right and power so to do, and that his present patent must be considered in the same light as if no other had been issued.

That an *abstract principle* was not patentable, the Judge said was clearly law, but this patent was not liable to that oojection. He also charged, that the specifications and drawings in the Secretary's office might both be used to make the machine, and if it could be made from the two together it would be sufficient, but that the model there deposited could not be used for that purpose. He then compared our Statute with the English Statutes, and decided that the jury must believe (under our Statute) that the specification was defective *by reason of the fraudulent or intentional concealment* of the patentee, or otherwise the patent would be good. He, perhaps, would not be perfectly satisfied of the correctness of this position, had it not been already expressly decided in the United States Circuit Courts in Boston and Philadelphia.

The great question was then submitted to the jury, *whether or not Grant was the true inventor of the machine.* The testimony in relation to Mason's invention, was fully commented upon, and the jury were instructed, that it was not necessary that Mason should have taken out a patent in order to take away the plaintiff's right—and, on the other hand, the plaintiff's right would not be destroyed merely because Mason had produced the same result; but that it must be shown, that Mason produced the same results by a machine acting upon the same *principle* as the plaintiffs'.

As to damages, the Judge said, it was a question exclusively for

the jury, that the plaintiffs should recover the actual damages which they had sustained, and that the nett profits made by the defendants was probably the best rule to guide the jury in assessing them.

The jury returned a sealed verdict in favor of the plaintiffs for *three thousand two hundred and sixty six dollars, and sixty six cents,* which the Court are by law obliged to treble—making the judgment $9799 98, besides costs.

THE LATE TEA CASE.

The following is an abridgment of the late Tea Case which was determined in the United States Circuit Court in Philadelphia, before Mr. J. Washington. The trial of it commenced on the 4th of November, and determined the 22d.. The action was an action of trespass, brought by plaintiff to recover damages of defendant, for seizing and detaining certain ships, and large quantities of valuable goods, altogether valued between two and three hundred thousand dollars, alleged to be the property of the plaintiff, F. H. Nicoll; the defendant, as marshal of this district, having levied upon them as the property of Edward Thomson, who owed the United States nearly a million of dollars for duties. The defendant's justification introduced the United States as the real defendants; and they took defence accordingly as priority creditors of Edward Thomson.

The cargoes in question arrived in the United States in the year 1826, in the ships Addison, Woodrop Sims, Scattergood, and Benjamin Rush, shortly after Thomson's failure, and were instantly seized by the United States, as his property, by virtue of their right of priority, under the act of congress, in pursuance of writs issued out of this court the 13th of March, 1826, real debt $500,000. The plaintiff immediately put in his claim to the ships and cargoes, under certain documentary titles, derived from Thomson, prior to his failure. The United States not satisfied with the evidence, continued to detain the property. An agreement was finally entered into, to sell the contested property, suffer the proceeds to lie in plaintiff's hands, on giving security for their investment, and took the right of property by jury trial. In pursuance of this wholsome agreement, devised to preserve perishable property, the whole matter came before the court in its present shape.

The plaintiff's counsel were R. J. Ingersoll, Binney, and J. Sergeant, Esq'rs.; the United States were represented by J. Randall and C. J. Ingersoll, Esq'rs.

The documentary evidence, which the plaintiff offered to sustain his right of property, and the evidence of the witnesses, it would be an endless task to detail, as they were the subject of a fortnight's examination.

On the 14th, the argument of counsel commenced, and ended the 20th at noon. The court then adjourned, until the next morning, at ten o'clock, to charge the jury.

The learned Judge consumed two hours on Saturday morning, in the delivery of an extremely lucid and powerful charge. The prominent points adjudicated, as well as touched upon, were principally these: that the securities, or title papers, presented by the plaintiff, were valid and legal; that the question of consideration did not arise, the execution of the instrument being *prima facie* evidence of it, and perfectly good, unless disproved by the defendant; that the title and transfer being good, the allegation of defendant that they were void, on the eight grounds urged in relation to fraud, was not law, inasmuch as no one of the grounds *per se* constituted a fraud in law, or fact. The learned judge then went over the different points as to fraud, and proved that there was nothing in either of them. He animadverted with great severity upon the custom house officers of 1825, said that they were not only negligent and lazy, but unfaithful; that the frauds were caused by acts of theirs, not only of *omission*, but of *commission;* and that they actually threw the shield of lawfulness over the whole transaction, by furnishing Thomson with documentary proofs of fairness. As to the point, that Floyd S. Bailey being an acknowledged accomplice of Thomson in the tea frauds, and the plaintiff's agent, and the plaintiff being responsible for his acts, the judge said, it was so, if Bailey was a *general agent* of plaintiff; but not an agent for particular purposes; which was the real fact the jury was to determine. Upon the point that the transfer to Nicoll was a full assignment of property, omitting only a trivial part, which realized to the assignees but $6000; and that being so, Nicoll was seized of the transferred property to the use of the United States, in the same manner as any general assignee would be; the learned judge decided, that if the jury believed it was the intention of Nicoll and Thomson to execute an instrument, to defraud the United States of their priority, the transfer was void, as to the preference, and Nicoll stood as assignee for the benefit of creditors; and the amount not assigned would be no alteration of the thing, if it were trivial and merely omitted colorably, with a view to carry on the deceit with greater effect. The jury must be fully satisfied of such an intention; fraud was never to be presumed until actually proved; and the jury would of course look at the fact, that Thomson still continued his mercantile transactions as usual, and did not make a

general assignment until compelled. The judge commented upon the point, whether a mortgage of all property would be an assignment under the act, but gave no decision. As to the question of damages, the judge left it entirely to the jury; if they were satisfied the right of property was in the plaintiff, then the taking by the marshal was illegal, and moderate compensatory, but not vindictive damages, should be given; the verdict would be for plaintiff, the amount of damages agreed upon, and not for the value of the property, that being already in plaintiff's hands; or for defendant.

The jury allowed the Messrs. Nicoll $220,000, all the property claimed, and damages amounting to $39,249 66.

JUDICIARY INTELLIGENCE.

Sup. Court of the United States. The Supreme Court of the U. States will commence its annual Session at the city of Washington, on Monday, the 12th inst. It will be recollected, that there is, at present, a vacancy in this Court, occasioned by the death of the late Judge Trimble, of Kentucky. The number of cases which now stand upon the old Docket of the Court, it is said, is not large; and there is a probability that all the new cases, which are ready for trial, will be disposed of before the end of the next term. The cases decided at the last term are contained in the first volume of Mr. Peters' Reports. This gentleman, it will be recollected, succeeded Mr. Wheaton as the Reporter—the latter gentleman, having been appointed Charge des Affaires to the Court of Denmark. From the specimen which has been exhibited by Mr. Peters of his qualifications for the office lately assigned him, the profession have certainly great reason to anticipate, that his future labours in that office, will be perfectly satisfactory.

Eastern District of Pennsylvania. Joseph Hopkinson, of Pennsylvania, has been appointed by the President of the United States to be Judge of the United States, for this District, in place of Richard Peters, deceased.

Ohio District. William Creighton, Jr. has been appointed Judge of the District Court of the United States, for this District in place of James Byrd, deceased.

New-Hampshire District. Daniel M. Christie, Esq. has been appointed District Attorney.

New-York Judiciary. William L. Marcy, Comptroller of the State of New-York, has been nominated to the office of Judge of the Supreme Court, in the place of Judge Woodworth, resigned. Samuel A. Talcott, Esq. has resigned his office of Attorney Gen.

ERRATA.

In page 11, for the words "or the doctrine and presumption," read "on the doctrine of presumption."

In page 12, for "Mr. J. Cambre," read "Mr. J. Chambre."

LAW INTELLIGENCER.

VOL. I. FEBRUARY. No. 2.

RESTRICTIONS UPON STATE POWER.

IN RELATION TO PRIVATE PROPERTY.

NO. 1.

[CONTINUED.]

What is generally understood by the right of property, is the dominion which one man claims and exercises over the external things of this world, in total exclusion of the right of any other individual in the universe.[1] This right, although it is acknowledged and protected by the institutions of society, is founded in the invariable law of nature. That is to say, if mankind were in a state of nature, conscience and common sense would dictate to each individual, that the effect or produce of t he labour of A, is not the effect of the labour of B.; and that therefore this effect, or produce, is A's, and not B's. But notwithstanding the self evident character of this principle, so easily are mankind imposed on by the illusions of self-love, that if there existed no other barrier than that of conscience against an unrestrained indulgence of the universal propensity to accumulate wealth, private property would always be exposed to the spoliation of the avaricious and powerful, and would consequently be held by a tenure so extremely precarious as to be nearly valueless. To establish the right in question upon a basis which would be more substantial, was undoubtedly one of the great benefits that were anticipated from political subordination, and in fact, one of the principal inducements for establishing, in the

[1] 2 Bla. Com. 2.

first instance, the well known system denominated "*civil government.*" It is therefore at once perceivable, that one of the indispensable duties of those who have been appointed, and who have, in consequence, assumed to superintend the concerns of the community, is to ensure to the owner an unmolested enjoyment of his estate; and that they are not possessed of any inherent power which amounts to any thing like a general and absolute control over the effects of private skill and industry. For if the original motive in emerging from a state of perfect nature and simplicity was to guard entirely against the existence of a power so immeasurable in any one, the conclusion cannot be avoided, that such power is not to be arrogated by government as one of its genuine prerogatives. In other words, if obedience to government is created by the consideration that every man shall be the quiet possessor and sole disposer of his own wealth, his wealth is clearly not to be exclusively possessed and completely disposed of by the government; but on the contrary, the government is pledged to acknowledge and protect *his* dominion over it. The government, it is true, may abuse the confidence of its constituents and violate this pledge, but when such is the case, the obedience of the latter is no longer due; and men need not be reminded, that at the very same instant when obedience ceases to be a duty—*resistance* becomes a *right.* And he who is but partially familiar with history will require no description of the scenes which usually follow such a a crisis, for he must know that the greatest happiness which can be anticipated, when that event is notorious, is the despotic power of a Cæsar, or a Buonaparte. Let the supreme power of every State therefore keep constantly in view the divine injunction—"thou shalt not covet," which makes no distinction between those who occupy the elevated position of power and magistracy, and those who have never been advanced from the less conspicuous station of subjects. To use the language of a celebrated monarch who stood only upon his native greatness, "In the estimation of justice, all men are equal—whether a prince complain of the peasant, or a peasant complain of the

prince."[1] The plain truth is, that men form and become united to political society for their *own* advantage and safety, and not to gratify the ambition or avarice of those in power; and the common respect for the natural duty of justice is the sole inducement for admitting the factitious obligation of obedience.

It is certainly a matter of surprise, that in this country—a country where the people pride themselves upon the simplicity and freedom of their political institutions, persons should be so frequently met with who treat the subject of State authority as something exceedingly complicated and indeterminate; and who even deride every attempt to apply arguments, drawn *a priori* from the natural foundations of reason and justice, in ascertaining the precise limits of this authortiy. Reflecting and disinterested men, of all countries must be sensible, that in political, as well as in every other science, there are certain axioms which the most ordinary intellect cannot renounce without extreme difficulty, and from which alone are to be deduced such propositions as are not so immediately obvious to the understanding. Thus, it was long since said that the fundamental maxims of the laws and constitution of England are *honeste vivere —alterum non lœdere—suum cuique tribuere.*[2] It is equally lamentable as strange that any American citizen should be found who is so far regardless of the constitution of his country as not to know, that while this constitution subsists, all the laws which emanate from the legislative department are *expressly* required to be framed in reference to those great fundamental truths which constitute natural equity. If it be possible that any one can in reality be thus ignorant, he may be enlightened by referring to the following declaration of the Supreme Court of the United States, made but a few years after the adoption of the American Constitution. "There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power—as to take away that security for personal liberty and *pri-*

[1] Frederic of Prussia. [2] Bracton L. 1. C. 3.

vate property, FOR THE PROTECTION WHEREOF THE GOVERNMENT WAS INSTITUTED."[1]

Indeed, it is only in a state of anarchy, and when a complete but temporary triumph (as in the French revolution) is obtained over reason and justice, that the right of property is ever openly insulted and entirely prostrated. And whether we have recourse to the laws and constitution of Rome, or to the policy of those nations which overrun and conquered her, we shall find this right acknowledged, defined and respected. The laws of Rome which authorised magistrates to interdict a prodigal from the use of his money, certainly suppose that that power did not belong to the magistrates in ordinary cases. Under the despotic rule of the Roman Emperors, it was customary, it is true, for the prince to interpret his own laws for particular occasions.—This "*interlocutio principis*" (although there was no distinct separation of the judicial from the legislative power) was nevertheless subject to the principle of the civil law, that the lawgiver could not alter his mind to the prejudice of a vested right—*Nemo potest consilium suum in alterius injuriam.*[2] A declaration in the code also, according to the construction put upon it by an eminent American Judge, relates not merely to future suits; but to future, as contradistinguished from past contracts and vested rights.[3] This declaration is "*leges et constitutionem futuris certum est dare formam negotiis, non ad facta praeterita revocari nisi nominatim, et de praeterito tempore, et ad huc pendentibus negotiis cutum sit* (*Cod.* I. 147.) The Spaniards of *Arragon*, in electing a king expressed their sense of his limited authority, by a representation resembling a *play*, in which was introduced a personage who was dignified by the name of *la Justiza* of Arragon—who was publicly declared to be greater and more powerful than the king.[4] If the power of Ferdinand of Spain had not been chained down to one of the great, first

[1] Calder v. Bull 3 Dallas.

[2] Dig. 50. 17, 75. This maxim, it is true, is general in its terms, but a very very learned writer, (Dr. Taylor,) considers it as a direct restriction upon the lawgiver.

[3] Chancellor Kent. [4] Cited by Mr. J. Wilson, in 2 Dallas 459.

principles of natural law, the son of the celebrated discoverer of America who had wasted two years in fruitless solicitations at Court, for the rights which descended to him from his father, would not have obtained by a judicial sentence that which was ungratefully and unjustly denied by a contemptible monarch.[1] Even in France, during the late reign of Napoleon, whose principles of state policy were so generally hostile to the opinions and feelings of a people accustomed to just and equal laws—the greatest deference was manifested for the sacredness of private property. If these instances of protection to property are not sufficient to make those republican legislators pause, who through inadvertence, or with a view to acquire popularity, are inclined to adopt measures the result of which is to despoil an individual of his estate, a still more striking instance may be mentioned. A Turkish Sultan is the absolute master of the lives of millions, and yet what was the conduct of the Sultan Mustapha, when he was denied the possession of an estate in the city of Constantinople by its humble owner? The man of power was conscientious. He hesitated. He consulted his *mufti;* and their answer was—*private property is sacred.*[2]

It is to be expected that in those countries which are more popular in their constitution, and where the power of government has been cautiously assigned to it by the people, there should be still greater protection for the right under consideration, and that it should be defended by the most explicit provisions against the encroachments of an unfaithful, or deluded magistracy. The law of England, it appears, has treated it as one of the rights inherent in every Englishman, which should not only be accurately ascertained, but at the same time effectually guarded. By the *great charter* it is provided, that "no freeman shall be disseised or divested of his freehold but by the judgement of his peers, or by due process of law." This celebrated instrument, which has been very justly considered as no

[1] Cited by Mr. J. Wilson, in 2 Dallas 459.

[2] This fact is recorded by De Tott in his memoirs of the Turkish government; and is referred to by the Court of S. Carolina in the case of Lindsay *v.* Charleston Commissioners. 2 Bay's Rep. 60.

imperfect outline of a free and equal government, was repeatedly renewed, until it became in the language of an accomplished writer "a general banner perpetually set up for the union of all classes of the people."[1] It was also recognized and confirmed by subsquent acts of parliament which provided, that "no man's goods should be seized into the King's hands, and that no man should be put out of his franchises, or freehold; and that if any thing was done to the contrary, redress should not be denied." Even an English Parliament, though it has often been distinguished by the appellation of "omnipotent," is not acknowledged as being invested with an uncontrolled dominion over the property of the subject; and the instances are very few of an attempt, or a disposition on the part of Parliament to exercise such dominion. And attempt was made in 1783, but that proved unsuccessful. The bill which was introduced for new modelling the charter of the East India Company is here referred to. Upon that occasion it was asserted, that the interference of Parliament was not only a dangerous violation of the charter of the company, but a total subversion of law and the constitution of the country. The bill was opposed by Mr. Pitt as being "a daring violation of chartered rights;" and it was boldly pronounced by Lord Thurlow "an atrocious violation of private property *which cut every Englishman to the bone.*"[2] Even the forfeitures in the reign of Charles (the *quo warranto* against the city of London and the repeal of Massachusetts charter) were *under colour* of law. And the only means by which it is pretended, that corporate franchises can be taken away in England, are *trial* and *judgement.*[3] The Parliament of Great Britain, when viewed theoretically may, it is true, appear in a qualified sense, omnipotent. But Parliament was considered to be limited in its authority as long since as the time of Bracton, who says "*nova constitutio futuris formam imponere debet, et non praeteritis.*[3] It was also expressly, declared by Lord Coke, when Chief Justice of the Kings Beach, that acts of Parliament were

[1] De Lolme p. 29. [2] Opinion of Lord Mansfield 3 T. R. 344.
[3] L. 4. fol. 228.

controlled by the common law and were to be adjudged void when against common right and reason.[1] And it was insisted on by Lord Chief Justice Hobart, in Day v. Savage, that an act of Parliament made against natural equity was void.[2] Lord Chief Justice Holt reiterated the same opinion in the case of the city of London v. Wood.[3] It is unfortunate that the same principle should not have been more invariably respected by some who have been appointed to discharge the important duty of legislators, but like his majesty King James they have been disposed to consider such principles as "dangerous conceits." Had it not been for such conceits in the English nation, where would have been the happiness which the subjects of that King and his successors have so long enjoyed at home, or the moral and political influence they have so long commanded abroad? And where would have been found a Hampden, a Sidney, and other inflexible patriots who generously dared—

"To stem the torrent of a downward age,
To slavery prone, and bid it rise again
In all the native pomp of freedom bold?"

[TO BE CONTINUED.]

DAMAGES ON FOREIGN BILLS OF EXCHANGE.

The regulation of damages upon Foreign Bills of Exchange certainly appears to be a matter of very great importance to the commercial interest of this country, so much so, that it is desirable that the rate of damages should be established with very considerable caution and deliberation. The law in relation to this subject, as well as the laws in relation to bankruptcy, should in fact be prescribed by Congress, and not remain as they are the offspring of State Legislation. The most respectable merchants, who must be allowed to be the most competent judges of the policy of the regulations as now established, have already preferred petitions to Congress, for their attention and interference in relation to this subject, and complain that the rate of damages as it has been fixed by several of the States is much too exorbitant, and in reality does serious injury to those concerned in foreign trade. The rule, for instance, in New-York has been, that the holder of a bill drawn

[1] 8 Rep. 118. [2] Hob. Rep. 87. [3] Mod. 687.

there at a place out of the United States, protested for non-acceptance, or non-payment, is entitled to recover of the drawer, or endorser the amount of the bill at the rate of exchange on the place on which the bill was drawn, at the time of notice given to the party to be charged, and *twenty per cent* damages on the amount of the bill, at the rate of exchange, the expenses of protest, and interest on the aggregate amount of the bill and damages, from the time of notice given. The construction formerly was, that the amount of the bill was to be calculated at the par of exchange. And it was held by Mr. J. Spencer, that "the twenty per cent. was in lieu of damages, in case of *re-exchange*, and because there was no course of exchange from London to New-York, and to avoid the constant uncertainty and fluctuation of exchange," (vid. Hendricks *v.* Franklin, 4 Johns, 119.) But this decision was overruled by the Court of Errors, who have adopted the construction before mentioned, (vid. Graves *v.* Dash, 12 Johns, 17.) The rate of 20 per cent is also the rate in Missouri—Alabama—Louisiana—Illinois—Connecticut and Delaware—upon bills payable out of the United States.

In Pennsylvania the rate is twenty per cent. if the bill is payable in any part of *Europe*—but if payable in Madeira, Spanish Maine, or Mexico, *fifteen* per cent; and in any other part of the world, out of the United States, *twenty-five* per cent. In all these cases interest is given on the amount of the bill, damages and charges of protest, from the time of notice. And the amount of the bill and damages is to be determined, by the bill of exchange, or value of the money or currency mentioned in the bill, at the time of notice. This excessive rate of damages, as was before observed, is extremely impolitic, and hostile to our commercial traffic. The following communication on the subject which lately appeared in the National Intelligencer, and which was from a gentleman in New-York to his friend in Washington discloses a fact that shews the correctness of the assertion just advanced. It is as follows:

"A fact came to my knowledge a few days ago, in relation to Bills of Exchange, which I beg leave to communicate A native American merchant having an acknowledged balance in the hands of a Liverpool house, drew for the same or part of it; but before his bill reached Liverpool the drawees failed. The bill was returned under protest, and the American merchant paid the damages, 20 per centum, the then rate, two or three years ago, and which went into the pocket of a British Agent, who was the holder of the bill. On proving his claim before the assignees in England, that for damages was rejected.

"This affair occurred to one of our most respectable merchants, and can, therefore, be proven at any moment. I have it from himself. I think the sum was stated to be 1,000*l.*—Here, then, was a transfer of 200*l.* equal to nearly 1000 dollars, from the United States to England, as a punishment to the former, for drawing in good faith, and as a reward to the latter, for a noncompliance of contract. Such events merchants generally keep a secret, but, from circumstances at that time, in England, there is the best reason to believe that many of a similar nature occurred to the merchants of this country."

In most of the States, the fixed rate of damages, upon foreign bills of exchange, is more moderate than that above mentioned. Thus in Maryland, upon a bill payable out of the U. States, the *value* of the bill is recoverable at the rate of exchange, *fifteen* per cent upon that value—damages, costs of protest, and interest on the value of the principal sum in the bill from the time of protest. In Ohio, Indiana, Virginia and S. Carolina the rate of damages is also *fifteen* per cent. In other States the rate is still more moderate. The rule of Massachusetts has been controlled by the *immemorial usage* of the State. *Parsons* C. J. in the case of Grimshaw v. Bender (6 Mass. R. 187.) says "the *usage* here is to allow the holder of the bill the money for which it was drawn *at par*, and also the charges of protest, with American interest on those sums from the time when the bill should have been paid; and the further sum of *one tenth* of the money for which the bill was drawn, with interest upon it from the time payment of the dishonoured bill was demanded of the drawer. But nothing has been allowed for re-exchange, whether it is below, or at par. This usage is so ancient that we cannot trace its origin; and it forms a part of the *law merchant* of the Commonwealth." It was by this rule, it appears, that damages were assessed upon a foreign bill in the case of Barclay v. Minchin (6 Mass. R. 162.) But by a statute of Massachusetts lately passed, it is enacted that, where any bill is drawn or endorsed in the State and where any bill is payable at any place beyond the *Cape of Good Hope*, in Africa, Asia, or the islands thereof, shall be refused acceptance or payment, the drawer or endorser, shall, on due notice and demand thereof, pay the contents of such bill at the par value, together with *twenty per cent* thereon, in full of all damages, interest and charges. And where any bill so drawn or endorsed and payable at any other place out of the United States, is dishonoured, the drawer, or endorser shall, on due notice and demand thereof, pay the contents of such bill at the current rate of exchange at the time of demanding payment, and *five per cent* damages on the contents, of such bill, togeth-

er with interest on such contents, from the time when such bill shall have been refused acceptance, or payment, which shall be in full of all damages, charges, and expenses. Other States seem to have been governed by the rate of damages established by the early usage of Massachusetts. And in Rhode Island, N. Carolina, Kentucky and Mississippi the rate of damages is *ten per cent* upon all foreign bills of exchange. In Tennessee, the holder of *any* protested bill is entitled to the same damages.

THE DOCTRINE OF UNITY OF POSSESSION.

It is singular that there should so seldom have been occasion in this country to apply the rule as to *unity of possession*. It seems, however, to have been relied on by the counsel for the plaintiff, in the case of Hazard *v.* Robinson, which was tried in the Circuit Court of the U. States, held in the District of R. Island, before Mr. Justice Story; and which is reported in the 3 vol. of Mason's Rep. p. 172. The case may be thus briefly stated: A. owns an upper mill, and B. a lower mill on the same stream. The lower mill has a dam which obstructs the free use of the upper mill. B. lowers his dam two feet, and allows it to remain in that state 38 years, and during that period the upper mill is free of obstruction. B. then sells the lower mill to A., who afterwards sells the lower mill to C. The Court held that on the ground of unity of possession, the right of raising the dam of the lower mill two feet was gone, and that the upper mill had acquired a right to use the water, without back-flowing.—And the Court considered it to be generally true, that unity of possession of the estate to which an easement is attached, and of the estate, which the easement encumbers, in effect, is an extinguishment of the easement, This doctrine was discussed at least as far back as 11. Hen. 7, as appears by the case of Surry *v.* Pigott, in Latch 153, and Popham 166. The case in 11. Hen. 7. was as follows: A. was the owner of a tenement, to which there was an ancient gutter running through an adjoining tenement, and afterwards he bought the adjoining tenement; and then sold the first tenement to the plaintiff. It was held in this case, that the ancient gutter was not extinguished by the unity of possession; but that it would have been otherwise, if A. during the unity of possession had destroyed the gutter, or cut it off. If, therefore, as was observed by Mr. J. Story in the case alluded to, "the dam of the lower mill had never been lowered, the right to use a dam of that height, notwithstanding the unity of possession, would have passed to the

subsequent grantee of the lower mill, as a subsisting privilege, or appurtenance; and he cited the case of Nicholas *v.* Chamberlain (Cro. Jac. 121.) In this case, it was considered by all the Court, "that if one erect a house and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduits and pipes pass with the house, because it is a necessary and *quasi* appendant thereto." Here the unity of possession was not admitted to destroy the right to the easement, because it was annexed to the messuage, and in use at the time of the grant. But if the conduit and pipes had been actually severed before the grant, there could have been no pretence to say that the conduits and pipes passed as appurtenances. The case of Morris *v.* Edgington, (3 Taunt. 24,) was referred to by Mr. J. Story, which, although different in its circumstances, appeared to him in its reasoning to establish the foregoing conclusion. The right of a natural water course is not extinguished by unity of possesion, in any case. Thus, Whitlocke J. in the case before alluded to (Surry *v.* Pigott, as reported in Popham) took the distinction that where a thing hath its being by *prescription*, unity will extinguish it; but where the thing hath its being *ex jure naturæ*, it shall not be extinguished, A water course, he said, did not begin by consent of parties, nor by prescription, but *ex jure naturæ*. The civil code of Louisiana contains the following provisions as to the extinction of incorporeal rights (*servitudes*) by unity of possession.

ART. 801.—Every servitude is extinguished, when the estate to which it is due, and the estate owing it, are united in the same hands.

But it is necessary that the whole of the two estates should belong to the same proprietor; for if the owner of one estate only acquires the other in part or in common with another person, confusion does not take effect.

ART. 802—If the union of the two estates be made only under a condition, or if it cease by legal eviction; if the title be thus destroyed either by the happening of the condition or by legal eviction, the servitudes revive, which in the mean time, will have been rather suspended than extinguished.

Thus the exercise of redemption, the happening of the condition on which the estate terminates, the eviction from a succession by a nearer heir, the abandonment or relinquishment of an estate on account of mortgages, will revive all the servitudes, active and passive.

Art. 803.—Confusion takes place by the simple acceptance of an inheritance, if there be but one heir.

If the heir who has thus accepted an inheritance, disposes of any estate belonging to the succession which is subject to any servitude towards his estate, without any stipulation for the preservation of his right of servitude, the estate thus alienated, which owed the servitude, remains free from it, in consequence of the confusion which had taken effect while the estate remained in his hands.

Art. 804.—But if the heir, under a simple acceptance, sell to a person the whole of his rights in the succession he has received, the sale prevents the confusion, and the estate belonging to the succession will continue to have the rights of servitude previously due to it, or be charged with the servitudes imposed on it, in the same manner as if it had not passed through the hands of the heir; because, in this case, the purchaser is not presumed to have purchased more or less than all the ancestors possessed.

Art. 805.—Confusion does not take effect if the heir has only a temporary possession of the estate subject to the servitude, or enjoying it for the purpose of delivering it to another person to whom it has been bequeathed, or when his right in it terminates at a certain fixed time.

Art. 806.—If the heir has accepted the succession under benefit of inventory, the confusion does not take effect; and if the heir is obliged to abandon the succession at the instance of the creditors, the servitudes resume their former state.

Art. 807.—The acquets, which the husband and wife make during the marriage, do not become confused with the private property of each; and if these acquets are sold during the marriage, the servitudes, active and passive, which existed previous to their being acquired by the husband and wife, continue to exist, without any stipulation to that effect.

Art. 808.—Except in the cases herein mentioned, and similar cases, services extinguished by confusion do not revive, except by a new contract; with the exception of continuous and apparent servitudes, with respect to which the disposition made by the owner of both estates is equivalent to a title.

Art. 809.—The renunciation or abandonment of the land extinguishes the servitudes charged on it, of whatever nature they may be, because the owner of the estate to which the servitude is due, is bound to accept the abandonment, which produces in his hand a confusion which puts an end to the servitude.

Art. 810.—It is not necessary to produce a discharge of the servitude, that the proprietor of the estate which owes it,

should abandon the whole estate; it suffices, if he abandon the part on which the servitude is exercised.

VALIDITY OF WAGERS AND BETS ON THE EVENT OF AN ELECTION.

The cases which have been adjudged in England in relation to bets or wagers do not it seems, in general, prohibit this species of contract; and if a wager is made on indifferent subjects or questions (however trivial) it has been considered valid, and that an action thereon may be maintained against the loser. This was established in Good v. Elliott (3 T. R. 693.) where the subject of the wager was whether one S. T. had, or had not, before a certain day bought a waggon belonging to D. C.; which wager three judges, contrary to the opinion Buller J., held to be good. So it has been held in England, that a wager on the ages of plaintiff and defendant is legal (3 Campb. 168.) The Courts however both in England and in this country have frequently reprehended these contracts and expressed their regret that they have ever been sanctioned. And it has been expressly decided in England that a wager made upon the life of Bonaparte, was void. (Gilbert v. Sikes, 16 East 156.) And as late as the third ult. a wager on the escape of the same individual from St. Helena was adjudged void by the Supreme Court of Pensylvania, though two of the Judges dissented. The wager upon which the action was brought was evidenced by a writing in the following terms, which was signed by the parties. "May 14th, 1821. This day, Stephen Ives bet one hundred dollars, with John Phillips, that Napoleon Bonaparte will, at or before the expiration of two years from the above date, be removed or escape from the island of St. Helena. It is understood between the parties, that if Bonaparte should die within the above period of two years, and on the island of St. Helena, that Mr. Ives loses the bet."

Bonaparte did die on the island of St. Helena, within the two years, or was dead at the time. The following is the opinion of the Court:

"Certainly a wager can generally be recovered in England, unless when betting on the particular subject is prohibited by act of Parliament. When we reflect that no good can result to the community from the practice of betting, that much loss and domestic distress is occasioned by it, no wonder that in that country Judges have regretted that it has been decided that a bet could be recovered. When our ancestors separated this

country from England, on the 28th Jan. 1777, it was enacted that the common law of such of the statutes of England as have heretofore been in force in this province, shall be in force and binding until altered, &c. Now I have always believed that the restrictive words "as have heretofore been" are applicable to common law as to statute law, much of both never was and is not now law here. And I would imitate those Judges who decided that gaming policies of insurance though good at common law were void here, and not suitable to the principles or genius of our institutions. In fact this is a gaming policy, but as I view this case, there is another principle on which the judgment of the court is right, admitting that some wagers can be recovered. But in this I do not give the opinion of the court, who think the legislature only can prohibit a recovery in all cases of wagers. No man or men have any right to occasion trouble or uneasiness to any other man or woman, and no court ought to assist them in so doing, or permit its jurisdiction to be abused, for such purpose. It has been decided that certain wagers, whether a particular person was a man or a woman, were not recoverable in a court of justice, because the proof might be indecent and the investigation distressing to the person, although the testimony may not, in all cases, lead to inquiries or call for proof which is indecent, and although the investigation may in some possible cases, not occasion distress to the person who is the subject of the bet. Yet the very same bet, and the evidence to be adduced, may be very distressing to another person, about whom the second bet may be made. A man of undoubted wealth, not in debt, and not surety for any person, may feel perfectly indifferent as to an investigation in a court of justice as to the precise amount of that wealth; but a man in other circumstances may be much distressed and seriously injured. I may be perfectly indifferent as to a bet on my age, but there are no doubt many persons about whose age it would be impertinent to bet and who would be much hurt by the investigation. Ordinarily, a man in prison for any cause is enough distressed. Shall it be permitted, that the question, when he will be liberated, shall be a subject of wagers among idle, or thoughtless, or malicious persons? And shall the courts of justice of the country add to that distress, by listening to, and collecting others to listen to, all that malice or avarice may be able to collect on the subject? I would consider it as a case calling for a general rule, and say, that as every bet about the age, or height, or weight, or wealth, or circumstances and situation of any person are either malicious or indecent, or impertinent or indelicate, all such bets are illegal, and that no court

ought, in any case, to sustain a suit on such a wager; and this whether the subject of the bet was man, or woman, or child, married or single, native or foreign, in this country or abroad — I can perceive no principle of law or justice, which will require or permit the time of the country and its courts to be wasted, to gratify the malice or curiosity, or the caprice of the unthinking and impertinent. There are many things which politeness would not mention, and charity would conceal, and would not assist folly or malignity in making them public. I would not as a man, and I will not as a Judge. I hold no bet of any kind, about any human being recoverable in a court of justice. And as the majority of the court is of this opinion, it is unnecessary to notice the other points discussed."

It would certainly be gratifying if the Courts of this country could consistently establish the doctrine with regard to wagers which prevails in Scotland, which is, that all wagers are invalid, on the sound principle, that courts of law were instituted solely for the protection of *real* rights, and for the enforcement of *serious* contracts. One rule, however, is well settled, both here and in England, and that is, if a wager is contrary to public *morals*[1] or *policy*, it is void. Whether this rule extends to a wager made on the event of an *election*, has, it appears in several cases been a question for the Court to determine.— In the case of Allen *v* Hearn, (1 T. R. 56.) which was an action of assumpsit before Lord Mansfield, to recover *one hundred pounds* on a wager made between the plaintiff and defendant, who were both *voters*, on the event of an election of a member to serve in Parliament; his Lordship was of opinion, that the right of the plaintiff to recover, depended upon the question as to the nature and species of the contract; and that if the contract was in the eye of the law corrupt, it could not be supported. One of the principal foundations of the constitution, he reasoned, depended on the proper exercise of the elective franchise, that the election of members of Parliament should be free, and particularly that every *voter* should be free from pecuniary influence in giving his vote. The wager, he thought, laid both parties under a *pecuniary influence*, and made each of them in the nature of a candidate. And he inquired, what was so easy, as in a case where a bribe is intended, as to lay a wager, and remarked upon the difficulty of proving that a wager made a party give a contrary vote to what he would have done otherwise.— As the wager, he continued to reason, had an influence on the mind of the party, it was a colour for bribery, and hence was void.

[1] In an action very recently brought on a *wrestling* bet before the King's Beach, Lord Tenderden said, it was an action he could not try.

In the above case, it will be observed, the parties who made the wager, were both *voters*, and it seems to have been on that ground that the contract was adjudged void. But it is certainly very desirable under a government like ours, where elections are so frequent, to prevent as far as possible every species of undue influence and to discountenance all electioneering for private ends. All wagers, therefore, made upon the event of an election, without any exception, should, when considered in reference to their results, in a political and moral point of view, unquestionably be denounced. In a case which recently came before the Supreme Judicial Court of Rhode-Island the action was to recover the amount of a wager made between plaintiff and defendant—that the Hon. Asher Robbins, would be elected a Senator to Congress at the next ensuing Senatorial election, at which the choice was to be made by the Legislature. Both plaintiff and defendant were inhabitants and citizens of the State, but neither of them members of the Legislature. Mr. C. J. Eddy gave his opinion as follows:

"It is admitted that by the Common Law, some wagers are legal, and may be enforced in a Court of Justice. This admission is made with regret in many of the modern decisions; and were the question *res integra*, there is little doubt that all wagers would now be declared illegal. Among wagers deemed illegal, are those against sound policy, or of immoral tendency, which may affect the feelings, interest or character of a third party, or tend to disturb the peace of society.

"In the case of Gilbert and Sykes (16 East 156,) an action on a wager on the life of Bonaparte,) Lord Edinborough says:—"Wherever the tolerating any species of contract, has a *tendency* to produce a public mischief or inconvenience, such a contract has been held void." And after, in nearly the same words, "If a contract have a *tendency* to a mischievous and pernicious consequence, it is void." And again, "Where the subject matter of the wager has a tendency injurious to the interests of mankind, I have no doubt in saying that it ought not to be sustained." In the same case Le Blanc J. says, "It has often been lamented, that actions upon idle wagers should ever have been maintained in Courts of Justice. The practice seems to have prevailed before that full consideration of the subject which has been had in modern times." "And it is now clearly settled, that the subject matter of a wager must at least be perfectly innocent in itself, and must not tend to immorality or impolicy." In the same case, Bailey J. speaking of the wager then under consideration, says, "It gives to one person a *pecuniary interest* in the violent death of another, by whatever means pro-

cured." "Shall it be allowed to a subject to say, (says Lord Ellenborough in the same case) that the moral duties which bind man to man are in no hazard of being neglected when put in competition with individual interest?"

"If we apply these principles to the question before us, there can be little doubt what the decision ought to be. The wager was on the election of a certain person, by the General Assembly, to the office of Senator in Congress. Did it not give to the plaintiff a *pecuniary interest* in the election of that person; and to the defendant an equal pecuniary interest in preventing that election? "And shall it be allowed to" either party, or any one else "to say," that in this case "the moral duties which bind man to man," or to communities of men, "were in no hazard of being neglected, when" thus "put in competition with individual interest?"

"If a contract have a *tendency* to a mischievous consequence, it is void. What is the tendency of a wager, on an approaching election? Is it to produce peace, harmony, fair dealing? Or is it not rather to produce clamour, misrepresentation, abuse, discord; the exertion of improper influence; of intrigue, bargain and corruption; of the use of *means*, by each party, fitted to the *end*, that is, the winning of the bet? And is not this tendency greater, in proportion to the amount of the wager, and the influence of the parties to the wager? To say that because the parties to a wager are not members of the Legislature by whose vote the wager will be decided, therefore the wager can have no influence on the members of the Legislature, is to say, that the power and influence of individuals out of the Legislature, can in no case affect the vote of that Legislature, however great the power and influence of those individuals may be. Which is to say what is in itself absurd, what daily experience teaches to be false, and what a moment's reflection must convince every one is not and cannot be true. If the tendency of the wager, in the case before us, be *thus;* then is that tendency *immoral;* for no one, it is believed, will so far hazard his own reputation for correct moral feeling, as to undertake to reconcile misrepresentation, slander, intrigue, or corruption, with the principles of morality. We might then safely say, it is contrary to sound policy, *because* immoral. But it is contrary to sound policy in a more important point of view. More important, because the immoral tendency, and pernicious bearing on our free institutions, is more extensive and injurious. The strong hold of freedom in our country, is in the freedom of our elections. Destroy this and our freedom is at an end. Whatever tends to this destruction in the remotest degree, ought to be resisted here, with

a determination that admits of no compromise. Wagers on elections, whether by the people or the General Assembly, have this tendency directly. And this tendency, in a given case, is in proportion to the interest at stake, and the influence of the parties to the wager. To say that a wager can have no influence in such a case, is to say, either that man has ceased to regard his own interest,or that interest has ceased to influence man's conduct. This interest and influence may result in the grossest corruption. It is enough for the decision of this case to shew, that a wager on an election has this tendency. Can it be necessary to ask, whether in a free country, a contract which has a *tendency* to destroy freedom of elections, and produce corruption, is consistent with sound policy? In Vescher *v.* Yates, (11 Johns, 31,) which was an action against a stakeholder, of a bet on an election, Kent C. J. in delivering the opinion of the Court says:—"We choose rather to place the decision of this case upon those great and solid principles of policy which forbid this species of gambling, as tending to debase the character, and impair the value of the right of suffrage."

There is one other point of view in which this case may be considered, and in which this wager will appear equally indefensible. If the feelings, interest, or character of a third party may be affected by a wager; or if it tend to disturb the peace of society, it cannot be sustained. (Da Costa *v.* Jones.) If the election in question had taken place by a majority of one vote, and that one vote had been procured by bribery, would the wager have been fairly won? And if *not* won, ought not the defendant to be permitted to shew it, and avoid the payment? But would a Court of law inquire into a transaction, so full of interest and feeling to third parties, in order to decide an "idle wager?" No, nor would it comport with sound policy to suffer such a question to be discussed in a Court of law, on a mere wager, independent of the feelings or interest of third parties. In the case of Da Costa *v.* Jones,(Cowp.720)Lord Mansfield stating as a case, a wager that an unmarried woman has had a bastard, says, "would you try that? Would it be endured? Most unquestionably it would not. Because it is not only an injury to a third person, but it disturbs the peace of society; and the party to be affected by it would have a right to say, how dare you bring my name in question?" With how much more propriety might the parties charged with corruption in the case above supposed, put the same question! And how much greater would be the tendency in that case, to disturb the peace of society?

In the case of Bunn *v.* Riker,(4 Johns. 428) which was a wager on the election of the governor of the state,Van Ness J. says, "It

may involve an inquiry into the validity of the election of the present chief magistrate. In answer to the objection that the certificate of the canvassers would be conclusive, he says, "It is enough that this wager may give birth to such a *question*, to pronounce it to be repugnant to the dictates of good policy."—"It is a discussion calculated to endanger the peace and tranquillity of a community." These principles are fully recognised in the case of Lansing *v.* Lansing, (8 Johns. 454,) which was a similar bet, made after the polls were closed. Say the Court—"This case falls within the principle laid down in Bunn *v.* Riker, that a bet, involving an enquiry into the validity of the election of Governor, was void, on principles of policy."

"With these principles as well as those quoted from the other authorities, whether binding on this Court as authorities or not, we fully concur, and have no hesitation in saying, that all bets on elections, whether by the people or the General Assembly, and all bets on judicial decisions, are of immoral tendency, against sound policy, and ought not to be sustained, especially in this State, where all our officers, judicial as well as others, are of annual appointment."

ACCEPTANCE OF BILLS OF EXCHANGE TO PAY AT A PARTICULAR PLACE.

It is not necessary, in order to found a claim against the acceptor of a bill to present his bill for payment at a particular place, when it is only specified in a memorandum annexed to the bill; for such memorandum is considered merely as an intimation where the payment may be had, and is not held to limit the debtor's general obligation to pay, by the condition of presentment at the place specified. This doctrine has been taken for granted in England in every case where it has been the subject of discussion—(Sanderson v. Judge 2 H. Bl. 509—Callaghan v. Aylett 2 Campb. 550. Sanderson v. Bowes 14 East 501—Price v Mitchell 4 Campb.200—Exon v. Russell,4 M. & S. 405—Hardy v. Woodroffe 2 Stark. 319.) But the courts were not unanimous in their opinions as to the effect of an acceptance of a bill "payable at a certain place," when no place was specified in the body of the bill; this subject having divided the courts of K. Bench and Com. Pleas for a great number of years, till it was settled by a solemn judgement in the House of Lords, and afterwards regulated by express statute. The House of Lords decided that in the case of a bill accepted "payable at a certain place," without any other words, the hol-

der must present the bill for payment at the place specified, before he can have an action even against the acceptor, and that such presentment being a condition of the acceptance must be both specially averred and proved (Rowe v. Young 2 Brod. and Bing. 165 and Vid. Carly v. Vance 17 Mass. R. 389.) Soon after the decision in Rowe v. Young the law was placed on a different footing by the 1 and 2 Geo. IV. c. 78. which after narrating the point decided in the preceding case, and stating that in consequence of a general understanding among merchants, that such an acceptance is a general acceptance, inconvenience may be sustained, if it should, on the contrary be regarded agreeably to this decision, as a qualified acceptance, therefore enacts, "If any person shall accept a Bill of exchange, payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill ; but if the acceptor shall in his acceptance express that he accepts the bill payable at a banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment when such payment shall have been first duly demanded at such banker's house or other place." Where a bill was drawn payable at a particular place, and accepted payable there, it was held to be a general acceptance within the meaning of this statute, and that it was not necessary to prove presentment at that place. (Fayle v. Bird 6 B. and C. 531.) Presentment for payment at the place specified in the acceptance is sufficient, as against the drawer or endorsers, without going to the acceptor personally. For the latter by specifying this place in his acceptance, points it out as the place where he is to be called on for payment and where he engages to have funds for the purpose ; and therefore his failure to pay when it is presented there, is as much a breach of his engagement, such as to authorise recourse against the other parties, as if he failed when it was presented to himself personally. (Thomson on Bills 453 2 H.Bl. 509, 7 East 385.) And accordingly it has been found, that when a bill is made payable at one or other of two places, presentment at one of them is sufficient to preserve recourse, though payment should be refused there, merely on account of the failure of the house, but would have been made at the other place, because the house there did not fail till a day or two afterwards. (Beeching v. Gower, Holts C. N. P. 313.) Nor does it make any difference though the actual place of presentment is more distant than the other. It is therefore implied and has

been held in the cases referred to and in Stedman v. Gouch, 1 Esp. 4. that the above doctrine is applicable, although the bill should be thus required to be presented for payment to a person in no way liable for it ; for instance to a banker at whose house the acceptor declares it payable, but who answers "no effects." And it has been further recognised as the custom of London, that when a bill is declared payable there at a bank the presentment of it to the banker's clerk at the clearing house is sufficient without presenting it at the bank. (2 Campb. 596. 2 Taunt. 388.)

THE LATE PARLIAMENTARY ENACTMENT

IN RELATION TO ACKNOWLEDGMENT OF DEBTS BARRED BY THE STATUTE OF LIMITATIONS.

In the celebrated speech delivered by Mr. Brougham in the British House of Commons, on the 7th February 1828, on the *Reform of the Law*, he referred, among other defects and anomalies of the law which required correction, to the rule by which a debtor renewed his obligation to pay, after the time limited by the statute of limitations had elapsed, for the commencement of an action by the creditor. A debt, he thought, ought not to be revived by a slight, nor even by any *verbal* acknowledgment. To use his own language, he "would prop up the statute of limitations by the statute of frauds, and say that nothing should take the case out of the former but a new promise, *in writing*, and thus put an end to the absurd and contradictory decisions." The wishes of the learned member in this respect it seems were soon gratified, for shortly after the above suggestion was made, an act was passed of which the following is an abstract. It deserves the attention of legislative bodies, in this country.

An act "for rendering a written memorandum necessary to the validity of certain Promises and Engagements," (9th May 1828) to take effect the 1st January 1829.

S. 1. After reciting the statutes of Limitations 21 Jac. and 10 Car (Irish act;) and also that various questions had arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the statutes, and that it was expedient to prevent such questions ; enacts, that in actions of debt or upon the case grounded on any simple contract, no acknowledgment or promise shall be deemed sufficient

evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby. Joint contractors, or executors or administrators of any contractor, shall not be chargeable in respect of any written acknowledgment of his co-contractor, &c. But this enactment is not to alter, take away, or lessen the effect of any payment of principal or interest, made by any person whatsoever. In actions against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise, that the plaintiff, though barred as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other, or others of the defendants, by virtue of a new acknowledgment or promise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

S. 3. *Indorsments of Payment.*—No indorsment or memorandum of any payment written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the said statutes.

THE LATE AMERICAN EDITION OF POWELL ON MORTGAGES.

A Treatise on the Law of Mortgages, by the late J. J. Powell, Esq., from the sixth London edition, much enlarged and improved, with copious notes, by Thomas Coventry, Esq. of Lincoln's Inn, Barrister at Law, and Notes and References to all the American cases, by Benjamin Rand, Esq. has recently been issued from the press, in 3 vols. 8 vo.

"Few parts of the law," says Mr. Butler, "lead to the discussion of more extensive and useful learning than the law of mortgages; and the reader will find every thing relating to that comprehensive subject, collected with great industry and ingenuity in the law of Mortgages by Mr. Powell." (Butler's Co. Litt. 205 a 237.) This work of Mr. Powell has long been known and held in high estimation also, by the profession in this country; and it must hence be gratifying to them to learn, that the work has recently been republished by an eminent English Barrister, with notes and references, as an enlargement and continuation of the

original work, down to the year 1827. And that to these have been super-added the American decisions by a lawyer of the professional skill and laborious research of Mr. Rand—who, it is fully admitted, by the ablest judges, has performed the important task with great diligence and ability. The publishers of the work, say very truly, that "the high reputation of the work, and the increasing importance of the subject, will render it an indispensible part of every lawyer's library." The best English edition of this work, though it has merited and received decided approbation from the most competent judges, would, without the additions which Mr. Rand has made, be comparatively of little value in this country. For, as is said by Mr. C. J. Parker, in his letter to the publishers:—"Our numerous independent state tribunals both of Law and Equity, necessarily occasion different systems of jurisprudence, or rather a different course of decisions on this as well as on other subjects. In some States there is no Court of Chancery; in others, there is a partial exercise of this jurisdiction only; in all, there are numerous usages, ancient decisions, of which there is only traditionary evidence, Colonial or Provincial regulations, which form a sort of common law, and materially affects the present administration and interpretation of Law—Of course, the field of American law, as it is called, is large and difficult to traverse."

OLIVER'S AMERICAN PRECEDENTS.

The book entitled "American Precedents of Declarations," is a book which may as frequently have been seen in the office of a New-England Lawyer as the *Statute Book*. This work, it seems, forms the foundation of the work lately offered by Mr. Oliver, who has endeavoured to supply such forms as were wanting in the original collection. The additions which have been made by Mr. Oliver—are, 1. A number of valuable forms selected partly from manuscripts prepared by Mr. J. Story, partly from approved draughts of distinguished pleaders, found on the records, and partly from the best English authorities. 2. Of notes marked (MSS.) which are taken from the same manuscripts. 3. Of a new general introduction to the whole work. 4. Of a concise introduction to each form of action—which contains very valuable information of the principles and authorities of law in relation to it; and 5. Of annotations occasionally introduced. There is a Supplement to the work which contains a few forms, which, it was at first apprehended, Mr. Oliver says, might not from their length, come within the limits of the work. Appen-

dix No. 1, contains a tract of the late Judge Trowbridge, on Real Actions as formerly practised in Massachusetts. In Appendix No. 2, is considered the subject as to when *Trespass* is the proper form of action and not *case*, and *vice versa*; and the authorities in relation to this very nice and interesting subject appear to have been here very faithfully collected, and also very methodically and judiciously arranged. The origin of the work known by the title of "American Precedents," which has been found of great practical utility, and which is now certainly made much more useful by the labours of Mr. Oliver, it appears from Mr. Oliver's Preface, was compiled by Mr. Benoni Pelham, who is now deceased. It was prepared by Mr. P. when a student at law, and near the termination of his studies, with the assistance of a gentleman now of high official standing. By the latter, a large part of the forms were collected and prepared, and the whole work carefully examined and revised. The Precedents collected in the work, were nearly all transcribed from manuscript forms which in the language of the Preface "were preserved with veneration, and collected with fidelity by the first ornaments of the bench and forum in our own and adjoining States."

JUDICIARY INTELLIGENCE.

Supreme Court of the United States.—The Supreme Court of the United States was to have commenced business on the 12th ult., but in consequence of the absence of several of the judges a quorum was not formed till the 19th. Mr. J. Johnson was detained by the upsetting of the Stage Coach in which he was travelling, and by which he was considerably injured, and Mr. J. Thompson was detained by indisposition.

The judges present at the beginning of the term were Washington and Story, the next who arrived was Marshall, and the next Duval. The National Intelligencer says, it is feared that the loss of a week's time of the Court will have the effect to postpone, for a year or two the hearing of some of the causes now on the docket. Had the Court proceeded directly to business, it would have despatched, during this term, so much of the business before it, as to be enabled to look forward with confidence to a complete clearance of the docket at the next term.

Monday, January 19th.—Pursuant to adjournment, the Court met this morning, at the Capitol—Present a quorum of the Court.

No. 24. The Columbian Insurance Company of Alexandria v. Joseph W.

Lawrence. The argument of this cause was opened by Mr. C. C. Lee, in behalf of the Plaintiff in Error—further argued by Mr. Swann, for the Defendant in Error.

Tuesday, January 20th 1829.—The Court met pursuant to adjournment—present, as on yesterday, four Justices.

No. 24—The Columbian Insurance Company of Alexandria, *vs.* Joseph W. Lawrence.—The argument of this cause was continued by Mr. Wirt for the Defendant in error and by Mr. Jones for the Plaintiff in error. Adjourned, until tomorrow, 11 A. M.

Wednesday Jan. 21st.—No 24.—*The Columbian Ins. Co. of Alexandria Plff. in Error v. Joseph W. Lawrence.* The argument of this cause was resumed and concluded by Mr. Jones. for the Pltf. in Error.

No. 11.—*A. S. Pennock, et al. Pltf in Error v. Adam Dialogue.* This cause was argued by Mr. Webster for the Pltf. in Error, and by Mr. Sergeant for the Defendant in Error.

Thursday Jan. 22d, 1829.—Pursuant to adjournment, the Court met this morning at the Capitol.—Present as on yesterday.

No. 13. *Abraham Venable et al. vs. The Bank of the United States.*—This cause was argued by Mr Wickliffe for the Appellants and by Mr. Sergeant for the Appellee.

No. 23. *M. T. Williams, Plaintiff in Error. vs. The Bank of the United States.*—This cause was argued by Mr. Wright in behalf of the Plaintiff in Error, and by Mr. Sergeant for the Defendant in Error.—Adjourned till tomorrow, 11 A. M.

Friday, Jan. 23d 1829.—Pursuant to adjournment, the Court met this morning, at the Capitol. Present, as on yesterday.

No. 71. *John Reynolds, Ten't (U. S.) Plaintiff in Error, vs. Duncan McArthur.*—The argument of this cause was opened by Mr. Scott, in behalf of the Plaintiff in Error.

Order of Court.—The Judges of this Court have received, with sentiments of profound sorrow, the melancholy information that their late estimable associate and friend, Mr. Justice Trimble, has departed this life. As a testimonial of their sincere regret for this loss, and of their high sense of his worth, they will wear crape for the residue of the term: Whereupon, it is ordered, that this resolution be entered on the minutes of the proceedings of this Court, and communicated to the family of the deceased.

Mr. Wirt, the Attorney General, having moved the Court, in pursuance of the third resolve contained in the subjoined proceedings of the Bar and Officers, to have said proceedings entered on the records of this Court, it is considered and ordered by this Court, that the said proceedings of the Bar and Officers be entered upon the minutes; which proceedings are entered accordingly, as follows, viz:

"At a meeting of the Members of the Bar and the Officers of the Supreme Court of the United States, held at the Court Room, in the City of Washington, on Monday, January 19th, 1829, William Wirt, Attorney General of the United States, was appointed Chairman, and the following resolutions, moved by Mr. Peters, were unanimously adopted:

"The Honorable Robert Trimble, one of the Associate Justices of this Court, having departed this life, during the late vacation, the Members of this Bar, and the Officers of the Court deeply regretting his loss, and entertaining the highest respect for his memory, have

"*Resolved*, That as a token of their sentiments, they will wear the usual badge of mourning, during the residue of the term.

"*Resolved*, That the Chairman communicate to the bereaved family of the deceased, the esteem and consideration in which the virtues and talents of Mr. Justice Trimble were held by the Bar and Officers of this Court; and assure them of their sincere sympathy in the loss which they, the Court, and the country, have sustained in his death.

"*Resolved*, That the Attorney General, in behalf of the Bar and Officers of this Court, do respectfully move the Court that the foregoing resolutions may be entered on the minutes of the proceedings of the Court."

Court adjourned till to-morrow, 11 o'clock.

Saturday, Jan. 24th, 1829.—Pursuant to adjournment, the Court met this morning at the Capitol.

No. 114. *Samuel Meredith's Lessee, Plaintiff in Error*, vs. *William Bradford and E. Daniel.*—R. WICKLIFFE, Esq. of Counsel for the Defendants in Error, moved the Court for a rule on the Plaintiff in Error, commanding him to appear before this Court on the 28th February, 1829, of the present Term of this Court, to shew cause why this writ of error, to the Circuit Court of the United States for the Kentucky District, should not be dismissed for want of jurisdiction. Rule granted.

No. 71. *John Reynolds, Ten't. (U. S.) Plaintiff in Error*, vs. *Duncan McArthur.*—The argument of this cause was resumed by Mr. SCOTT, for the Plaintiff in Error, and continued by Mr. VINTON, for the Defendant in Error.

Court adjourned to Monday morning, eleven o'clock.

Monday, January 26th.—Pursuant to adjournment, the Court met this morning, at the Capitol. Present, as on Saturday, four Justices.

No. 11. *Abraham S. Pennock, et al. Plaintiffs in Error*, vs. *Adam Dialogue.* On the writ of Error to the Circuit Court of the United States for the District of Pennsylvania. Adjudged and ordered that the judgment of said Court, in this cause, be affirmed with costs. Judge Story delivered the opinion of the Court, in which the point was decided that if an inventor sells his invention or suffers it to go into use before he applies for a patent, he is precluded from taking out a patent.

No. 71. *John Reynolds, Ten't. (U. S.) plaintiff in Error*, vs. *Duncan McArthur.*—The argument of this cause was continued by Mr. VINTON and Mr. MASON for the Defendant in Error.

Adjourned till to-morrow, 11, A. M.

Tuesday, January 27th.—Pursuant to adjournment, the Court met this morning at the Capitol.

Present as on yesterday.

Proclamation being made, the Court was opened.

No. 71. *John Reynolds, Ten't. (U. S.) plaintiff in Error*, vs. *Duncan McArthur.*—The argument of this cause was continued and concluded by Mr. SCOTT, for the Plaintiff in Error.

No. 26. *Wm. C. Gardner* vs. *John A. Collins.*—The argument of this cause was commenced by Mr. WHIPPLE for the Plaintiff.

Adjourned till to-morrow, 11, A. M.

Wednesday, Jan. 28th.—Pursuant to adjournment, the Court met this morning at the Capitol.

Present as on yesterday.

Proclamation being made, the Court was opened.

Mr. Chief Justice Marshall delivered the opinion of the Court in No. 24.—The Columbian Ins. Co. of Alexandria, Plaintiff in Error, *vs.* Joseph W. Lawrence—On writ of error to the Circuit Court of the United States for the County of Alexandria, D. C. Judgment of said Circuit Court reversed, and the cause remanded to the said Court, with directions to award a venire facias de novo. It being the opinion of this Court that the said Court erred in instructing the Jury that the interest of the assured in the property insured was such as was described in the original offer for insurance, and in the policy; and also in the opinion of said Court to the Jury that the evidence was sufficient to be left to them, from which they might infer that the defendants waived the objections to the certificate and other preliminary proof required by the ninth rule of the policy.

No. 26. *Wm. C. Gardner, plaintiff*, vs. *John A. Collins, et al.*—The argument of this cause was resumed by Mr. Whipple for the plaintiff, and continued by Mr. Robbins for the defendant.

No. 30. *Bank of the United States, plaintiff in Error*, vs. *Thomas Corcoran.*—The argument of this case was opened by Mr. Lear for the plaintiff in error, continued by Mr. Jones for the defendant in error, and concluded by Mr. Sargeant for the plaintiff in error.

Thursday, Jan. 29th.—Pursuant to adjournment, the Court met this morning at the Capitol.

Present as on yesterday.

Proclamation being made, the Court was opened.

Mr. Justice Washington delivered the opinion of the Court in

No. 23. *Micajah T. Williams, plaintiff in Error*, vs. *Bank United States.*—On writ of error to the Circuit Court of the United States for the Ohio District. Judgment of said Circuit Court affirmed, with costs.

No. 26. *Wm. C. Gardner, plaintiff*, vs. *John A. Collins, et al.*—The argument of this cause was resumed by Mr. Robbins for the defendants, and concluded by Mr. Whipple, for the plaintiff.

No. 35. *Robert Boyce, plaintiff, in Error*, vs. *Paul Anderson, et al.*—The cause was argued by Mr. Bates for the Defendants in Error.

No 31. *John P. Van Ness, plaintiff in Error*, vs. *Peres Packard.*— The argument in this cause was opened by Mr. Coxe for the plaintiff in error, and continued by Mr. Barrell for the defendant in error.

Adjourned till to-morrow, 11, A. M.

Friday, January 30th.—Pursuant to adjournment, the Court met this morning at the Capitol.

Present, as on yesterday, and Mr. Justice Thompson.

No. 31. *John P. Van Ness plaintiff in Error*, vs. *Peres Packard.*—The argument of this cause was continued by Mr. Jones for the defendant in error, and concluded by Mr. Coxe for the plaintiff in error.

No. 32. *J. Harper, plaintiff in Error* vs. *Anthony Butler.*—Writ of Error to the Circuit Court of the United States for the District of Mississippi.—*Dismissed*, the plaintiff in error failing to appear and prosecute his writ.

No. 33. *James Clark and others, appellants*, vs. *The Brigantine Dodge, Healy.*—Appeal from the Circuit Court of the United States for the Pennsylvania District. *Dismissed*, the appellants failing to appear and prosecute their appeal.

No. 36. *Thomas F. Townsley, plaintiff in Error*, vs. *Joseph K. Sumrall.*—The argument of this cause was opened by Mr. Coxe for the plaintiff in Error, continued by Mr. Nicholas for the defendant in Error, and concluded by Mr. Coxe for the plaintiff in Error.

No. 39. *Le Roy, Bayard & Co. plaintiffs in Error*, vs. *George Johnson.*—The argument of this cause was opened by Mr. Key for the plaintiffs in Error.

Adjourned till to-morrow, 11, A. M.

The Senate of the United States have not yet confirmed the nomination of Mr. Crittendon, as Judge of the Supreme Court.

Mr. C. J. Marshall has given notice that in consequence of the absence of several of the Judges, no case, involving any constitutional question, would be tried during the present term.

Senate of the United States—Jan. 20.—Mr. Webster, from the Committee on Judiciary, reported "An act in addition to an act, entitled 'An act to amend the Judicial System of the United States.'"

The mover briefly explained this bill. The Court was now held by four Judges

only. A rapid passage of the bill was necessary. If one of the Judges now here should be taken sick to-morrow, the term would be lost. If no objection, the subject was so important, he would ask for a second present reading. It was accordingly read again, and ordered to be engrossed for a third reading, and soon after passed and sent to the House.

A message came from the House stating that the House had passed the bill in relation to the Supreme Court. The signature of the President was probably received the same day.

It will be seen from the above that the Supreme Court of the United States is enabled to adjourn from day to day, till a quorum appear. Had it not been for the arrival of Mr. J. Duvall before ten days had elapsed, after the commencement of the term, the whole of the present term of the Court would have been lost; and after his appearance if one of the four judges present had been taken sick, the Court could not have avoided adjourning over to the next term, or more properly, the session must have ended.

Mr. Barbour's Bill.—The bill introduced into the House of Representatives by Mr. Barbour requiring the concurrence of five of the Judges of the U. S. Supreme Court in all cases where the validity of a State Law is in question, and also the report which accompanied this bill will be given in the next Number of the Law Intelligencer.

STATE COURTS.

New-York Judiciary.—Wm. I. Marcy who was lately nominated for a Judge of the Supreme Court, in place of Judge Wordsworth, resigned, has since been appointed to that office. Daniel Mosely, of Onondagua, has been appointed Circuit Judge of the *Seventh* Circuit in the place of Lieut. Governor Throop, resigned. George C. Bonson has been appointed Attorney General in place of Samuel A. Talcott, resigned. The Supreme Court will open at Albany, on Monday, the 3d instant. Court of Chancery before Chancellor Walworth, at his chambers in Albany, first and third Tuesday of every month.

Georgia Judiciary.—Thomas W. Cobb, late Senator of the United States, has been elected Judge of one of the Circuit Courts of the State of Georgia, in place of Judge Shorter, resigned. Judge S's. letter of resignation is as follows:

"*Eaton, 12th Dec.* 1828.

"SIR—Painful and peculiar circumstances, not necessary to be here particularly enumerated, have induced many to believe that my election to the office of Judge of the Superior Courts of the Ocmulgee circuit, was effected by the use of unfair and improper means. I am unwilling to hold this or any other office, un-

der such an imputation ; and, therefore in justice to myself and my friends, I now, through you, resign the office into the hands of those who bestowed it upon me.
Respectfully, &c. ELI S. SHORTER.
" His Ex. JOHN FORSYTH, Milledgeville."

Constitution.—The bill of the Senate to alter the constitution so as to allow the Judges and Solicitors to hold their offices for four years, and to make the sessions of the legislature biennial, was passed, yeas 100—12.

Vermont Judiciary.—The Legislature of Vermont have recently passed a law establishing an additional Judge of the Supreme Court, and chosen Ephraim Paddock to be the fifth Judge. Chief Justice Skinner, who was re-elected Chief Justice, declined the appointment, but having been elected, has consented to serve another term.

Mississippi Judiciary.—It is mentioned that John A. Quitman, who has received from the Governor the appointment of Chancellor of the State of Mississippi, in the place of the late Joshua G. Clarke, has accepted, been qualified, and is now in the discharge of the duties of his office.

Kentucky Judiciary.—George Robertson and Joseph R. Underwood have been appointed Associate Judges of the Court of Appeals of this State. As the Chief Justice (Mr. Bibb) has been chosen a Senator of the United States, and will vacate his seat on the Bench, the whole Bench will have been effectually reorganized.

South-Carolina Judiciary.—Chancellor Thompson has resigned, and the proceedings against him have been discontinued. The Legislature, previous to adjournment, elected William Harper, Chancellor of the State. John B. O'Neal has been elected a Circuit Judge, in place of Judge James. Daniel E. Huger, another of the Circuit Judges, has resigned his commission.

A correspondent of the Charleston Mercury says, that " the Judge, influenced by the noblest and most honorable feelings, was induced to take this step, from the passage of a bill to reduce the salaries of nearly all the public officers, the Judges included. " To hold my office," says he, " in opposition to the wishes of my fellow-citizens, or to receive a larger salary than they think consistent with the public good, would do violence to feelings I have long habitually indulged." By an unanimous vote, the letter of the Judge was ordered to be entered on the journal."—And he was unanimously re-elected. Judge Thayer also resigned, and was unanimously re-elected.

LATE AND INTERESTING DECISIONS.

Right to Sue in U. States' Courts.—The question was whether the plaintiff was a citizen of Rhode-Island and entitled to sue in the Circuit Court of the U. States. He proved that he was born in Rhode-Island, and had always resided there until a few years since, when he obtained a considerable property in Georgia, since which time he has passed the winter months in Georgia on his plantation, and the summer months in Rhode-Island; he keeps a furnished dwelling-House in both States all the year. The Court decided that whilst he might be liable in Georgia to the performance of certain duties, such as military, jury, &c. yet he could not be deprived of his privileges as a citizen of R. Island, since it appeared from the evidence, that he had exercised or claimed no privileges as a citizen of Georgia, and when compelled to perform jury duty, had protested against its compromiting his privileges as a citizen of Rhode-Island. Under the circumstances of this case the *will* of the party must decide, and the plea is overruled. Circuit Court of U. S. District of Georgia, November Term, 1828. *Arnold* v. *Marshall U. States.*

Priority of U. States—Marshall and Sheriff.—Goods imported by a person indebted to the United States, on Custom-House Bonds which had fallen due, were on their arrival attached at the suit of a private Creditor by a Deputy Sheriff, who offered to give security for the payment of the duties, but which the Collector declined accepting, and were deposited in the Custom-House store, the store-keeper giving a certificate that he held them subject to the order of the Deputy Sheriff. The Marshall of the United States afterwards attached and took the same goods on a writ in favour of the U. States, upon the bonds above mentioned. *Held*, that the Marshall was liable to the Deputy Sheriff in an action of trespass. *Dennie* v. *Harris* 5, *Pickering's Rep.* 120.

It seems, that the U. States had no lien on the goods thus deposited in the Custom-House store, for the payment of duties previously due from the importer. *Ibid.*

Whether goods imported are attachable before the duties on them are paid or secuered, *quære.* *Ibid.*

Bills and Notes—Notice.—In an action against the indorser of a note, proof of a waiver of notice will support the allegation of actual notice. *Taunton Bank* v. *Richardson*, 5 Pickering's Rep. 436.

Where the indorser of a note applied to a bank to have it discounted, and promised to attend to the renewal of it, and to take care of it, and directed that a notice to the maker should be sent

to his care, and such notice was sent accordingly. It was *held*, that this was a waiver of regular demand and notice, or at least, that from it the jury might legally infer a waiver.—*Ibid.*

Bills of Exchange—Special Indorsements.—King's Bench—London, Nov. 1.—*Siggerney* v. *Jones, Lloyd & Co.*—The plaintiff, a merchant in Boston, in America, consigned a cargo of flour to London, and the master of the ship drew bills of exchange for the produce, which were accepted by the consignees or persons who purchased the flour, and indorsed by the master to the plaintiff, and by him to a Mr. Williams, his agent in London, the indorsement being in this form:—"Pay to Williams or order, for my use." Williams discounted the bill with the defendants, who were his bankers, and they paid him the money, *minus* the discount, and soon after he became bankrupt. The bills, when due, were paid by the acceptors of the defendants. The plaintiff brought his action against the defendants on one of the bills for 1,464*l.* and had a verdict, subject to a case for the opinion of the Court, with liberty to turn it into a special verdict.

The case was argued this day by Mr. Pollock for the plaintiff, and Mr. Parke contended that the words "to my use," meant nothing more than put the proceeds to my account.

Lord Tenterden was of opinion that in this case the plaintiff ought to recover. There were already authorities in the books for special or restricted indorsements; and by this indorsement warning was given on the back of the bill itself that the proceeds ought to be paid to the use of the plaintiff, and to his use only; and when the defendants, knowing this, discounted the bills, and paid the money to the use of Williams, they were parties to the misapplication, and answerable to the plaintiff. It was of great use, in commercial transactions, that there should be limited indorsements of this kind, for they would prevent a failing man from raising money for his own purposes, on such bills, to the prejudice of the first indorser. If Williams had really applied the proceeds to the use of the plaintiff, the assignee of the bill would be discharged—but as he did not, the assignee is still liable.

Mr. Justice Bayley concurred. If the plaintiff had sent a private letter to Williams to apply the proceeds of the bill to his use, and Williams had indorsed the bill to another without any notice of the private order, and nothing appeared on the face of the bill itself but the general indorsement in the ordinary course of negociation, then the plaintiff could only look to Williams; and if Williams had waited until the bill became due, and had received the money from the acceptor, probably, in that case,

the plaintiff could only have looked to Williams: but here the defendants had discounted the bills, and applied the money to the use of Williams, with distinct notice from the bill itself that this was a misapplication.

Delivery.—In a negociation for the purchase of a yoke of oxen, the buyer having his arm over one of them in the act of measuring him said he would give the price demanded; to which the seller replied that he might have them; and the seller then borrowed them to haul a load of lumber to his house, which was ten miles distant, engaging to put them to no other use; *held*, this was no delivery of the oxen, and so no title passed to the intended buyer. *Phillips v. Hunnewell*, 4 *Greenleaf*, 376.

Banks—Interest.—The *St. Albans Repertory*, in *Vermont*, of 22d Jan. last, in alluding to the Supreme Court of that State then in session, says—

Two or three cases in favor of the Bank of St. Albans, were decided, which we presume will put at rest the question of usury, which has lately been considerably agitated in this State, by certain delinquent debtors. It has been, we believe, the uniform practice at all the banks to receive the interest at the time of discounting the notes: and in the computation of time, to reckon thirty days a month, or the twelfth part of a year. The correctness of such a rule was never doubted, until a decision made in the State of New-York, declared the practice to be usurious. Our Court, though always paying great deference to the judicial decisions of other states, did not in the present instance, consider the case to which we have alluded, as any authority; but determined that the practice of discounting notes in the manner above mentioned, is not usurious. A similar decision, we understand, was made by the Supreme Court, last winter at Danville, in this state, and another of like import at the recent session of the Court, at Burlington. The Court here declined hearing any argument on the question, considering it was fully settled by thedecisions at Danville and Burlington.

LAW INTELLIGENCER.

VOL. I. MARCH. No. 3.

RESTRICTIONS UPON STATE POWER IN RELATION TO PRIVATE PROPERTY.

As the law of England, and more especially that part of it which relates to the protection of property, was here transplanted and cherished by the early settlers of America, and their descendants, it could of course be successfully appealed to, whenever the natural right to property was invaded, and before that right was declared to be sacred and inviolable, by the written constitutions which were subsequently established. The State of Rhode Island affords a precedent, which not only supports this position, but which deserves a conspicuous place in the constitutional history of the country. The Judges who decided the case which is about to be mentioned, not only afforded an uncommon example of judicial independence, but their decision must be esteemed valuable, as assisting to preserve those fuudamental principles of liberty and justice, which finally became embodied in the grand written constitution of the American people.

Soon after the establishment of American Independence, and some time before the adoption of the Constitution of the United States, the General Assembly of the State of Rhode-Island passed an act for emitting the sum of 100,000 pounds, lawful money, in bills upon land security, which should pass in all kinds of business and payments of *former* contracts, upon par with silver and gold. At the session next ensuing, another act was passed, subjecting every person who should refuse the bills in payment for articles offered for sale, or should make a distinction in value

between them and gold and silver, or who should in any manner attempt to depreciate them, to a penalty of 100 pounds, lawful money; one moiety to the State, and the other to the informer. Experience, it seems, soon evinced the inadequacy of this measure to the objects in view. And at a session of the General Assembly, shortly afterwards specially convened by the Governor, another act was passed, in addition and in amendment of the one last mentioned, wherein it was provided, that the fine of 100 pounds be varied; and that for the future the fine should not be less than six, nor exceed thirty pounds, for the first offence: That the complainant should apply to either of the Judges of the Superior Court, or the Court of Common Pleas within the county, and lodge his certain information, which was to issue by the Judge according to a form provided. It was then required, that the person complained of, come before a Court to be specially convened by the Judge, in *three days;* that the said Court, when so convened, should proceed to the trial of said offender, which they were authorized to do without any jury, by a majority of the Judges present. Three members were sufficient to constitute a Court; and it was provided, that if the judgment of the Court was against the offender, it should be forthwith complied with, or that he stand committed to the county jail till sentence was performed; and that the said judgment should be final and conclusive, and from which there should be no appeal; and that no essoin protection, privilege or injunction should be in any wise prayed, granted or allowed. The disgrace thrown upon the State by this legislative outrage upon the rights of freemen, was fortunately, in a great measure, effaced by the promptitude of the Court in declaring it against common right and reason, and by the independence and intrepidity the Court displayed when summoned to appear before the Gen. Assembly, to explain the reasons of their judgment, In consequence of a supposed violation of the aforesaid law, one John Trevett exhibited his complaints against one John Weeden, to the Hon. Paul Mumford, C. J. of the Superior Court, who caused a special court to be convened. The complaint charged the said Weeden with re-

fusing to receive the paper bills of the State in payment for meat sold in market; and the defendant took the ground that the law was *unconstitutional* and *void.* His counsel, General Varnum, relied upon the *great charter* of liberties, and upon the subsequent corroborating statutes—upon the *petition of right* in the reign of Charles I.—upon the act of *habeas corpus* in the reign of Charles II.—upon the *bill of rights* delivered by the Lords and Commons to the Prince and Princess of Orange—and lastly, upon the re-assertion of certain undoubted rights and liberties in the act of settlement whereby the crown was limited to the House of Hanover. The rights guaranteed by those instruments, and on those occasions, he maintained, were transferred to this country—that they were the fairest inheritance transmitted by our ancestors—and that they had continued through all the changes of the American government. He then referred to an important clause in the charter of King Charles, to the colony of Rhode-Island, which is as follows:—"That all and every the subjects of us, our heirs and successors, which are already planted and settled within our said colony, which shall hereafter go to inhabit within the said colony, and all and every of their children, which have been born there, or on the sea going thither, or returning from thence, shall have and enjoy all liberties and immunities of *free and natural subjects*, within any of the dominions of us, our heirs, or successors, to all intents, constructions and purposes whatsoever, as if they, and every of them, were born within the realm of England." After thus showing that the legislative department of the State was subject to certain *constitutional* limits which it was compelled to respect, he eloquently enquires, "Have the citizens of this State ever entrusted their legislators with the power of altering their constitution? If they have, when and where was the solemn meeting *of the people* for that purpose? By what public instrument have they declared it, or in what part of their conduct have they betrayed such extravagance and folly? For what have they contended through a long, painful and bloody war, but to secure inviolate, and transmit unsullied to posterity, the inestimable privileges they received from

their forefathers? Will they suffer the glorious price of all their toils to be wrested from them, and lost forever, by the men of their own creating? They, who have snatched their liberty from the jaws of the British Lion, amidst the thunders of contending nations, will they basely surrender it to the administration of a year?" This passage well deserves the attention of those citizens of R. Island who have been taught to believe they have no State Constitution, and that their legislature is subject to no control. For it must satisfy them, as completely as the Court before whom the language was uttered, were satisfied, that the judicial power of the State is bound to overrule every legislative violation of the first principles of political liberty. In the case before them, the Court were unanimous in their opinion—that the information was not cognizable.[1]

(1) But the proceedings in this memorable affair did not end here. In consequence of the determination of the Court a summons was issued from both Houses of Assembly, requiring an immediate attendance of the Judges, "to render their reasons for adjudging an act of the General Assembly, unconstitutional." In the address of the Judges to the General Assembly, upon that occasion, they say, "If Judges are not directed by their own understanding, uninfluenced by the opinion of others, how can they be said to judge at all? The very act of judging supposes an assent of the mind to the truth or falsehood of a proposition. And if a decision is given contrary to this assent, the judge is guilty of perjury, and ought to be rendered infamous. The Judges may err; for error is the lot of humanity, and perfection cannot be required of imperfect beings. But the very idea of being accountable to the legislature, in matters of opinion, supposes the legislature to possess the standard of perfection. A thought highly derogatory to the attributes of the Deity!" To the observations of the Judges, succeeded a debate among the members, which terminated in a vote, " that the Assembly was not satisfied with the reasons given by the Judges in support of their judgment." A motion was then made and seconded, for dismissing the Judges from office, during the discussion of which, a memorial was presented by the Judges, praying to to be heard by counsel, and for an opportunity to answer *certain and specific* charges, if any such could be brought against them, before any sentence should be passed. This (in the language of the memorial) they claimed and demanded "as freemen and as officers of the State." At the same time, they, with deffernce, utterly protested against the exercise of any power in the legislature, by a summary vote, to deprive them of their right to exercise the functions of their aforesaid office, without *due process of law*. The Assembly after taking the

The judicial history of South Carolina affords another precedent in favor of the principle that the legislative power of the American states is restricted by the fundamental principles of the English law, even if those principles, had not been incorporated and expressly declared in a written constitution. In 1712, the legislature of that State passed a law transferring a freehold of an heir at law to a stranger. In 1792, the question came before the Superior Court of the State, on an issue directed from the Court of Chancery, as to the validity of that law. The Court, after a full consideration of the subject were clearly of opinion, that no title could be claimed under the law, as it was against *common right and Magna Charter*, to take the freehold of one man and vest it in another. And on this ground they held, not only that the law in question was *ipso facto* void, but it being originally founded in erroneous principles, no length of time could give it validity.[1] The same views, it is very evident, were entertained by the Circuit Court of the United States, in the case of Vanhorne v. Dorrance, (2 Dallas 314) in deciding upon the merits of a question somewhat similar. In the case just cited, Mr. J. *Patterson* after alluding to the deference which was paid to the rights of private property by the government of England, thought it would be a great stigma upon American legislation if an equal regard should not be paid in this country, " surrounded as we are" (to adopt his precise language) " by a blaze of political illumination."

Such, however, has been the predeliction of the people of the United States, for the rules which were thus early engrafted into the constitution of England, for the protection of private property, and such their solicitude to perpetuate them here, that we find them solemnly promulgated—first, in the Bills of Right of the original States, and afterwards, in all the State Constitutions. In

opinion of the Attorney General and other professional gentlemen finally voted to discharge the Judges from any further attendance. Thus ended an important controversy, and thus triumphant was the judicial power in a contest with legislative usurpation.

[1] Bowman v. Middleton, 1 Bay's. Rep. 252.

R. Island, it is true, there never has been any other *written* State Constitution than the original charter of King Charles. But it is nevertheless expressly provided by the Bill of Rights of that State, "That the right of the people to be secure in their persons, papers and possessions shall not be violated." And the written Constitution of the United States, which was obviously intended by the people, to restrain State Legislatures within the acknowledged principles of justice and the established maxims of the English law is peculiar for its explicit provisions in favor of the right now under consideration. One of these provisions is, that "No State shall pass any law impairing the obligation of contracts." Another is, that "No person shall be deprived of life, liberty, or property without due process of law." Another is, that "Private property shall not be taken for public use without just compensation." Another is, that "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." Every law of a State, which is contrary to the letter or spirit of the above constitutional provisions is of course void; for these provisions have established a law superior and paramount to any that can be made by the representatives of a State. This overruling character of a written constitution was maintained by the State Court of South Carolina,in the case of Lindsay v. the Charleston Commissioners. (2 Bay's Rep. 38.) The Judges,in that case, claimed to be administrators of the public will,as expressed in the constitution, which was paramount, they held, to the will of the representatives expressed in the law. In the case which involved a territorial controversy between the States of Connecticut and Pennsylvania (Vanhorne v. Dorrance, 2 Dallas 304)—which came before a Circuit Court of the United States, in 1795, Mr. J. Paterson observed, that "The Constitution was a form of government delineated by the mighty hand of the people, in which certain first principles of fundamental laws were established."—And he considered legislative bodies to be "creatures of the constitution"—that "they owed their existence to the constitution, and derived their powers from it"—that the constitution was

"their *commission*"—and that "hence all their acts must be conformable to it." In 1803, the power and duty of the judiciary to disregard an unconstitutional act of a State, received an elaborate and interesting discussion from the present venerable Chief Justice of the Supreme Court of the United States, in the case of Marbury v. Madison. (1 Cranch, 137.) The province and duty of the judicial department, he said, was to say—"What the law is," and if two laws conflict with each other, to decide on the operation of each. And if the constitution, he inquired, was superior to an act of the legislature, how could the Court close their eyes, on the constitution, and see only the law. This case has been considered as establishing one of the most interesting points in favor of the security of property in this country, that has ever been determined.[1]

The question, whether a legislative act, repugnant to the constitution, can become a law, the C. Justice, in the case just cited, considered to be more deeply interesting to the United States than it was intricate; and that it was only necessary to recognize certain principles, supposed to have been long and well established, to decide it. The government of the United States, he took to be a government organized by the original and supreme will of the people, who had assigned to the different departments their respective powers. That the powers of the *legislative* department were defined and limited, and that those limits might not be mistaken or forgotten, the constitution was written.—The distinction between a government with limited and unlimited powers, he thought, would be abolished, if those limits did not confine the persons on whom they are imposed. And he viewed it as a proposition too plain to be contested—that the constitution controlled every legislative act repugnant to it, and that the legislature could not alter the constitution. It was emphatically, he said, the province and duty of the judicial department, to say what the law is—that if two laws conflict with each other, the Courts must decide on the operation of each—and also, if a law

[1] Vid. 1 Kent's Com. 425.

be in opposition to the constitution, and if both apply to a particular case, the Court must either decide conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law. This he took to be the very essence of judicial duty. If then, he said, the constitution is to be regarded, and that is superior to any ordinary act of the legislature, the former and not the latter, must govern the case to which they both apply. He also alluded to the *oath of office* imposed on the Judges by the legislature, as completely demonstrative of the legislative sentiment on the subject, and inquired, why does the Judge swear to discharge his duties agreeably to the constitution, if that constitution forms no rule for his government? If the constitution was not to be referred to, after the taking of this oath, he thought it would be *worse* than solemn mockery to prescribe it, because to take it, was equally a crime. The particular phraseology of the United States constitution, confirmed, in his opinion, and strengthened the principle, which was supposed to be essential to all written constitutions—viz. that a law repugnant to the constitution is void, and that *Courts*, as well as other departments, were bound by that instrument.

LAW OF COPY RIGHT.

If there is any single species of property which merits greater protection from the laws of the country than any other, it is *literary* property, because it is from this that society derives the most extensive benefit. And if there is any particular description of theft which reflects, in the estimation of men generally, more dishonour and disgrace upon him, who commits it, than any other, it is that which consists in deliberately seizing the productions of mental fertility and cultivation to the loss and injury of the author. Literary property is fairly reducible to the title acquired by *occupancy*, which Mr. Locke, and many others, considered to be founded on the personal labour of the occupant. When a

man, says Blackstone (2 Bla. Com. 405) "by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it, appears to be an invasion of that right." The Roman law adjudged, that if one man wrote any thing on the paper or parchment of another the writing should belong to the owner of the blank materials;—meaning thereby the *mechanical* operation of writing; for in works of genius and invention, as in painting on another man's canvas, the same law gave the canvas to the painter. (Inst. 2. 1. 33. 34.) As to any other property in works of the understanding, the Roman law is silent; though the sale of literary copies, for the purpose of recital or multiplication is as ancient as the times of Terence, Martial, and Statius. (Vid. 2 Bla. Com. 407 who refers to Juv. VII. 83.) No less than eight of the twelve Judges of England were of opinion that literary property was allowed and perpetuated by the common law. But six of these Judges held, that the enjoyment of it was abridged by the statute of Queen Anne, and that all remedy for the violation of it was taken away after the expiration of the terms specified in the act; and the final judgment of the House of Lords was conformable to that opinion. (4 Burr. 2303.) The determination that the right of the author did not extend beyond the limits prescribed by the aforesaid statute, it should be remarked, was contrary to the opinions of Lord Mansfield and Sir Wm. Blackstone.

A sense of the importance of some attention to this subject has been manifested by the people of this country, in Art. 1. s. 8. of the Constitution of the United States, which provides that "Congress shall have power to promote the progress of science, and the useful arts by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." In pursuance of the authority here given, it has been directed by Congress (*acts of May* 31, 1790, and *April* 29, 1802) that the authors of *maps, charts and books*, being citizens of the United States, or residents therein, are entitled to the exclusive right of printing, publishing and vending them for *four-*

teen years; and if the author be living and a citizen of the United States, or resident therein, at the end of the term, then he is entitled to an additional term of fourteen years, on complying with the terms prescribed by the acts of Congress. These acts were taken from the aforesaid statute of Anne, though they differ from it in several respects. The latter has a provision against the scarcity of editions and exorbitancy of price, which is not contained in the former. The statute of Anne makes no distinction between natives and foreigners, as the act of Congress does; and it renews the copy-right at the expiration of the fourteen years, if the author be then living, for another term of fourteen years, without any re-entry and re-publication as is required by the laws of the United States. But it is considered, that many of the decisions, under the statute of Anne, are essentially applicable to the rights of authors, under the acts of the United States. (2 Kent's Com. 310.) Musical compositions have been considered to be within the meaning of the statutes respecting copy-right in England, so far as it relates to *publication*. But no protection has yet been given, either in England or in this country, to authors of literary works or musical compositions, as regards their *representation* on the stage. The first point was decided in England, in the case of Back v. Longman. (2 Cowp. 623.) And that dramatic works may be represented without the permission of the author, and without allowing him to realize a portion of the profits arising therefrom, was adjudged in Coleman v. Watkins. (5 T. R. 245, and Murray v. Elliston, 5 B. & A. 657.) A copy right has been given in England, by the statutes 8 Geo. 2. c. 13, and 17 Geo. 3. c. 38, to the inventor of prints and engravings, for the term of twenty-eight years. The right afforded by these statutes, however, do not extend to the painter or artist of the original picture or design; and even where the engraving has been made by himself, from his own picture, any other person is allowed to make a new engraving from the original picture, if he does not copy the former print. (2 Starkie's Rep. p. 458.) The English government seem to have afforded the *sculptor* more encouragement than the painter, as the act of 54 Geo. 3. c. 56,

vests in the *maker* the sole right and property of all new and original sculpture for fourteen years, to be renewed for another term of fourteen years, if the party be living at the end of the first term.

It seems that no pretence was ever set up, either in England or in this country, that a common *newspaper* or *price current* was a fair subject of copy right until at the late term of the Circuit Court of the United States, for the Southern District of New-York. At the late term, there was a *qui tam* action determined by Mr. J. Thompson, under the statute in relation to copy right, for abridging an article published in a number of a semi-weekly paper, of which the plaintiffs were proprietors, called "The Price Current." The plaintiffs, it appeared, had never secured their copy right in any number of the above mentioned paper, except the one in question. The learned Judge offered the following reasons for ordering judgment to be entered for the defendants.[1]

"I am inclined to think the Price Current cannot be considered a book, within the sense and meaning of the act of Congress. The literary property intended to be protected by the act, is not to be determined by the size, form, or shape in which it makes its appearance, but by the subject matter of the work. Nor is this question to be determined by reference to Lexicographers, to ascertain the origin and meaning of the word book. It will be more satisfactory to inquire into the general scope and object of the legislature, for the purpose of ascertaining the sense in which the word book was intended to be used in the statute.

It seems to be well settled in England, that a literary production to be entitled to the protection of the statutes on copy rights, need not be a book in the common acceptation of the word; a volume written or printed, made up of several sheets and bound up together. It may be printed on only one sheet, as the words of a song on the music accompanying it. It is true, that the English statute of 8th Anne, in the preamble, speaks of books and other writings. But the body of the act speaks only of books, the same as in the acts of Congress; and a learned commentator upon American Law, seems to think the English decisions on this subject have been given upon the body of the statute of Anne, without laying any stress upon the words, "other writings in the preamble."

In determining the true construction to be given to the act of Congress, it is proper to look at the constitution of the United States, to aid us in ascertaining

[1]The defendants were William L. Stone and Francis Hall, Editors of the New York Commercial Advertiser.

the nature of the property intended to be protected. "Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries." [Art. 1, s. 8.] The act in question was passed in execution of the power here given, and the object therefore was the promotion of science. It would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market, as falling within any class of the sciences. They are of a more fixed, permanent and durable character. The term science cannot with any propriety be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price current; the subject matter of which is daily changing, and is of mere temporary use. Although great praise may be due to the plaintiffs for their industry and enterprize in publishing this paper, yet the law does not contemplate their being rewarded in this way. It must seek patronage and protection from its utility to the public, and not as a work of science.

The title of the act of Congress is "for the encouragement of learning," and was not intended for the encouragement of mere industry, unconnected with learning and the sciences. The preliminary steps required by the law to secure the copy right, cannot reasonably be applied to a work of so ephemeral a character as that of a newspaper. The author is required to deposit a printed copy of the title of his book, in the Clerk's office of the District Court, and the Clerk is required to record the same; a copy of which record must be published for four weeks, in one or more newspapers, within two months from the date thereof. And a copy of the book to be delivered to the Secretary of State, within six months from the publication, to be preserved in his office. And all this would have to be done for every newspaper. The right can not be secured for any given time, for a series of papers published from day to day, or from week to week. And it is so improbable that any publisher of a newspaper would go through the form for every paper, that it cannot reasonably be presumed that Congress intended to include newspapers under the term book. That no such pretence has ever before been set up, either in England or in this country, affords a pretty strong argument that such publications never were considered as falling under the protection of the copy right laws.

We are accordingly of opinion, that the paper in question, is not a book, the copy right to which can be secured under the act of Congress.

Judgment must accordingly be entered for the defendants."

It appears by an article in the London Jurist, for March, 1827, entitled "French Law of Literary Property," that the law of France on this subject is more consistent, and confers much greater privileges upon authors and artists, than the law of England, or the law of the United States. It appears also, from the same ar-

ticle, that these privileges have not been found to support the opinion which has been sometimes advanced;—viz. that it is for the advancement of literature and science that no exclusive property whatever should exist in works, after they had once been given to the world by publication. Among those who have been of this singular opinion, is Lord Camden, who in a discussion upon the subject, thus declaimed—"Glory," said he, "is the reward of science, and those who deserve it, scorn all meaner views. It was not for gain that Bacon, Newton, Milton and Locke instructed and delighted the world." This view of the subject,will find very few supporters at the present day, when it is fully proved by experience, that a liberal reward to intellectual labour, is both just and useful. As Chancellor Kent very truly says, "the prospect of gain has not been found in the case of such men as Robertson, or Gibbon, or Sir Walter Scott, either to extinguish the ardour of genius, or abate the love of true glory." (2 Kent's Com. p. 315.)

By the article above referred to, as contained in the Jurist, it appears, that in France, by a decree of the 19th of July, 1793, it was declared "that authors of works of every description, composers of music, painters and engravers,should enjoy during their lives, the exclusive right of selling, causing to be sold, or distributing their works, within the territory of the Republic, and of assigning their property in them, either wholly or in part; and that their heirs or assigns should enjoy the same right for the term of ten years after their death.[2] And also, that, by a decree of the

[2]This decree is remarkable, as illustrating the peculiar character of the French people. It is a curious fact, in the history of mankind, says Chancellor Kent, that the French National Convention, in July, 1793, should have busied themselves with the project of a law of that kind, when the whole Republic was at that time in the most violent convulsions, and the combined armies were invading France, and beseiging Valenciennes; when Paris was one scene of sedition, terror, proscription, imprisonment and judicial massacre, under the forms of the revolutionary tribunal; when the convention had just been mutilated by its own violent denunciation and imprisonment of the deputies of the Gironde party, and the whole nation was preparing to rise in a mass to expel the invaders. [2 Kent's Com. 309.]

5th of February, 1810, the author's copy right was further continued to his widow, if she survived him, for life, and to their children for twenty years after the death of the survivor." From the same source we learn, that the public voice in France, has been for some time, demanding a further extension of the term for which an author's property in his works is secured to him and his family; for the writer of the article alluded to, says :—

"The circumstance of the descendants of some of their greatest writers having become reduced to solict charity, while the works of their ancestors were being constantly republished and represented upon the stage, as public property, excited attention to the state of the law, relative to literary property. Considerable discussion took place upon the subject; and finally, a commission was appointed by the King to frame a new law, to be submitted to the Legislature, for the further protection of literature and the fine arts. This commission was composed of the Viscounte de la Rochefoucault, chief of the department of the Fine Arts, President, and twenty-two other members, consisting of Peers, Deputies, Members of the Council of State, and Members of the Institute. There were afterwards added to it four literary men, who were chosen by the dramatic authors, to represent their interests, and two booksellers, delegated by the other members of their trade, for the same purpose. The commission met for the first time, on the 12th of December, 1825, and closed its sittings in the middle of the last year. The subject of literary property was very fully discussed by the members. They set out by admitting the principle of the perpetual and exclusive right of authors, their heirs and assigns, to their works; but when they came to look for the means of carrying this right into effect, they were obliged to renounce the idea. They then named eighty years as the period during which the property in a work should be vested in an author and his heirs. This period, however, on further discussion, appeared too long; and it was accordingly reduced to the term of the author's life, and fifty years to commence from his death."

The Commission, it seems, afterwards made a report to that effect, and prepared the draft of a law conformable thereto for the consideration of the Legislature. Why should not this example be followed by the United States ? There is no doubt, as the law of the United States at present stands, that a very inadequate protection is afforded to native authors of intellectual productions. And while popular opinion has induced the general government to afford a very extensive protection to the interest of the American *manufacturer*, the natural rights of the American *author* are but partially provided for. And the family of the latter, though

they may see his productions constantly re-published, for the benefit of his country, may themselves be encountering the chilling blasts of poverty. It has always been conceded, that one of the principal duties of the legislative department, is to encourage literature and promote the arts and sciences. Why is it then, that a law for that purpose, so obviously imperfect, should any longer remain as it now is?

MERCANTILE LAW—LAW OF MERCHANT SHIPS AND SHIPPING.

A Treatise of the Law, relative to Merchant Ships and Seamen: in four parts. 1st, of the owners of Merchant Ships. 2d, of the persons employed in the navigation thereof. 3d, of the carriage of goods therein. 4th, of the wages of Merchant Seamen, by Charles Abbott, now Lord Tenderden C. Justice of England, fourth American Edition, from fifth London Edition, edited with permission of the Author, by John Henry Abbott, of the Inner Temple, Barrister at Law—with annotations containing the principal American authorities, by Joseph Story, one of the Justices of the Supreme Court of the United States. And an Appendix containing the American Acts respecting the Registry and Navigation of Ships, Salvage, the regulation of Seamen, &c. &c. Boston: Hilliard, Gray, Little & Wilkins.

THERE is no country which is better adapted to the growth and perfection of mercantile law, than the United States. The disposition of our population to commercial enterprize, has been notorious, and has not been surpassed even by their attachment to a free and republican government. The consequence is, that many nice and important questions have arisen, involving principles of the *law-merchant*, which have called for and received the solemn determination of our Courts of Justice. The reports of the Supreme and Circuit Courts of the United States, the reports of New-York, Pennsylvania, Massachusetts, and many other States, teem with decisions that concern this interesting branch

of legal science. If all these numerous decisions were faithfully collected, digested, and illustrated, what a valuable acquisition would such a work be, both to the lawyer and the merchant.—But, singular as it may appear, most of the leading subjects of mercantile law have not been treated upon by the American Bar. Mr. Livermore, it is true, some years ago, gave a treatise upon the law of *agents* and *factors*, and Mr. Phillips still more recently, a treatise upon the law of *insurance*. There have also been several respectable American treatises upon Admiralty law.—But what American treatise has there been upon *bills of exchange*—upon the law of *shipping*, or of *partnership*, or other subjects which could be mentioned, in which the commercial community are peculiarly and deeply interested? The deficiency, to be sure, has been, in a great measure, supplied by the re-publication of English works, on the above mentioned subjects, with the addition of notes, referring the reader to American authorities—such as Lord C. J. Tenderden's treatise on *shipping*, edited by Mr. J. Story—Mr. J. Bailey's work on *bills of exchange*, edited jointly by Mr. Phillips and Mr. Sewall—and Mr. Gow's work on *partnership*, edited by Mr. Ingraham. Other American editions of English works, relating to the *law-merchant*, which have done much credit to their editors, might be mentioned.—Still it is to be regretted that the mercantile law of this country, has not received more attention; and that it has so long remained scattered (except as to a few subjects, and where it has been appended to the productions of English lawyers) through a vast multitude of reports. The existence of this source of regret is certainly not to be attributed to a reluctance in the profession, to devote themselves to the necessary labour, any more, than it is owing to their want of capacity and learning in executing it. As an evidence that there is both sufficient industry and ability, we have only to refer to the original American works, relating to other branches of the law, which have done honour both to the talents and research of their authors. In the single State of Massachusetts, for example, there have been no less than *three* treatises written and published, respecting *landed property*—viz.

Sullivan on 'Land Titles,' 'Stearns on Real Actions,' and the late Treatise of Judge Jackson, upon the same subject. These works are all distinguished for acumen and unwearied investigation.

It must certainly be conceded that there has been a singular remissness on the part of American lawyers, is assisting to condense, methodise, and explain a branch of the law of so much importance, as that which relates to mercantile transactions, and upon which questions have so frequently arisen, that the decision of them forms the subject matter, of far the greatest number of our reported cases. The same complaint, it seems, is made in England, as to the profession there (though there is less reason for it in that country than in this) as will be seen from the following extract from an article in the "London Law Magazine," entitled "Mercantile Law."

"Though multifarious in its details and extensive in its application, the mercantile code of this country is by no means intricate or confused. On the contrary, it is remarkably simple and harmonious Indeed it is a system of sudden and comparatively modern growth, having been begun, matured, and perfected within the limits of the last half century. It has, therefore, passed through few hands, and is the work of a succession of judges, as vigorous in understanding, and of as enlightened and comprehensive views, as any that have adorned the bench,—of Mansfield, Kenyon, Ellenborough, and Tenterden. But though from this circumstance it has derived a more than ordinary unity and consistence, it has nevertheless the disadvantage, in consequence, of remaining still in a great measure an undigested heap of particulars. It is not many ages since England became decidedly a trading country. In the old text books of the law, therefore, little is to be found on the subject of mercantile dealings. It is evidently considered a matter of minor importance; and whilst unwearied labor is bestowed in digesting, illustrating and commenting upon every part of the law which concerns the realty, whatever relates to the mere personalty, that unsubstantial, ever-changing property, which was almost beneath the regard of the lordly proprietor of lands and manors, is either altogether passed over or dismissed with an occasional notice. Unfortunately, in modern times, the labor manifested in the compilations of Comyn, Viner and Bacon has not been fashionable, and hence it has happened that there is not a single treatise in which this part of our law has been reduced into one general code. Particular sections have, it is true, been handled with great ability, and some by persons now deservedly at the summit of the profession. The work of the learned Chief Justice on shipping, that of Mr. J. Park on insurance, that of Mr. J. Bailey on bills of exchange, are all excellent in their

kind. Again, there is a short treatise on the law of principal and agent, by Mr. Paley, and a few others which will readily occur to the memory of the reader, well deserving the attention of the student. Still, in all these treatises there is this disadvantage, that each being the work of a separate individual, and considered only in reference to its own peculiar class of cases, there wants that unity of design, that co-relation between the different parts making up the whole, without which we conceive there can be no perfect understanding, either of this or any other system. To judge of a system, as of a building, to ascertain its bearings and proportions, it must be viewed altogether with one sweep of the eye. The parts of which it consists, being all referrible to common principles, and directed to a common end, necessarily illustrate each other."

The maritime law of England is certainly as "matured and perfect" as any other branch of the law-merchant, though it has never been reduced to any formal code, like the codes of the Consolato Del Mare—the laws of Oleron and other celebrated European codes, which were established during the middle ages, and the admirable commercial ordinances of France, established at a later period. But the decisions of the English Courts bear the fullest evidence of the highest respect for, and a complete knowledge of, the principles of those codes and ordinances, and are remarkable for great depth, and more than ordinary judicial precision. The admiralty decisions of Lord Stowell (formerly Sir William Scott) which commenced in 1798, have been read, says a learned American writer, "and admired in every region of the republic of letters, as models of the most cultivated and enlightened human reason."[1] The treatises of Molloy, Beawes, Postlewaite, Chitty, and others, have also materially assisted in affording a knowledge of the interesting topics connected with maritime law. But there is no treatise upon those topics which is equal in point of interest and authority, to that of Lord Tenterden, mentioned at the beginning of this article. The work just mentioned, has been known to the American lawyer, for about twenty years. It was first published in England, in the year 1802, and first re-published in the United States in the year 1810, when it received a valuable addition of notes to American authorities, by Joseph Story, Esq. Since the latter

[1]Vid. 2 Kent's Com. 526.

period, the author has been created Chief Justice of the Court of King's Bench, and promoted to the peerage by the title of Lord Tenderden; and the editor appointed one of the Justices of the Supreme Court of the United States.

The distinguished author of the above work, compiled it not only from the text writers of his own country and the decisions of his own Courts, but also from the civil law, and from such of the maritime laws of foreign nations, and the works of foreign writers, as he was able to obtain. The ordinances which he most frequently quotes, are those of Oleron and Wisbury, the two ordinances of the Hanse Towns, and the ordinance de la Marine 1681. Whenever the ordinance of the Hanse Towns is mentioned generally, the reader is to understand that it is the *first* Hanseatic Ordinance, and not the one published in 1677, with a latin translation and commentary by Kuricke. The author has lamented his inability to consult the earliest code of modern Europe (not being acquainted with the Spanish or Italian language)—the *Consolato Del Mare;* and whenever he has referred to this code, the reference was taken from the work of some other author, and made for the purpose of giving an opportunity to such as were disposed and able to consult the original. This is a code which boasts the honour of having established the rule of decision in commercial transactions for almost all Europe; and its origin has been disputed with uncommon tenacity. The better opinion, however, seems to be, that it was not written, as some have contended, in the age of St. Louis, but that it was read at least nearly two hundred years prior to that time, in 1705, at Rome, and there sworn to by the people.[1] It has been translated into several European languages, though there has yet been no entire English translation. But a translation into English of two chapters of it, on *prize*, and of some chapters on the *ancient commercial courts*, and on *re-captures*, are inserted in the 2d, 3d, and 4th volumes of *Hall's American Law Journal.* The ordinance of Louis IV. is quoted by the author from *Valin's* edition, of 1766, and containing his valuable commentary. "If

[1] 2 Hall's Law Journ. p. 385.

the reader (the author says) should be offended at the frequent references to this ordinance, I must request him to recollect that those references are made to a maritime code of a great commercial nation, which has attributed much of its national prosperity to that code." (Preface to the first Ed. p. 12.) The prejudices of his countrymen against a powerful commercial rival, to which the author here alludes, one would suppose, could hardly extend to a system of nautical and commercial jurisprudence, so perfect as the one referred to, and so highly esteemed that but slight alteration was made in it by the Code de Commerce, in 1807. The latter indeed, is the same re-digested with some very few modifications and additions; and yet it was offered to the French Legislative body in 1807, as having been *conceived*, meditated, discussed and established *by the inspiration of the greatest man in history; the hero—pacificator of Europe, "while he was bearing his triumphant eagles to the banks of the astonished Vistula."*[1]

The above codes and ordinances, as also the writers on the civil law, have been quoted by the author, not so much as binding authority, as to illustrate admitted and received principles; and to furnish information which might be useful in the intercourse with foreign states. The cases which have been adjudged in England, since the last edition of this work, it seems, exceeded *two hundred.* For the addition of these cases, the profession are indebted to Mr. John Henry Abbott, of the Inner Temple, who is a near relative of the original author. And for a continuation of the American authorities, the profession are under no little obligation to that able and indefatigable Judge, Mr. Justice Story.

The following is the advertisement of the latter editor, to the present (fourth) American edition of this important work.

"The new American edition of the excellent Treatise of Lord Chief Justice Abbott, now Lord Tenterden, being proposed, I was requested to revise the Notes

[1]Vid. 2 Kent's Com. *note* p. 524. In contradiction to much of this adulation and incense, the code will be found, on sober examination, to be essentially a republication, in a new form, of the marine ordinance of Louis IV. Ib.

prepared by me for the second American edition, published in 1810. I was induced to undertake the task principally from a desire to render those notes more complete and more acceptable to the profession. The labour has indeed exceeded my expectations, owing to the great accumulation of materials in the intermediate period in the commercial states of the union. The consequence has been, that almost every note has been recomposed, and very many important additions have been extracted from our maritime jurisprudence.

The sole object of these notes is to present the general results of the American Authorities as collected in authentic books of reports. It is not my intention to express any opinion respecting the doctrines asserted by those Authorities, but merely to bring them to the notice of the reader. He will judge for himself what value is to be attached to them. In a few instances, however, where the decided cases seemed to call for the expression of a doubt from some apparent difference among them, I have ventured to throw out some suggestions for the consideration of the profession. I have, after some hesitation, referred to my own decisions in the first circuit, as reported in Mr. Gallison's and Mr. Mason's reports. These decisions constitute, until reversed, the received law in the Circuit Courts of that circuit; and the total omission of them might in that view have been deemed an inexcusable defect. They must stand or fall by their own intrinsic merit; and no authority can be claimed for them beyond what the reasons, on which they are founded, may appear to justify.

With these explanations the present edition is respectfully submitted to the indulgence of a liberal profession, which my past experience entitles me to believe will not be disposed to visit any involuntary errors with undue censure."

It has already been hinted that the present edition of the work under consideration, contains more than two hundred English cases, in addition to what were contained in the first edition.— By the above advertisement of the American Editor, it appears that not only his old notes have been re-composed, but the American authorities which have been added, are also exceedingly numerous. The American Editor, with characteristic diffidence, says that he has referred, after some hesitation, to his own decisions in the first circuit. As to the merit of these authorities, all who are conversant with the decisions of the Editor can entertain but one opinion. His admiralty decisions are distinguished for uncommon learning and judgment, and they are thought to constitute the highest authority for the determination of all questions arising under the maritime code of our country. The learned commentator upon American Law has referred to these decisions, in the following language. "I should omit do-

ing justice to my own feelings as well as the cause of truth, if I were not to select the decisions in Gallison's and Mason's Reports, as specimens of pre-eminent merit. They may fairly be placed upon a level with the best productions of the English Admiralty, for deep and acurate learning, as well as for the highest ability and wisdom in decision." (2 Kent's Com. 527.)

MR. BARBOUR'S BILL.

Mr. P. P. Barbour, of the Judiciary Committee, appointed by congress, has lately offered in the House of Representatives a report accompanied by a Bill, the object of which is, to require a greater number than a majority of the Supreme Court of the United States to concur in deciding the law of a State to be unconstitutional. The considerations which induced the committee to recommend this important alteration are detailed in the report. The subject it seems caused considerable debate in the House when the Report was made, and the printing of so large a number of copies of the report as *three thousand* was opposed by several, chiefly on the ground that it contained the arguments only in favour of the Bill, while the minority of the judiciary committee had no opportunity of meeting these arguments. Mr. B. expressed his apprehension that the bill would not be definitely acted upon during the present session. The following is the Bill referred to.

Be it enacted, &c. That in any case, which now is, or hereafter may be, brought before the Supreme Court of the United States, by writ of error or otherwise, to the final judgment or decree, in any suit in the highest court of law, or equity, in any State, in which shall be drawn in question the validity of any part of an act, passed by the Legislature of a State, unless five justices at least, of the said Supreme Court, shall concur in deciding such part of said Constitution, or Legislative act, to be invalid, the same shall not be deemed or holden to be invalid, but shall be deemed and holden to be in full force and effect, the concurrence of any lesser number of the said justices, in an opinion to the contrary, notwithstanding.

The bill was twice read, and the further consideration thereof was postponed. The following is the report which accompanied this Bill, three thousand copies whereof were ordered to be printed.

"The Committee on the Judiciary, to whom was referred the resolution of the House, instructing them to inquire into the expediency of providing, by law, that a greater number than a majority of the Supreme Court should concur, in pronouncing any part of a State Constitution, or act of a State Legislature, to be invalid, and that, without such concurrence, no part of a Constitution of a State, or act of a State Legislature, shall be holden invalid, beg leave to submit the following report:

The committee, considering the subject-matter of the resolution to be one of great importance, have bestowed upon it that grave consideration which it so emphatically deserved. At an early period of our judicial history, the principle was decided in the Supreme Federal Court, that it was within their competency to decide any law to be void, which was in contravention of the constitution. This decision was placed by them upon the ground that the constitution, and laws of the U. States made in pursuance thereof, and treaties made under the authority of the United States, were declared to be the supreme law of the land; they therefore held, that, when any State Constitution or law came, in their opinion, into conflict with what was declared to be the supreme law, that which was *not supreme* must yield to that which *was;* and that consequently any State Constitution or law, thus coming into conflict, must he held null and void. It will be seen that this is a principle derived by our judiciary from the nature of our written constitution, imposing many limitations and restrictions, as well upon the Federal as State Governments, and at the same time, upon its face, declaring its own supremacy. The committee do not propose at all to explore the foundations of this great principle; but, taking it as one which has long been decided and acted upon, they cannot forbear to remark, that the power which it implies is one of great magnitude and most extensive operation; embracing within its comprehensive grasp the authority to nulify the legislative acts of the Union, and of the States, individually, and even the most solemn of all acts, the expression of the will of the sovereign People of the States, in the form of their written Constitutions. That a power so tremendous should be fenced around with proper guards, is a proposition which the committee suppose, scarcely requires the aid of argument to challenge the assent of all. They are aware that it is a question about which there is

much more difference of opinion to what extent this caution shall be carried. As the Supreme Court of the United States is at present organized, it consists of seven members, of whom four constitute a quorum, and three being a majority of that quorum, it results, that the concurrence of three of the Judges is competent to the nullification of a State law or even constitution; it may then happen, in the actual posture of our judiciary, that a minority of the Court might nullify the most solemn acts of the States, whilst the majority of the Court might possibly entertain a different opinion.

The committee presume that there are but few who would not at once acquiesce in the justice and propriety of the proposition, that in making so solemn and important a decision, there should be a concurrence of at least *a majority* of the whole Court.—They, however, think that it would be advisable to require the concurrence of five members of the Court. This is, indeed, a question of more or less doubt, and upon which it is admitted that it cannot be predicted with absolute certainty, that any particular number is the proper one; but they will offer to the House some other prominent considerations which have induced them to decide in favor of the number five.

It will be recollected, that, in controversies originating in the State Courts, a question concerning the validity of a State law, or Constitution, cannot be brought before the Supreme Court of the United States until it shall have been adjudicated by the highest State tribunal, nor unless the decision of that tribunal shall have been in favour of its validity. Before, then, the Supreme Court can pass upon such a question, in any case, the validity of the law or constitution, as the case may be, must have received the most authoritative stamp of approbation in the State in which it arose. If it relate to the validity of a law, it must have been approved of by both the branches of the legislature; if it relate to that of a constitution, it must have been approved of by the People of the State, in the exercise of their sovereign power, in their primary assembly, as a convention; and it must, in controversies originating in State Courts, also have been decided in favor of, by the Court of denier resort in the State. In this posture of the subject, if a bare majority of the Supreme Court of the United States should decide against the validity, the State, whose constitution, or law, was thus nullified, can scarcely acquiesce without a murmur, especially when it is considered, that, besides the concurring approbation of its Convention or Legislature, and its Judiciary, it might be sustained by that also of the three remaining members of the Court; and when it is remembered, too, that the question must always be, whether the State has, or has not, transcended the limits of its

reserved rights, growing out of its compact with another party, to wit: the Federal Government—and that the Supreme Court of the United States are the tribunal of that other party. The concurrence, then, of a greater number than a bare majority of that tribunal, will tend to produce a greater spirit of acquiescence, to quiet heart burnings, and thus add a strong cement to that Union which we all desire to be indissoluble and perpetual.

Nor is the selection of the number five at all an arbitrary one, as might possibly at the first view be supposed. The Constitution of the United States, in several instances, where the subject is important, requires the concurrence of two thirds of the body called upon to act in relation to it. Thus, an amendment to itself cannot even be originated without the concurrent vote of two thirds of both Houses of Congress, or the application of two thirds of the several States. Thus, too, a treaty cannot be ratified without the concurring vote of two thirds of the Senators present. But there is another provision of that instrument which bears a much closer analogy to the present question, because it has reference to a judicial tribunal; it is that which declares, that, in case of impeachment, no person shall be convicted without the concurrence of two thirds of the members of the Senate present. It will at once be seen by the House, that the number five is as near as may be to that proportion of the whole Court.

Nor can the committee perceive any well-founded objection to the requisition of more than a bare majority; because they hold it to be a sound principle, that the successive approbation of the Convention or Legislature of a State, and then of its highest judicial tribunal ought, at least, to prevent the nullification of a constitution or law in every case of doubtful character, and indeed in every case in which its incompatibility with the supreme law was not clear beyond any rational doubt; and in cases of this latter class, it can scarcely be doubted, but that five of the judges would perceive that incompatibility, and, perceiving it, declare it by their decision. Upon the whole view of the subject, the Committee are of opinion that it is but a reasonable safeguard to the reversed rights of the States, to provide that they shall not be declared to have passed beyond them, without the concurrence of five Judges of that Government, whose own tribunal is deciding upon its own powers; and, in conformity with these views, they herewith report a bill."

JUDICIARY INTELLIGENCE.

The Supreme Court of the United States, is still in session at Washington.—The following is a journal of its proceedings as they have been given in the Washington papers. The last number of the Law Intelligencer contains the proceedings to the 31st of January.

Saturday, January 31.—No. 32. *J. Harper*, plaintiff in error v. *Anthony Butler*, it was ordered, that this cause be, and the same is, reinstated on the docket.

No. 39.—*Le Roy, Bayard & Co.* plaintiffs in error v. *George Johnson.* The argument was continued by Mr. Key, for the plaintiffs in error; by Mr. Jones, for the defendant in error, and concluded by Mr. Swan, for the plaintiffs in error.

No. 37.—*William Patterson, Lessee*, plaintiff in error v. *Willis Jenks.* The argument was commenced by Mr. Wilde. Adjourned till 11, A. M. Monday.

Monday, February 2.—Pursuant to adjournment, the Court met at the Capitol. No. 44.—*Daniel Jackson and others*, plaintiffs in error v. *John Twentyman.*—This case was argued by Mr. J. W. Taylor, for the plaintiffs in error.

Tuesday, February 3.—Mr. J. Story delivered the opinion of the Court in No. 26. *W. G. Gardner* v. *John A. Collins, et al.* He also delivered the opinion in No. 18. *Abraham Venable, et al.* v. *Bank of the U. S.* Mr. J. Washington delivered the opinion in No. 30. *Bank of the U. S.* v. *Thomas Corcoran.*

Nos. 44 and 40.—The *Bank of Kentucky* v. *John Wister, et al.* and *John Ashley, et al.* These causes were argued by Mr. Nicholas, for the plaintiff, and Mr. Caswell, for the defendants.

No. 48.—*Julia Thompson* v. *Alice Tomlie.* The argument was commenced by Wilde, for the plaintiff, and continued by Mr. Key, for the defendants.

Wednesday, February 4.—No. 71.—*John Reynolds, tenant*, (U. States) plaintiff v. *Duncan M'Arthur*, on writ of error from the S. Court of the State of Ohio. Judgment of said S. Court was affirmed with costs.

No. 43.—*Julia Thompson* v. *Alice Tomlie.* The argument of this cause was continued by Mr. Key, and concluded by Mr. Jones.

No. 21.—*James Connelly, et al.* v. *Richard Taylor, et al.* The argument of this cause was commenced by Mr. Peters.

Thursday, February 5.—No. 21.—*James Connelly et al.* v. *Richard Taylor, et al.* The argument was continued by Messrs. Peters & Wickliffe for appellants.

Friday, February 6.—Pursuant to adjournment, the Court met this morning at the Capitol. Present, as on yesterday. Proclamation being made, the Court was opened.

No. 44.—*Daniel and Joseph Jackson*, plaintiffs in error, v. *John Twentyman;* on a writ of error to the Circuit Court of the United States, for the District of Kentucky. Judgment of said Circuit Court reversed, and cause remanded for further proceedings.

No. 21.—*James Connelly et al.* appellants, v. *Richard Taylor et al.* The argument of this cause was continued by Mr. Nicholas for the appellants. Adjourned till to-morrow, 11, A. M.

Saturday, February 7.—Pursuant to adjournment, the Court met this morning at the Capitol. Present, as yesterday. Proclamation being made, the Court was opened.

Mr. Justice Story delivered the opinion of the Court in No. 31, *John P. Van Ness*, plaintiff in error, v. *Peres Packard*:—On writ of error to the Circuit Court

of the United States for the District of Columbia, holden in, and for the county of Washington. Judgment of said Circuit Court affirmed with costs.

Mr. Chief Justice Marshall delivered the opinion of the Court in No. 35, *Robert Boyce*, plaintiff in error v. *Paul Anderson et al.* On writ of error to the Circuit Court of the United States for the District of Kentucky. Judgment of said Circuit Court affirmed with costs.

No. 37.—*Lessee of William Patterson*, plaintiff in error, v. *Willis Jenks et al.* The argument of this cause was continued by Mr. Haynes for the defendants in error, and concluded by Mr. Berrien for the plaintiff in error.

No. 53.—*Bank of the U. States*, appellants, v. *Daniel Weisiger, et al.* The argument of the cause was commenced by Mr. Sergeant for the appellants. Adjourned till Monday, 11, A. M.

Monday, February 9.—Pursuant to adjournment, the Court met this morning at the Capitol. Present, as on Saturday. Proclamation being made, the Court was opened.

No. 105.—*The People of Vermont*, plaintiff in error, v. *The Society for the propagation of the gospel in foreign parts.* Writ of error to the Circuit Court of the United States for the District of Vermont, on motion of Mr. Hubbard, of Counsel for the defendant in error, dismissed for want of jurisdiction, with liberty to the plaintiff in error to shew cause to the contrary during the present term of the Court.

No. 53.—*Bank of the U. States*, appellants, v. *Daniel Weisiger, et al.* The argument of this cause was continued by Mr. Wickliffe for the appellees, and concluded by Mr. Sergeant for the appellant.

No. 51.—*David Hunt, et al.* appellants, v. *Robert Wickliffe.* The argument of this cause was commenced by Mr. Buckner for the appellants. Adjourned till to-morrow, 11, A. M.

Tuesday, February 10.—Pursuant to adjournment, the Court met this morning at the Capitol. Present, as on yesterday. Proclamation being made, the Court was opened.

Mr. Chief Justice Marshall delivered the opinion of the Court in No. 36, *Tho. F. Townsley*, plaintiff in error, v. *Joseph K. Tumrall.* On writ of error to the Circuit Court of the United States for the District of Kentucky. Judgment of said Circuit Court affirmed, with costs and damages, at the rate of six per cent. per annum.

No. 51.—*David Hunt, et al.* appellant, v. *Robert Wickliffe.* The argument of this cause was continued by Mr. Wickliffe for the appellee, and concluded by Mr. Buckner for the appellant.

No. 54.—*John F. Satterlee*, plaintiff in error, v. *Elizabeth Matthewson.* The argument of this cause was commenced by Mr. Price for the plaintiff in error.—Adjourned till to-morrow, 11, A, M.

Wednesday, February 11.—Pursuant to adjournment, the Court met this morning at the Capitol. Present, as on yesterday. Proclamation being made, the Court was opened.

No. 54.—*John F. Satterlee*, plaintiff, in error, v. *Elizabeth Matthewson.* The argument of this cause was continued by Messrs. Sutherland and Peters for the defendant in error, and Mr. Sergeant for the plaintiff in error. Adjourned till to-morrow, 11, A. M.

Thursday, February 12.—No. 54. *John F. Satterlee*, plaintiff, in error, v. *E. Matthewson.* The argument of this cause was concluded by Mr. Sergeant for the plaintiff in error.

No. 59.—*John Dandridge*, appellant, v. *Martha Washington's Executors.* This cause was argued by Mr. Lear, for the appellant, and by Mr. Taylor, for the appellees; and, in conclusion, by Mr. Swann, for the appellant.

No. 60.—*John T. Ritchie*, appellant, v. *Phillip Munro and Joseph Forrest.* The argument of this cause was commenced by Mr. C. C. Lee for the appellant.

Mr. Justice Thompson delivered the opinion of the Court in No. 48. *Julia*

Thompson, plaintiff in error, v. *Alice Tolmie, et al.* On writ of error to the Circuit Court of the United States for the county of Washington, in the District of Columbia. Judgment of said Circuit Court reversed, and the case remanded, with directions to said Court, to enter judgment for the defendant.

Mr. Justice Washington delivered the opinion of the Court in No. 39. *Wm. Bayard, Jr. and Robert Bayard*, plaintiffs, in error, v. *George Johnson.* On writ of error to the Circuit Court of the United States for the county of Alexandria, in the District of Columbia. Judgment of said Court affirmed, with costs.

No. 55.—*Bank of the United States*, plaintiff in error, v. *Thomas D. Carneal.* On writ of error to the Circuit Court of the United States for the District of Kentucky. On motion of Mr. Sergeant stating that the matters in controversy had been agreed and settled between the parties, ordered to be dismissed. Adjourned till to-morrow, 11, A. M.

Friday, February 13.—Pursuant to adjournment, the Court met this morning at the Capitol. Present, as on yesterday. Proclamation being made, the Court was opened.

Mr. Chief Justice Marshall delivered the opinion of the Court in No. 37. *Wm. Patterson*, plaintiff, in error, v. *Willis Jenks and others.* On writ of error to the Circuit Court of the United States for the District of Georgia. Judgment of said Court reversed, and cause remanded.

No. 60.—*John T. Ritchie* appellant, v. *P. Munro, et al.* The argument of this cause was continued by Mr. Bradley for the appellees, and by Mr. Chambers for the appellant.

No. 58.—*David Wilkinson*, plaintiff in error, v. *Thomas Leland and others.* The argument of this cause was commenced by Mr. Whipple for the plaintiff in error. Adjourned till to-morrow, 11, A. M.

Saturday, February 14.—Mr. Justice Johnson delivered the opinion of the Court in No. 40, *bank of the Commonwealth of Kentucky*, plaintiff in error, v. *John Weisiter, et al.* On writ of error to the Circuit Court of the United States for the District of Kentucky. Judgment of said Circuit Court in this cause affirmed, with costs.

Mr. Justice Johnson delivered the opinion of the Court in No. 41. *The bank of the Commonwealth of Kentucky*, plaintiff in error, v. *John Ashley and Jno. Ella, Jr.* On writ of error to the Circuit Court of the United States for the District of Kentucky. Judgment of the said Circuit Court affirmed, without costs in error, upon the defendants in error entering a remittitur in this Court of the debt omitted, and damages pro tanto.

No. 58.—*David Wilkinson*, plaintiff in error, v. *Thomas Leland, et al.* The argument of this cause was resumed by Mr. Whipple for the plaintiff in error, and continued by Mr. Webster for the defendants in error. Adjourned till Monday, 11, A. M.

Monday, February 16.—Mr. Chief Justice Marshall delivered the opinion of the Court in No. 59. *John Dandridge*, appellant, v. *Martha Washington's Executors.* On appeal from the Circuit Court of the United States for the County of Alexandria, District of Columbia. Decree of said Circuit Court reversed, and cause remanded to said Court.

No. 60.—*John T. Ritchie*, appellant, v. *Phillip Munro and Joseph Forrest.* On appeal from the Circuit Court of the United States for the County of Washington, District of Columbia. Appeal dismissed for want of jurisdiction.

No. 58.—*David Wilkinson*, plaintiff in error, v. *Thomas Leland and others.* The argument of this cause was continued by Mr. Webster for the defendants in error, and by Mr. Wirt for the plaintiff in error. Adjourned till to-morrow, 11, A. M.

Attorney General, Mr. Wirt. It will be gratifying to the numerous friends of this distinguished gentleman to know, that he is perfectly restored to health, and is about to resume the tasks of his office. His late illness was induced by over exertion in the arduous duties of his profession.

STATE COURTS.

New-York Judiciary.—The following is from the Troy Sentinel, of February 3, 1829.—*Court of Errors.*—On Monday last the Court adopted the resolutions, offered by Chancellor Walworth, on the 13th inst. declaring that the Lieut. Governor, as President of the Senate, is a member of the Court and has the right, equally with any other member, not only to give his opinion on questions presented to the Court, but also to *vote* in every decision. The resolutions it will be recollected, were introduced in consequence of the declaration of Lieut. Governor Throop that he claimed the right; and it was laid over for consideration. On Monday, on the opening of the Court, the Chancellor read an elaborate opinion in favor of the resolution. Mr. Justice Sutherland concurred with the Chancellor, and Mr. Senator Viele gave the reasons on which he should vote against it. The vote stood, ayes 23, noes 5.

We think Lieut. Gov. Throop meets his duty properly in making the claim he does, for we do not see how the right asserted by him as the President of the Senate, could be more clearly granted than it is by the Constitution. The language of that instrument, in relation to this court, is that it "shall consist of the President of the Senate, the Senators, the Chancellor, and the Justices of the Supreme Court, or a major part of them." Here is no distinction; and if one member has a right to vote, another has.

Connecticut Judiciary.—The Superior Court closed its session at New Haven, on Saturday, 31st January last. During the term, according to the New Haven Journal, of the 3d ult. no less than eight persons were found guilty of serious criminal offences.

The Superior Court commenced its session for Litchfield county, at Litchfield on Tuesday, 17th ult. the Hon. Judge Lanman presiding.

Massachusetts Judiciary.—The Supreme Court which has been sitting in Boston, since the first Tuesday of November last, adjourned on Thursday, 19th ult. The March term will commence on the 3d inst.

English Court of King's Bench.—Mr. J. Parke, the new Judge, has recently taken his seat on the King's Bench. He is no relative of Sir James Allen Parke, Judge in the Court of Com. Pleas. The new Judge is a native of Liverpool. His appointment was occasioned by the resignation of Mr. J. Holroyd.

LATE AND INTERESTING DECISIONS.

Foreign Law.—Where a party to a suit in Virginia, relies on the law of another State to support his claim, he may produce an authenticated copy of the *section only* on which he relies, without a copy of the whole law. Hunter v. Fulcher, 5 Randolph's Rep. 126.

Insurance.—The following is from the New Haven Journal, of January 27, 1829. The Superior Court commenced its session in this city, on the 20th inst. Judge Peters presiding. After impanneling a Jury, the Court proceeded to try the case of Atwater & Daggett, v. the New Haven Insurance Company.—This was a case in which the plaintiffs claimed, first, to recover for losses sustained by the ship Wallace, on a voyage from New York to Teneriffe. It appears that upon the voyage out, some of the sails of the vessel were carried away in a squall; that she lost her jolly boat, binnacle, compasses, &c. Secondly, the plaintiffs claimed to recover for losses sustained by the running on shore of the vessel at Sandy Hook, on her return to New York. It appears that when the vessel had arrived outside of Sandy Hook, and was waiting for a pilot, the wind suddenly changed to the south west, and there was every appearance of an approaching storm. Under these circumstances, the captain judged it expedient to venture upon pilot ground without a pilot rather than endanger the safety of both crew and vessel, by trying to keep off at sea, since night was fast approaching, his vessel was a dull sailer, and there was every prospect of an immediate tempest. He accordingly ventured in, and in so doing, the vessel was driven upon the shore, and sustained considerable damage.

The defendants claimed to be exempted from the payment of the first mentioned losses, since the loss at no one time amounted to 5 per cent. on the amount insured. From the second loss, they claimed exemption, because a vessel upon pilot ground without a pilot, is not considered sea-worthy. Reference was had to the general and established usage of New York, in this particular, and to several experienced sea captains of this port. The opinions of the various ship masters consulted, differed upon the course to be pursued under similar circumstances, some affirming that they would have kept out to sea, and others that they would have hazarded making an entrance upon the pilot ground. The law is such, that, provided the master of a vessel does not display gross ignorance, or gross misjudgment, in cases of peril and danger, the insurers are still liable for all losses.

The jury returned with a verdict of $1000 for plaintiffs.—Damages claimed, $1200.

Marriage Settlement.—The following is from the New York Statesman.—This interesting subject, though frequently brought into examination in the English courts, is very rarely presented for discussion in our own. It was, however, particularly investigated in a suit tried before Judge Irving on Saturday last.

The facts of the case were, that F. possessed of a moderate independence, inherited from her father, contracted and duly solemnized a marriage with A. B by whom the lady's portion was bestowed in the purchase of a house and furniture. A considerable time afterwards, and on the receipt, from her father's estate of the final share of the wife, B. settled all the property purchased with F's. fortune upon her—and for that purpose conveyed the same to M. (the mother of F.) in *trust*. B. subsequently became insolvent; and one of his creditors having obtained judgment, levied upon a part of the furniture so conveyed and settled. M. brought the above action for the trespass committed by the levy—and the defendant sought to defeat the settlement made by B. on the ground of fraud.

It appeared by the testimony, that B. was free from debt at the time of the settlement; that the property had been purchased with the money of F. and that it was made with the usual view to her individual protection against her husband's liabilities. The defendant showed that F. and B. and M. were in the habit of living in one family, and that they indiscriminately used the property included in the settlement.

The jury were instructed as to the law, that settlements (though usually made before marriage, and in such instances unimpeachable, if done in proper form) are yet valid when executed subsequently—provided they be done while the husband is out of debt, and not with any immediate view to escape just responsibilities. The purpose of such settlements is fair and equitable; it is to protect the wife against casualty; and as the giving of credit always presupposed information as to the debtor's circumstances, and is at all events done at the risk of the party—the latter has no right to complain of injustice as to the protecting operation of the law on the wife's behalf. As to the use made by the husband of the furniture assigned over to M. it was to be deemed only incidental because unavoidable; for, if his wife is ever to realize the benefit intended her, he by consequence, partakes—though not legally designed to receive any advantage.—The jury accordingly brought in a verdict for the plaintiff—that is, in favor of the wife's trustees against the husband's creditors.

Insurance.—In the Supreme Court of the United States, January 28, 1829, the Chief Justice delivered the opinion of the

Court in the case of the Columbian Insurance Company of Alexandria vs. Lawrence. It was a case upon a policy of insurance against a loss by fire on a mill and appurtenances. There was a statement in the application for insurance, that it was requested upon a mill *belonging* to the assured; and the policy was on *their* (the assured's) mill. The assured had a title to one part of the mill in fee simple, as to another part as mortgagees, and as to another part, only by contract of sale, the conditions whereof were not yet performed. The Court held that as there was no disclosure of the *special* interest, the insurance was void, as the terms in the application, and in the policy must be deemed a representation or declaration of an *absolute* interest in the mill.

Bill of Exchange—Notice.—In the Supreme Court of the U. States, January 29, 1829, Mr Justice Washington delivered the opinion of the Court in Williams vs. The Bank of the United States. It was an action by the Bank brought against Williams, as endorser upon a negotiable note. The only question, was whether there was due notice to the endorser. It appeared that the endorser lived in the town where the bank was situate, and when the note became due and was dishonored, a Notary went to the house of the endorser to give him notice, found it shut up, and upon inquiry of a neighbor, learned that the endorser and his family were out of town on a visit. The Notary then left a written notice at a neighbor's house, requesting it to be delivered to the endorser upon his return. The Court held that where the house of the endorser is shut up, and no person is there to receive notice, it is not necessary for the Notary to do any further act to give notice, or leave any written notice any where else for the endorser. The judgment of the court below, in favor of the bank, was therefore affirmed.

☞The list of original American Law Books which have been hitherto published, which list it was contemplated to give in this number, has not yet been fully completed.

Errata.—In page 63, for "Magna Charter," read Magna Charta. In pages 73 and 74, for "Lord Tenderden," read Lord Tenterden. In note to page 62, for "defference," read deference.

LAW INTELLIGENCER.

VOL. I. APRIL. No. 4.

RESTRICTIONS UPON STATE POWER IN RELATION TO PRIVATE PROPERTY.....CONTINUED.

IT is too plain then to be disputed, that both the written and unwritten constitutions of the several United States have provided, in behalf of the right of private property, certain restrictions upon the legislative department, which the courts of the country are bound to respect, whenever they are appealed to by any individual, who complains of the intrusion of that department, upon such right. But although the highest power of a State has not an *unlimited* control over private property, yet it is possessed of a control which is *restricted* and *qualified.* The government of a State may, for instance, take the property of a citizen *when the public good requires it, by making a sufficient compensation.*— This is a right which has always been conceded, and one which by no means militates with the true principles of political freedom. No State can administer its public affairs in the most beneficial manner, if it has not, on particular occasions, the power of disposing or imparing the value of the property of a citizen. It is therefore presumed, that when mankind originally entered into society, they consented that whenever their property was necessary to the public good, they would not obstinately retain it on being offered a fair and full equivalent. This right, on the part of government, is what is called the "*eminent domain,*" to which,says Vattel, "men have impliedly yielded, though it has not been expressly reserved."[1] Bynkershoek lays it down, that this "*eminent domain*" may be lawfully exercised whenever

[1]Vattel ch. 20. s. 244.

public necessity or public utility requires it, and that the sovereign power may take from the proprietors "those things without which high roads cannot be made;" and that "this right may be imparted to others occasionally, as to *chief magistrates of towns, cities, &c.*" But then he annexes the qualification, that "if houses and lands are taken from individuals—*adequate compensation should be made.*"[1] The law of England on this subject is conformable to the opinions which have just been advanced, and is thus extremely well illustrated by Blackstone—"If a new road (says he) were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even public tribunal, to be the judge of this common good, and to decide whether it be expedient, or no. Besides the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and in similar cases, the legislature *alone* can, and indeed frequently does, interpose, and compel the individual to acquiese. *But how does it interpose and compel?* Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is considered as an individual, treating with an individual for exchange. All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price; *and even this is an exertion of power, which the legislature indulges with caution.*"[2]

The highway act of 13 Geo. 3, which provides for widening and diverting highways through or over any person's soil, is framed consistently with the views above expressed. And the surveyor is required to offer to the owner of the soil, over which the new way is carried, a reasonable compensation, which, if he refuses to accept, a jury is to be empannelled, who are to assess

[1] Bynkershoek lib. 2. cp. 15. | [2] 1 Bla. Com. 139.

the damages which have been sustained; and the owner of the soil is also entitled to all mines within the soil which can be got without breaking the highway. So the statute of 9 Geo. 3, entitled "an act for making a road from Blackfriar's Bridge across St. George's Fields," provides for treating with the owners of such houses and lands as shall be necessary *to be purchased*, (for the purposes of the act) for the purchase of the same.[1] The case of the *Isle of Man* presents another example of the correctness of the above statement of Sir William Blackstone. The distinct jurisdiction of this subordinate royalty being found to be an inconvenience to the operations of the English government, authority was delegated to the treasury department by the statute 12 Geo. 1, to purchase the interest of the then proprietors for the use of the Crown; and a contract was accordingly concluded in the year 1765, by the terms of which, the whole island and all its dependencies were alienated and made subject to the regulations of British excise and customs.[2] This transaction, therefore, shews a free and mutual negotiation, in which the grantors were treated on equal terms, and which in fact partook of the spirit and essence of a contract. The Attorney General, in the case of *Lindsay* v. *the Charleston Commissioners*,[3] endeavoured to distinguish this transaction from a purchase of property, and contended that it was more of a cession from one sovereign to another, than an appropriation for public purposes. But although it is perfectly true, that the transfer was only of the jurisdiction which the Duke of Athol had over the island, and not of his landed and manerial interests; yet there is certainly more reason for seizing without remuneration the sovereignty of an island, which, on account of its proximity to the country, affords an interruption to commerc , and a retreat for fugitives from justice, than there is for appropriating the right of soil merely when that is required for public benefit. It is, therefore, as strong a case as any which can be offered in favor of the principle, that the legal rights of an individual cannot be

[1]Vid. Rex v. Croke Cowper's Rep. 26. | [2]2Bay's Rep. 54.
[3]1Bla. Com. 107.

arbitrarily wrested from him, by the plausible plea of public necessity. And it shews that the English Parliament were governed in the transaction referred to, by the axiom so well expressed by Sir W. Scott, viz: "no necessity can vindicate what is in itself unjust, and no public advantage can compensate a breach of public faith." There is as much reason that the citizens of the U. States should be protected by this undeniable principle of justice and equity, as the people of Great Britain. At least it was so considered by the framers of our constitution, who have taken care to express therein, "that private property shall not be taken for public use, without just compensation." This clause of the constitution clearly recognises the inviolability of the right of property; and though it impliedly licences the legislative department of a State to appropriate private property to objects of public utility which cannot be accomplished without it, yet it at the same time preserves to the owner its full value.

For the land which was taken or injured by the State of New York in making the canals in that State, an adequate compensation was provided for the owners, and therefore the appropriation or the injury was not unconstitutional. But where the trustees of a village in that State, were authorized by an act of the legislature to supply it with water, by means of conduits; and for this purpose, to enter on the land of individuals, to make reservoirs and lay conduits, and provide compensation for the owner of such land, and also for the owner of the land on which the spring from which the water was to be conducted, was situated —the Court of Chancery granted an injunction to prevent any proceedings to divert the stream, until proper provision was made for compensating the owners of the land through which the stream naturally run.[1] In the case of Perry v. Wilson, in Massachusetts, the Court were clear, that no appropriation of property to public uses could be made by the legislature, without a reasonable compensation.[2] In the case of Stevens v. Proprietors of the Middlesex Canal, before the same Court—the Court say, "If the legislature should for public advantage and convenience,

[1] 2 Johns. Ch. Rep. 162. | [2] 7 Mass. Rep. 393.

authorize any improvement, the execution of which would require or produce the destruction or diminution of private property, without affording, at the same time, means of relief and indemnification, the owner of the property destroyed would, undoubtedly, have his action at common law, against those who caused the injury, for the damages." And in the case of Stackpole v. Healy, the same Court seemed to consider that the legislature had no authority to enact that cattle may go at large and feed in the highway, without compensation to the owner of the soil, over which the highway is located.[1]

The question whether private property is required for public use is in a great measure left at the discretion of the legislature. For example, it is discretionary with the legislature to say, whether or not a communication, by means of a road or a canal, between the point A. and the point B., would be publicly useful; and if it is determined in the affirmative, the land intervening, and the best adapted, may be appropriated, on complying with the provision mentioned in the constitution. So in the erection of light houses and fortifications, the legislature is the proper tribunal to determine when they are necessary, and where they should be located. It seems to have been generally considered, however, that whenever a sale of private property is demanded on the ground of public utility, that it must have a *direct* tendency to promote the objects in view, as in the cases abovementioned, of roads, canals, &c. And that although the remote consequence of an appropriation of land, may, in many cases be a public benefit, yet the proprietor is not compelled to surrender the possession on any terms. The multiplication of establishments for any particular species of manufactures may be thought to be highly useful to the community, and yet the legislature can hardly be deemed competent to direct one citizen to part with his land to a neighbour, if the latter should wish to obtain it with the view of erecting such an establishment, let the sum tendered be ever so liberal. And it is certain, that those whose opinions are entitled to the highest respect, have questioned the

[1] 16 Mass. Rep. 36.

constitutionality of the statutes of Massachusetts and Rhode Island, which authorise A. to overflow the land of B., though the damages are to be estimated by a jury, and compensation afforded accordingly.

But though it may, in a great degree, be within the province of the legislature to decide when the appropriation of private property is required for the public—yet it is the province and duty of the Court to determine whether or not the necessary condition has been fully complied with, and to adjudge such appropriation unconstitutional, if the mode prescribed for obtaining indemnification is inadequate. That is, although the legislature are to judge of the *necessity* of the case, they are not to judge of the *value* or the *nature* of the *equivalent*. As to the value of the equivalent—it can be constitutionally ascertained but in three ways—1st, By the parties—that is, by stipulation between the legislature and the proprietor. 2d, By commissioners mutually elected by the parties. 3d, By the intervention of a jury. The two first cases resemble the before-mentioned transaction, in relation to the *Isle of Man*, and approximate to an ordinary bargain between individuals; and the will of the party affected, or their agents, is exercised. The case last mentioned—viz. the intervention of a jury is resorted to, when the parties are not able to agree; and here is the great constitutional guard upon legislative authority on such occasions. It is a barrier, said Mr. J. Patterson, "which ought never to be removed;" and he therefore adjudged, in the case of Vanhorne v. Dorrance,[1] that an act of the State of Pennsylvania, by which the "Board of Property" were to decide upon the value of the land to be taken, without the participation of the party, or the interposition of a jury, was unconstitutional and void. As to the *nature* of the equivalent—there is no other just equivalent but *money;* and land cannot be given in exchange for land, against the consent of the party, with the view of promoting any project of a public nature whatever. This was held in the case just mentioned of Vanhorne v. Dorrance, where the act in question only allowed to the owners of the

[1] 2 Dallas 304.

land to be taken, certain other lands. Mr. J. *Patterson* was of opinion, that the act was defective and invalid in this respect also, and observed—"Money is a common standard, by comparison with which the value of any thing may be ascertained. It is not only a sign which represents the respective values of commodities, but is an universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation is a recompence in value—a *quid pro quo*, and *must be in money*. True it is, that land or any thing else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him. His consent will legalize the act, and make it valid; nothing short of it will have that effect. It is obvious, that if a jury pass upon the subject or value of the property, *their verdict must be in money*."

REGISTRATION OF DEEDS AND PRESUMPTION OF GRANTS.

THERE is one interesting question connected with the statute requiring the registration of deeds, which has been raised and discussed by, and among members of the bar, in this country, though it has not as yet been considered *sub judice*. The general understanding of our Courts has been, whenever the subject has come before them, that a continued and exclusive enjoyment of a right of way—a right to divert water—or to flow land, &c., for the period limited by the statute of limitations, for the right of entry upon land, is conclusive evidence of such right. The objection which has been stated to this construction of the law is—that as a conveyance of a right of way, or of any easement growing out of the land, is as much required to be recorded, as a conveyance of the land itself, the presumption of a grant of such easement from long enjoyment, is rebutted by the fact that there is no record of the grant. And that although, in analogy to the before-mentioned statute, a grant may consistently be pre-

sumed, in England, in those counties wherein the registration of conveyances of interests in real property is not expressly required by law, yet such presumption will not hold where that ceremony has been made necessary, and has not been observed. Mr. Mathews in his treatise upon the doctrine of presumptive evidence, has inserted a note upon this point, which is extremely applicable if not conclusive.[1] As it is a point of very great importance and of very general interest, his views in relation to it cannot fail to be acceptable. In speaking of the presumptions which are made by Courts of law in favor of old dormant rights, and of the supposition of law as to the existence of the needful instruments of conveyance, in support of long possession, he observes, that it has been considered doubtful whether deeds affecting lands in the *register counties* can be presumed in opposition to the want of registration. Or, to state the point more explicitly, whether the allegation of releases of ancient claims; of re-conveyances of old legal estates, by trustees or mortgagees; of surrenders of outstanding satisfied terms; or of conveyances from a prior to a succeeding owner (which are the usual instances of presumed deeds) must not, in the case proposed, be necessarily regarded as contrary to that fact. In order to shew that doubts of this nature do not rest on very solid foundation, he observes:—

"The object of the Registry Acts was to prevent the commission of fraud; and to protect *bona fide* purchasers and mortgagees against preceding secret acts, and fraudulent conveyances. And this was their only object: the preamble to each of the statutes adverts solely to the injuries sustained by persons innocently buying, or advancing money, on estates previously sold or encumbered; and the enacting clauses, in order to provide a suitable remedy, merely declare, that all future conveyances of lands should, as against subsequent purchasers for valuable consideration, and mortgagees be adjudged fraudulent and void; unless memorials of such conveyances were registered before the registering of the deeds under which the subsequent purchasers or mortgagees claimed. (See 2 & 3 Anne. c. 4; 5 Anne. c. 18;—

[1] Mathews on the doctrine of presumption, p. 6. A notice of this work was given in the first No. of the Law Intelligencer.

6 Anne. c. 35; 7 Anne. c. 20; and 8 Geo. 2 c. 6.) Nor is there any thing in these statutes making it *imperative* on parties to register the assurances through which they derive title; an option only is given. The direction in the acts is, that a memorial *may* (in the 2 & 3 Anne, c. 4. are inserted the words, "at the election of the persons concerned,") be registered: and consistently with this, there is nothing either expressly declaring, or tacitly implying, that the want of registration should be otherwise prejudicial to titles, than against subsequent purchasers and encumbrancers. Then why shall these legislative provisions be construed to extend to cases which the legislature never contemplated, and which do not fall within the mischief intended to be remedied? It cannot be supposed, that the object of the register acts was to make the ownership of estates less secure;—to supply means whereby (to use a judicial expression) holes may be picked in titles. Yet such would be the inevitable consequence, whenever the registration of material instruments should be omitted; a consequence which, in some cases, would not only contravene the principles of justice, but defeat the very end and purpose of the statutes themselves. Suppose, for example, the case of a first and second mortgagee, the latter only of whom has registered his security, and got into possession; the first discovers, as he imagines, an old outstanding legal estate, or satisfied term, and obtaining from the representative of the trustee or termor, a conveyance or assignment, brings his ejectment; when the second mortgagee produces in defence an old unregistered deed surrendering the term, or re-conveyancing the estate from the original trustee:—or to put another case; suppose the conveyance to the mortgagor or his ancestor, being of above twenty years' standing, had not been registered; that the first mortgagee obtains a conveyance from the preceding owner, and that the second rests his title on the unregistered conveyance to the mortgagor:—Is it possible in either of these cases seriously to imagine, that the plaintiff in ejectment would be allowed to recover? If so, the registry acts would frustrate their own design. The negligent, or in the eye of the legislature the fraudulent mortgagee, would deprive the diligent and honest mortgagee of the advantage meant to be ensured him. But doubtless, the courts would pause ere they made such a decision. The application of this reasoning to the principal point is obvious. If the re-transfer of the outstanding legal estate, the surrender of the satisfied term, or the conveyance from the preceding owner, could not, in the cases just proposed, be avoided on account of their non-registration; the presumption, by parity of reason, of a re-transfer, surrender, or conveyance, could not, it is conceived, under similar, and therefore under no circumstances, be held conclusively

rebutted, by the fact of a registered memorial of the presumed deed not being found. The cases are parallel: they cannot be distinguished on any clear or satisfactory principle."

The above remarks are extremely applicable to the presumed grants of easements, as a right of way, &c. which being annexed to, or growing out of the lands, it is as necessary the grant should be recorded as that a grant of the land itself should be. The presumption of a grant of an easement arising from long and uninterrupted enjoyment is in fact an *arbitrary* rule, established "for the purpose, and on the principle of quieting a long possession."[1] And it has been resorted to, according to Lord Chancellor Erskine, "with the view of relieving the infirmity and necessity of mankind, who require, for the preservation of their property, and rights, the admission of some general principle, to take the place of individual and specific belief, from which a conclusion can be formed from particular and individual knowledge."[2] It is evident, therefore, that the rule of presumption in these cases, is not regarded as the means and instrument of truth, but is an artificial and technical rule, which is wholly independent of the principle of *creating belief;* and that its principal foundation is *public convenience and utility*. Supposing, then, a jury were ever so well satisfied that no grant was in reality ever made—yet, the fact of twenty years enjoyment for the reasons above-mentioned, would be conclusive evidence of a grant. And it would be an anomally, if an adverse possession of land, during the period limited by the statute of limitations, should be made a bar to an action of ejectment, while the enjoyment of a minor interest therein of the same duration, should not be regarded as producing an equal effort. Mr. J. Wilmot's reasoning was, "as twenty years will give a title in ejectment for a house—it is a sufficient title to any easement belonging to it."[3]

[1] Per Lord Mansfield Cowp. 110. | [2] 12 Ves. 264.
[3] 2 Wms. Saund. 175.

DIGESTS OF REPORTED CASES IN EQUITY.

Analytical Digest of Reported Cases in the Courts of Equity and the High Court of Parliament, from the earliest authentic period to the present time; to which are added, the Decisions of the Courts of Equity and Parliament in Ireland, with a repertorium of the Cases doubly arranged. By Richard Whalley Bridgman, Esq. First American, from the third and last London Edition; by R. O. Bridgman, Esq., of Lincoln's Inn, Barrister at Law.

The American Chancery Digest; being a Digested Index of all the reported decisions in Equity in the United States Courts, and in the Courts of the several States, by John D. Campbell and Stephen Cambreleng, of the New York Bar.

It is a well known rule, in the common affairs of life, "not to defer until tomorrow what may be done to day." The principle of this rule holds true with regard to jurisprudence, which, if condensed and arranged with accuracy and judgment, as it is administered and explained in one century, inconceivable advantages will be thereby derived by the next; and in the latter, the important system of obligations and rights, instead of appearing like an overgrown and distorted monster, will, in the words of Gibbon, be found to resemble "a statue cast in a simple mould." If the *leges* of Rome (properly so called)—the plebiscita—the consulta of the senate—the responsa prudentum —the imperial rescripts, &c. &c.—had regularly undergone the process of simplification and arrangement, the enterprise conceived by Justinian would not have proved so arduous in the execution. Instead of chaos and perplexity, Tribonian would have found order and certainty; and the great work of compilation might have been performed without the aid of his sound judgment, and wonderful assiduity. But even Tribonian, with all his accomplishments and his vanity, has been compelled to acknowledge the assistance he derived from previous compilers, and particularly from the works of *Gaius*.[1] The assistance he

[1] Inst. Proem. § 6.

derived from Gaius is, however, more clearly shewn in the *Ecloga Juris Civilis* published at Paris in 1822, by which it appears, that he availed himself, in one book, of nearly *ninety* passages from the institutes of Gaius. It is, in fact, now beyond doubt, that the institutes of Justinian would not have been as perfect as they are, had it not been for the institutes of his predecessor.[1] And how much has after ages been indebted to these Digests, and how much have they contributed to the richness and perfection of modern law! Their advantages are even felt in those countries which are subject to the common law of England, and particularly as it respects equity and admiralty jurisdiction. In fact, Rome, owing to the labors of her compilers, in the words of D'Aguesseau, "reigns throughout the world by her reason, after having ceased to reign by her authority." The history and results of Tribonian's labors, and the labors of other ancient compilers, are, therefore, evidence of the benefit which those lawyers bestow on succeeding ages, who have applied themselves to the classification and abridgment of positive laws and "written reason."

The *responsa prudentum* and the imperial rescripts are not unlike the decisions made by English and American Judges. And the Prætorian Edits were made very much in the sume spirit which governs the decrees of the Courts of Chancery, in England and America. The practice of digesting these decisions and decrees is becoming more and more important. Lord Bacon, it appears from his *aphorisms*, was impressed with a sense of the importance of Digests—"whenever there has arisen a vast accumulation of volumes." If Digests were necessary in his time—how much more so are they to the American lawyer at the present day! They are more necessary in this country than in any other, owing to the great number of our distinct tribunals in law and equity, and the many reports of those tribunals which are annually published. There are at least *sixteen* volumes of Reports (including the United States and State Reports) pub-

[1]History of Laws and Gov. of Rome, published in 1827, at Cambridge, in England; p. 288.

lished in this country every year. In fifty years hence, therefore (and allowing the number annually published to continue the same) there will be, at the least, eight hundred volumes of our own adjudged cases, in addition to those now published.—The sum required, to purchase these eight hundred will not be less than three thousand and two hundred dollars—calculating the price of each volume at *four* dollars—a sum which few lawyers would be willing or able to expend in law books. And if they were willing and able, it would cost them much trouble to get hold of what they wanted. But if the cases contained in those numerous volumes shall be properly digested, their substance will be compressed within *fifty* or *sixty* volumes. Johnson's Digest of the cases previously decided by the Courts of the State of New-York, is in two moderate octavo volumes, and yet it contains in substance, what is embraced by at least thirty volumes of Reports. The precedents in a Court of Equity are acknowledged to be as binding as those in a Court of Law. The practice of publishing the former, however, is not as ancient as that of publishing the latter, and was not commenced in England until about the period of the restoration. The earliest Chancery cases which are reported, are contained in the volume entitled "Reports of cases taken and adjudged in the Court of Chancery, in the reign of Charles, I., Charles, II., James, II., William, III., and Queen Anne." "Reports in Chancery," and Vernon's Reports soon succeeded—which embrace the decisions of the celebrated Lord Nottingham, of Lord Somers, and Lord Cowper. These were followed by the well known Reports of Peere Williams, which commenced in 1695, and which bring the English equity cases down to the year 1735, during which interval Lord Harcourt, Lord Macclesfield, Lord King, and Lord Talbot were Chancellors. Moseley's Reports were also in the time of Lord King. The decisions of the learned and illustrious Lord Hardwicke, who suceeded Lord Talbot, it is almost superfluous to mention, are contained in the Reports of the elder Vesey, of Atkyns, of Ambler and of Dickens. The successor of Lord Hardwicke was Lord Northington, whose decisions are contained in

the highly esteemed Reports of Eden. Brown's Reports, the next book of deserved celebrity, commenced with Lord Thurlow's appointment to the office of Chancellor in 1778. Lord Kenyon was Master of the Rolls under Lord Thurlow, and his decisions are contained in Cox's cases in Chancery. A very large space of time is covered by the Reports of the younger Vesey, who has given to the public the researches of Sir Richard Pepper Arden, as Master of the Rolls, and all the decisions of Lord Loughborough and a great portion of the decisions of Lord Eldon. The succeeding English Equity Reports have found their way to, and been re-published in this country soon after they appeared in England, and are both well known and highly appreciated by the profession here, as well as there. The reported decisions in the *Irish* Court of Chancery are also known and held in high estimation by our own tribunals. The cases which compose these reports will be found very ably digested in the last edition of "Bridgman's Analytical Digest." The original compiler of that work, it appears, had made considerable progress in the preparation of a third edition, when, owing to his decease, the completion of it devolved upon his son. Since the father's last edition, upwards of *forty* volumes of Equity Reports were issued from the press in London, in 1822, and the cases therein contained, and up to that period, have been introduced into the present edition, under the proper titles. In this work, the original compiler adopted the plan of noticing all the cases which have been questioned, doubted, or denied; and of adding a note of reference to those places where all the authorities upon any leading point are collected. The work affords, therefore, a species of information, which is not only peculiar to a digest, but which is extremely important and deserving of imitation in all future works of the same description. Besides the additional matter which has been collected and annexed to the work by the present editor, he has made some new titles, and increased the sections and sub-divisions of the original titles. The third volume of the work is a *repertorium* of the names of cases reported, alphabetically and doubly arranged—the titles in italics, pointing

out the principal cases, and the roman titles showing the references.

The American Chancery Digest is a valuable supplement to the one above mentioned. It is a digest of the equity cases which have been decided by the Federal Courts, and which are reported in Dallas, Cranch, Wheaton, Peters, Gallison and Mason. It also comprehends the equity cases, which have been reported in the States of New-York, South Carolina, Maryland, Virginia, North Carolina, Massachusetts, Connecticut, Ohio and Kentucky. In some of the States which have been mentioned, there are distinct and independent Courts of Equity, and in others the jurisdiction of law and equity belong to the same tribunal. But the American equity system, with the exception of some alterations and modifications, is the same as the English. This work is unquestionably the result of great industry, and to appearance, is a very faithful collection of the cases reported in the United States, which relate to equitable power and jurisdiction. The compilers of the work are also to be highly commended for their luminous arrangement, their clearness of method, and their accuracy of detail. In relation to the discrepancies in the adjudications of the several States, the compilers inform the public, that these discrepancies exist more in relation to matters of form, than they do in regard to equitable principles; and that in the latter respect there is but little jarring. The profession, it is believed, will be of opinion that no work which could have been published, would have been found more practically useful, than that which has just been the subject of consideration.

SKETCH OF MR. JUSTICE TRIMBLE.

THE following well drawn sketch of the late Mr. Justice Trimble, of the Supreme Court of the U. States, appeared several months since in the Bos. Centinel.

"The melancholy rumour of the death of Mr. Justice Trimble, of the Supreme Court of the United States, has at length

been confirmed. That excellent man is no more. The nation has sustained a loss of no ordinary magnitude, and Kentucky may now mourn over the departure of another of her brightest ornaments, in the vigor of life and usefulness. It is but a few years since that *Hardin*, who deservedly held the foremost rank at her bar, fell an early victim to disease. The death of that worthy and discriminating judge, Mr. Justice Todd, soon followed; and now Trimble is added to complete the sad triumvirate. It is but two years since the latter took his seat on the bench of the Supreme Court, having been elevated to that station from the District Court, solely by his uncommon merits. It is not saying too much to assert, that he brought with him to his new office the reputation of being at the head of the profession in his native state. Men might differ with respect to the rank of other lawyers, but all admitted, that no one was superior to Trimble in talents, in learning, in acutness, in sagacity. All admired him for his integrity, firmncss, public spirit, and unconquerable industry. All saw in him a patience of investigation, which never failed, a loftiness of principle which knew no compromise, a glorious love of justice and the law which overcame all obstacles. His judgments were remarkable for clearness, strength, vigor of reasoning, and exactness of conclusion. Without being eloquent in manner, they had the full effect of the best eloquence. They were persuasive and often overwhelming in their influence. Such was the reputation which accompanied him to the Supreme Court. Before such a bar as adorns that Court, where some of the ablest men in the union are constantly found engaged in argument, it is difficult for any man long to sustain a professional character of distinction, unless he has solid acquirements and talents to sustain it. There is little chance there for superficial learning or false pretensions, to escape undetected. Neither office, nor influence, nor manners, can there sustain the judicial functions, unless there is a real power to comprehend and illustrate juridicial arguments, a deep sense of the value of authority, an untiring zeal, and an ability to expound with living reasons the judgments, which the court is called upon to pronounce. A new judge, coming there for the first time, may, under such circumstances, well feel some painful anxiety, and some distrustful doubts, lest the bar should search out and weigh his attainments with too nice an inquisition. Mr. Justice Trimble not only sustained his former reputation, but rose rapidly in public favour. Perhaps no man ever on the bench gained so much in so short a period of his judicial career. He was already looked up to as among the first judges in the nation in all the qualifications of office. Unless we are greatly misinformed, he possessed in an eminent degree the con-

fidence of his brethren, and was listened to with a constantly increasing respect. And well did he deserve it; for no man could bestow more thought, more caution, more candor, or more research, upon any legal investigation, than he did. The judgments pronounced by him in the Supreme Court cannot be read without impressing every professional reader with the strength of his mind, and his various resources to illustrate and unravel intricate subjects. Yet we are persuaded, that if he had lived ten years longer in the discharge of the same high duties, from the expansibility of his talents and his steady devotion to jurisprudence, he would have gained a still higher rank, perhaps as high as any of his most ardent friends could have desired. One might say of him as Cicero said of Lysias—*Nihil acute inveniri potuit in eis causis, quas scripsit, nihil (ut ita dicam) subdole, nihil versute quod ille non viderit; nihil subtiliter diei nihil presse, nihil enucleate, quo fieri possit aliquid limatius.*

In private life he was amiable, courteous, frank and hospitable; warm in his friendships, and a model in his domestic relations. In politics he was a firm and undeviating republican, but respectful and conciliatory to those who differed from him. In constitutional law, he belonged to that school of which Mr. C. J. Marshall (himself a host) is the acknowledged head and expositor. He loved the Union with an unfaltering love, and was ready to make any sacrifice to ensure its perpetuity. He was a patriot in the purest sense. He was—but how vain is it to say what he was—he has gone from us forever. We have nothing left but to lament his loss and to cherish his fame.

Salve æternum mihi, maxime Pallu;
Æternumque vale.

LATE LAW IN SOUTH-CAROLINA, RESPECTING THE ASSIGNMENT OF DEBTORS.

An important law, it appears, has lately passed the legislature of South Carolina, entitled "an act regulating the assignments of debtors." It was passed December 20, 1828, and is as follows:—

1. Whenever any debtor shall assign his or her property for the benefit of creditors, it shall be lawful for said creditors, and

they are hereby authorised to name and appoint, an agent or agents equal in number to the assignees, to act in their behalf, jointly with the assignees named and appointed by the assignor.

2. That it shall be the duty of the assignees, within ten days after the execution of the deed of assignment, to call the creditors together to proceed to the appointment of their agent or agents, and all sales and transfers of property made by the assignee or assignees, prior to the appointment of the agent or agents, of the creditors, are hereby declared void and of no effect; and in case the assignee or assignees delay, neglect, or refuse to assemble the creditors within the time herein prescribed and limited, it shall be lawful for the creditors to meet and appoint their agent or agents, and the said agent or agents, on application to and by order of any judges of the Court of Law of Equity, shall take into his hands and possession all the property assigned, and of which the assignee would by law be entitled to the possession, and shall sell and dispose of the same agreeable to the deed of assignment.

3. That in the appointment of the agent or agents, the majority in the amount of the debts represented by the creditors present at the meeting, shall govern; and the agent or agents so appointed, shall have equal power and authority with the assignee or assignees, to sell and dispose of the property assigned, and distribute and pay the proceeds according to the intent and provisions of the deed of assignment; and all sales, hypothecations, or other transfers of property, either real or personal, shall be void and null, unless made with the consent and concurrence of the assignee or assignees and agent or agents, or a majority of them; and should the assignee or assignees and agent or agents be equally divided on any question, the same shall be decided by an umpire appointed as hereafter provided—Provided nevertheless, that should the creditors as aforesaid, refuse or neglect to appoint an agent or agents in ten days after they have been called together, by the assignee or assignees, the assignee or assignees may forthwith proceed to sell, or otherwise dispose of the assigned effects, without the concurrence of the said creditors.

4. That the proceeds arising from the sales of the property assigned, shall be deposited for safe keeping in the Bank of the State of South Carolina, or any of its branches, in the joint name of the assignee or assignees, and subject to their joint drafts.

5. That in case of disagreement between the assignee or assignees and the agent or agents, any of the judges of the Court of Law or Equity of chambers, shall on the application of either of the parties decide, and if deemed necessary, name and appoint an umpire to act jointly with the assignee or assignees and agent or agents

6. That it shall be the duty of the assignee or assignees and agent or agents to lay, every three months, before the creditors or such committee as they may appoint, an exact statement of their proceedings: the creditors or their committee may, however, call the assignee or assignees, and agent or agents, oftener to account, —they may also direct and prescribe the time and mode of selling, and the terms of sale, order a distribution of the assignments on hand, and the final close of the concern, and in the case of need, may revoke and dismiss their agent or agents, and name and appoint another in his stead. And the said assignee or assignees and agent or agents failing or neglecting to lay the statement of their proceedings before the creditors or their committee, as herein directed, or whenever called on, or to obey, or abide by their directions, shall be answerable for all damages resulting from their refusal or neglect, and forfeit the commissions they might otherwise be entitled to.

7. That the commissions due and owing to the agent or agents and assignee or assignees, for their trouble and labor, shall be five per cent. on receiving, and two and a half per cent. on paying, to be equally divided between them (i. e.) one half to the assignee or assignees, and the other half to the agent or agents.

JUDICIARY INTELLIGENCE.

Kentucky Judiciary.—From the Frankfort Commentator of February 9th, 1829.—*Judges of the Court of Appeals.*—We mentioned in our last, that the Senate had rejected the nomination of J. J. Marshall, Esq. as Chief Justice of Kentucky. The vote upon the question of advising and consenting to his appointment stood as follows—Ayes, 16—Nays, 21.

On Wednesday, the Governor nominated Joseph R Underwood, Esq. as Chief Justice, and in the event of his appointment, John T. Johnson, of Scott, as an associate judge of the Court of Appeals.

Mr. Faulkner moved a re-consideration of the vote by which the nomination of Mr. Marshall, as Chief Justice, had been rejected. But the Governor having been officially informed of the rejection, and having, moreover, sent to the Senate another nomination, the proposed re-consideration was said to be out of order; the Speaker so decided, and the Senate sustained the decision, 23 to 8.

Mr. Woods afterwards moved a re-consideration of the vote,

by which the nominations of Judge Underwood and Mr. Johnson were postponed to the first of June, and the vote stood, ayes, 16, nays 16—the Speaker voted in the negative—so the motion failed.

Thus all the efforts of the executive to fill the vacancy in the bench of the Court of Appeals, have been frustrated by a very remarkable combination of circumstances.

Thomas B. Monroe, Esq. has been re-appointed *Reporter of the Decisions of the Court of Appeals*, for another term of two years. This appointment was, we believe, rather unexpected to the profession most interested in the business of the office. It has been a subject of just and serious complaint at the Circuit Courts, and among the lawyers, that since the former appointment of the Reporter, two years ago, he has only given them the decisions pronounced by what he used to call the 'Bank Court,' during the period when, according to his ideas of constitutional law, the Court was a *caput mortuum*, and the gentlemen delivering the opinions *no judges;* many of which opinions the profession had previously seen in the newspapers; while, of about *nine hundred and eighty* causes decided since the repeal of the *re-organizing act*, not a single decision has yet been published, though they afford materials for about *four volumes* of Reports.

Commonwealth's Attorneys.—An attorney for the Commonwealth has been recently appointed in each judicial district of the state; [the names of the gentlemen on whom these appointments have been conferred, are given in the Frankfort Commentator of the above date.]

Alabama Judiciary.—The following were the proceedings of the legislature of Alabama, on December 29th, 1828, at Tuscaloosa. In the Senate, a communication from Wm. Kelly, Esq. was read, impeaching Judges Crenshaw, White and Saffold.—The principal grounds of accusation are founded on the noted usury cases determined in the Supreme Court of this State at its last session in July. Mr. Kelly, in his introductory remarks, expresses himself in strong and emphatic language. He says, he looks with candour to all the results that may be likely to ensue, and feels constrained by a paramount sense of duty, to seek redress for the injuries inflicted on his client by conduct that he is unable to view in any other light, than a palpable departure from the plain and acknowledged line of judicial duty.

The charges appear to be predicated on the opinion of the above named Judges, on writs of Error from the Circuit Court of Lawrence county Robert Thompson vs. Littlebery H. Jones, three in number. Mr. Kelly asserts that the judgment was reversed by the minority against the known opinions of the majority of the

Judges of the Supreme Court. (Judge Perry, who was in favor of the judgment below, being confirmed, was absent when the case was argued, but had expressed his opinion on the arguments during the previous session of the court, on that subject.)

The resolutions adopted by the last legislature and submitted to the people, to be voted upon, at the General Election in August last, proposing an alteration to the Constitution of the State of Alabama, in relation to the tenure by which the Judges of the Circuit Courts hold the offices, were read a third time, according to the requirement of the Constitution, and on the question of adoption, as a part of the Constitution, were rejected, there being not two thirds of the members voting in the affirmative. Yeas, 12, nays 10.

Tuscaloosa, Jan. 24.—The Senate yesterday proceeded to the final adjudication and decision of the charges preferred by Wm. Kelly, Esq. against Judges Saffold, Crenshaw and White. A resolution of the following form being submitted for consideration by Mr. Perry, the member from Dallas.

Resolved—That it is the opinion of the Senate, that the Charges preferred against Judges White, Saffold, and Crenshaw by Wm. Kelly, Esq. are not sufficiently sustained by proof, to authorise an address to the Governor, for their removal.

"*Resolved*—That it is inexpedient to take further notice of said charges."

On the consideration of the first resolution, a motion was made so to divide the question, as to take the sense of the Senate in relation to Judge Saffold: Whereupon, it is unanimously decided, that the charges preferred against him, are not sufficiently sustained; to justify and warrant any further proceedings to be had against him.

The question then recurred on the adoption of the foregoing resolution, in reference to Judges Crenshaw and White, and was determined by the following vote in the affirmative. Yeas, 15, nays 5. The second resolution was then adopted by a vote of 17 ayes—2 nays. Thus, in the refusal of the Senate to vote an address for the removal of the Judges implicated, has terminated a case, which has excited a considerable portion of public attention and produced some feeling.

Missouri Judiciary.—Three articles of impeachment have been preferred against Judge Todd. It appears from the western papers, that the attempt to remove him from office originated in party views and prejudices. If this be true, it is a satisfaction to learn, what appears from the Kentucky Republican of the 11th of February last, viz. that this Judge, after a full investigation, has been honourably acquitted.

Ohio Judiciary.—In the State of Ohio, Joshua Collet has been elected Supreme Judge of the State Court, vice Judge Burnet, resigned; and George B. Holt has been elected President Judge of the first Judicial Circuit, vice Mr. Crane, resigned.

SUPREME COURT OF THE UNITED STATES.

Tuesday, Feb. 17, 1829.—No. 27. *James Foster, et. al.* plaintiff in error, v. *David Neilson.* The argument of this cause was commenced by Mr. Coxe, for the plaintiff in error, and continued by Mr. Jones, for the defendant in error. Adjourned till to-morrow, 11, A. M.

Wednesday, Feb. 18.—On motion of Mr. Peters. Samuel Chew, Esq. of Pennsylvania, and on motion of Mr. Ogden, Mordecai M. Noah, Esq. of New York, were admitted as Attorneys and Counsellors of this Court.

No. 27. *James Foster and Pleasants Elam*, plaintiffs in error, v. *David Neilson.* The argument of this cause was continued by Mr. Jones. for the defendant in error.

No. 49. *Joseph Mandeville, et. al.* appellants, v. *Romulus Riggs.* The argument of this cause was commenced by Mr. E. I. Lee for the appellants. Adjourned till to-morrow, 11, A. M.

Thursday, Feb. 19.—On motion of Mr. Ogden, J. L. Riker, Esq. of New York, and on motion of Mr. Key, J. Johnson, Esq. of Maryland, were admitted as Attorneys and Counsellors of this Court.

No. 49. *Joseph Mandeville, et. al.* appellants, v. *Romulus Riggs.* The argument of this cause was continued by Mr. E. I. Lee, for the appellants, and by Mr. Coxe, for the appellee. Adjourned till to-morrow, 11, A. M.

Friday, Feb. 20.—No. 19. *Bank of Hamilton*, plaintiff in error, v. *Lessee of Ambrose Dudley, Jr.* This cause was argued by Messrs. Benham and Baldwin for the plaintiff in error, and by Mr. Garrard, for the defendant in error. Adjourned till to-morrow, 11, A. M.

Saturday, Feb. 21.—On motion of Mr. Webster, Benjamin Hazard, Esq. of R. Island, and on motion of Mr. Hubbard, R. C. Mallary, Esq. of Vermont, were admitted as Attorneys and Counsellors of this Court.

No. 27. *James Foster, et. al.* plaintiffs in error, v. *David Neilson.* The argument of this cause was concluded by Mr. Webster, for the plaintiffs in error.

No. 146. *Charles Vattier*, plaintiff, v. *Thos. S. Flinde*, and *ux.* On motion of Mr. Caswell, ordered to be docketed and dismissed.

No. 57. *Le Roy, Bayard & Co.* plaintiffs in error, v. *The Fire and Marine Insurance Company of Boston.* This cause was argued by Mr. Webster, for the defendant in error.

No. 49. *Joseph Mandeville, et. al.* appellants, v. *Romulus Riggs.* The argument of this cause was continued by Mr. Wirt, for the appellee. Adjourned till Monday, 11, A. M.

Monday, Feb. 23.—Pursuant to adjournment, the Court met this morning at the Capitol. Present, as on Saturday. Proclamation being made, the Court was opened.

Mr. Justice Story delivered the opinion of the Court in No. 58, *David Wilkinson*, plaintiff in error, v. *Thomas Leland, et. al.* on writ of error to the Circuit Court of the United States for the District of Rhode Island. Judgment of said

Circuit Court reversed, and cause remanded with permission to award a *venire facias de novo*.

Mr. Chief Justice Marshall delivered the opinion of the Court in No. 57, *Le Roy Bayard & Co.* plaintiffs in error, v. *The Massachusetts Fire and Marine Insurance Company of Boston*, on writ of error to the Circuit Court of the U. States for the District of Massachusetts. Judgment of said Circuit Court affirmed with costs.

No. 49. *Joseph Mandeville and others*, appellants, v. *Romulus Riggs*. The argument of this cause was concluded by Mr. Jones, for the appellants.

No. 21. *James Connelly, et. al.* appellants, v. *Richard Taylor, et. al.* The argument of this cause was continued by Mr. Sergeant, for the appellees. Adjourned till to-morrow, 11, A. M

Tuesday, Feb. 24.—Pursuant to adjournment, the Court met this morning at the Capitol. Present, as on Monday. Proclamation being made, the Court was opened.

Mr. Justice Washington delivered the opinion of the Court, Mr. Justice Johnson dissenting, in No. 54, *John F. Satterlee*, plaintiff in error, v. *Elizabeth Matthewson*, on writ of error to the Supreme Court of Pennsylvania, for the Middle District. Judgment of said Court affirmed with costs.

No. 20. *Le Roy, Bayard & Co.* plaintiffs in error, v. *Rutger Jan Schimmelpennick*. This cause was argued by Mr. Webster, for the defendant in error.

No. 21. *James Connelly, et. al.* appellants, v. *Richard Taylor, et. al.* The argument of this cause was continued by Mr. Sergeant, for the appellees, Adjourned till to-morrow, 11, A. M.

Wednesday, Feb. 25.—Mr. Chief Justice Marshall delivered the opinion of the Court in No. 19, *the Bank of Hamilton*, plaintiff in error, v. *The Lessee of Ambrose Dudley, Jr.* on writ of error to the Circuit Court of the United States for the District of Ohio. Judgment of said Circuit Court affirmed, with costs.

Mr. Chief Justice Marshall delivered the opinion of the Court in No. 20. *Le Roy, Bayard & Co.* plaintiffs in error, v. *Rutger Jan Schimmelpennick*, on writ of error to the Circuit Court of the United States for the Southern District of N. York. Judgment of said Court affirmed, with costs and damages at the rate of seven per centum per annum.

On motion of Mr. Peters, C. I. Jack, Esq. of Pennsylvania, was admitted as an Attorney and Counsellor of this Court.

No. 21. *James Connelly, et. al.* v. *Richard Taylor, et. al.* The argument of this cause was continued by Mr. Wirt, for the appellants. Adjourned till to-morrow, 11, A. M.

Thursday, Feb. 26.—No. 21. *James Connelly, et. al.* appellants, v. *Richard Taylor, et. al.* The argument of this cause was concluded by Mr. Wirt, for the appellants.

Mr. Chief Justice Marshall delivered the opinion of the Court in No. 63, *Anthony Butler, et. al.* plaintiffs in error, v. *Joshua Baldwin, use of Hawes and Osgood*, on writ of error to the District Court of the United States for the District of Mississippi. Judgment of said District Court affirmed, with costs and damages at the rate of ten per centum per annum.

No. 47. *Ann Shanks, et. al.* plaintiffs in error, v. *Abraham Dupont, et. al.*—The argument of this cause was commenced by Mr. Cruger, for the plaintiffs in error. Adjourned till to-morrow, 11, A. M.

Friday, Feb. 27.—Mr. Justice Johnson delivered the opinion of the Court in No. 53, *Bank of the United States*, appellants, v, *Daniel Weisiger, et. al.* on appeal from the Circuit Court of the United States for the District of Kentucky.—Decree of said Circuit Court reversed.

Mr. Chief Justice Marshall delivered the opinion of the Court in No. 51, *David Hunt, et. al.* appellants, v. *Robert Wickliffe*, on appeal from the Circuit Court of

the United States for the District of Kentucky. Decree of said Circuit Court reversed.

No. 47. *Ann Shanks, et. al.* v. *Abraham Dupont, et. al.* The argument of this cause was continued by Mr. Cruger, for the plaintiffs in error, and by Mr. Legare, for the defendants in error.

No. 32. *J. Harper*, plaintiff in error, v. *Anthony Butler.* This cause was argued by Mr. Jones, for the plaintiff in error. Adjourned till to-morrow, 11, A.M.

Saturday, Feb. 28.—No. 6. *Plowden Weston, et. al.* plaintiffs in error, v. *The City Council of Charleston.* This cause was argued by Mr. Hayne for the plaintiffs in error, and by Messrs. Cruger and Legare, for the defendant in error.

No. 66. *Bank of the United States*, plaintiffs in error, v. *William Owen, et. al.* This cause was argued by Mr, Sergeant, for the plaintiff in error,

No. 72. *Charles A. Beatty, et. al.* appellants, v. *Daniel Bussard, et. al.* The argument of this cause was commenced by Mr. C. C. Lee, for the appellant, and continued by Mr. James Dunlap, for the appellees. Adjourned till Monday, 11, A. M.

Monday, March 2.—No. 72. *Charles A. Beatty, et. al.* appellants, v. *Daniel Bussard, et. al.* The argument of this cause was continued by Messrs. J. Dunlap and Key, for the appellees, and concluded by Mr. C. C. Lee, for the appellants.

Mr. Chief Justice Marshall delivered the opinion of the Court in No. 32, *J. Harper*, plaintiff in error, v. *Anthony Butler*, on writ of error to the District Court of the United States for the Mississippi District. Judgment of said District Court reversed; and cause remanded, with direction to award a *venire facias de novo.*

Nos. 73 and 74. *David English, et. al.* appellants, v. *Catherine Foxall.* The argument of these causes was commenced by Mr. Key, for the appellants,and continued by Mr. Jones, for the appellee.

Tuesday, March 3.—On motion of Mr. Peters, Charles B. Penrose, Esq. of Pennsylvania—and on motion of Mr. Ogden, Jas. C. Hornblower, Esq. of New Jersey, were admitted as Attorneys and Counsellors of this Court.

Mr. Chief Justice Marshall delivered the opinion of the Court in No. 30. *The Lessee of Wm. A. Powell, et. al.* plaintiffs, v. *John Harman*, on certificate of division of opinion of the judges of the Circuit Court of the United States for the District of West Tennessee—ordered to be certified to the said Circuit Court,that under the Statute of limitations of Tennessee of seventeen hundred and ninety seven, a possession of seven years is a protection only when held under a grant, or under valid mesne conveyances, or a proper title, which are legally or equitably connected with a grant, and that a void deed is not such a conveyance as that a possession under it will be protected under the Statute of Limitations.

Mr. Justice Johnson delivered the opinion of the Court in No. 1, *Wm. Campbell's Executors*, appellants, v. *Pratt, Francis, et. al.* on appeal from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington. Decree of said Circuit Court affirmed with cost.

Nos. 73 and 74. *David English, et. al.* appellants, v. *Catharine Foxall.* The argument of these causes was continued by Mr. Jones for the appellees, and concluded by Mr. Key, for the appellants.

No. 43. *The American Fur Company*, plaintiff in error, v. *The United States.* This cause was argued by Mr. Ogden, for the plaintiff in error, and by the Attorney General for the defendant in error. Adjourned till to-morrow, 11, A M.

Thursday, March 5.—Pursuant to adjournment, the Court met this morning at the Capitol. Present as on yesterday. Proclamation being made, the Court was opened.

No. 131. *Solomon Southwick, et. al.* plaintiffs in error, v. *The Post Master General United States.* The motion made by Mr. Attorney General to dismiss

this cause for want of Jurisdiction; was opposed in argument by Mr. J. W. Taylor of counsel for the plaintiffs in error.

On motion of Mr. Ogden, Theodore Frelinghuysen, Esq. of New Jersey, and Frederick De Peyton, Jr. Esq. of New York, were admitted as Attorneys and Counsellors of this Court.

No. 101. *Bank of the United States*, plaintiff in error, v. *Thomas D. Carneal* The argument of this cause was commenced by Mr. Caswell, for the plaintiff in error, and continued by Mr. Benham, for the defendant in error. Adjourned till to-morrow, 11, A. M.

Friday, March 6.—Pursuant to adjournment, the Court met this morning at the Capitol. Present as on yesterday. Proclamation being made, the Court was opened.

On motion of Mr. Sergeant, John Varnum, Esq. of Mass. and Nathan Nathans, Esq. of Penn. were admitted as Attorneys and Counsellors of this Court.

No. 101. *The bank United States*, plaintiff in error, v. *Thomas D. Carneal*, The argument of this cause was concluded by Mr. Sergeant, for the plaintiff in error.

No, 45. *John Inglis*, demandant, v. *The Trustees of the Sailor's Snug Harbour in the city of New York*, tenants. The argument of this cause was commenced by Mr. Talbott, for the tenants. Adjourned till to-morrow, 11, A. M,

Saturday, March 7.—Mr. Chief Justice Marshall delivered the opinion of the Court in No. 131. *Solomon Southwick, et. al* plaintiffs in error, v. *The Post Master General of the United States*, on a writ of error to the Circuit Court of the United States for the Southern District of New York. Adjudged and ordered to be dismissed for want of jurisdiction.

No. 21. *James Connelly, et. al.* appellants, v. *Richard Taylor, et. al.* On motion of Mr. Wirt, for leave to re-argue this cause, it is ordered that said motion be over-ruled.

Mr. Chief Justice Marshall delivered the opinion of the Court in No. 21. *Jas. Connelly, et. al.* appellants, v. *Richard Taylor, et. al.* on appeal from the decree of the Circuit Court of the United States for the District of Kentucky. Decree of said Circuit Court affirmed, with costs.

No. 51. *David Hnnt, et. al.* appellants, v. *Robert Wickliffe.* Ordered that the motion made in this cause by Mr. Wickliffe, for a re-argument, be over-ruled.

No. 45. *John Englis*, demandant, v. *The Trustees of the Sailor's Snug Harbor, &c.* tenants. The argument of this cause was continued by Mr. Talcott, for the tenants. Adjourned till Monday, 11, A. M.

Monday, March 9.—Mr. C. J. Marshall delivered the opinion of the Court in No. 27, *J. Foster, &c.* v. *D. Neilson.* Judgment of the Circuit Court of Louisiana affirmed, with costs.

No. 26. *Wm. C. Gardner*, plaintiff below, v. *John A. Collins. &c.* The motion made for a re-argument by Mr. Robbins, ordered to be over-ruled.

No. 45. *John Inglis*, v. *Trustees of Sailor's Snug Harbor.* The argument was continued by Mr. Ogden, for the demandant.

Tuesday, March 10.—Mr. Justice Thompson delivered the opinion of the Court in No. 73, *David English, et. al.* appellants, v. *Catharine Foxall.* On appeal from the Decree of the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington. Decree of said Circuit Court reversed, so far as it grants the particular relief as to the affirmed deficiency and in all things else, and cause remanded for further proceedings to be had therein according to law and justice.

Mr. Justice Thompson delivered the opinion of the Court in No. 74, *David English. et. al.* appellants, v. *Catharine Foxall.* On appeal from the Circuit Court of the United States for the district of Columbia, holden in and for the county of Washington. Decree of the said Circuit Court affirmed, with costs.

Mr. Justice Story delivered the opinion of the Court in No. 101, *the bank of*

the United States, plaintiff in error, v. *Thomas D. Carneal*. On writ of error to the Circuit Court of the United States for the district of Ohio. Judgment of said court reversed, and cause remanded, with directions to award a venire facias de novo.

No. 45. *John Inglis*, demandant, v. *The Trustees of the Sailor's Snug Harbor*. &c. tenants. The argument of this cause was continued by Mr. Webster, for the demandant.

No. 6. *Plowden Weston, et. al.* plaintiffs in error, v. *the City Council of Charleston*. The argument of this cause was concluded by Mr. Hayne, for the defendant in error. Adjourned till to-morrow, 11, A. M,

Wednesday, March 11.—Mr. Justice Washington delivered the opinion of the court in No 43. *the Am. Fur Company*, by Wm. H. Wallace, &c. plaintiffs in error, v. *The United States*. On writ of error to the District Court of the United States for the district of Indiana. Judgment of said District Court reversed, and cause remanded with directions to award a venire facias de novo.

No. 45. *John Inglis*, demandant, v. *The Trustees of the Sailor's Snug Harbour*, &c. tenants. The argument of this cause was continued by Mr. Wirt, for the tenants.

No. 12. *Wm. G. Buckner*, plaintiff. v. *Thos. Finley, et. al.* This cause was argued by M. D. Hoffman, for the plaintiff. Adjourned till to-morrow, 11, A. M.

Thursday, March 12.—Mr. Justice Story dellvered the opinion of the court in No. 49, *Joseph Mandeville. et. al.* appellants, v. *Romulus Riggs*. On appeal from the Decree of the Circuit Court of the United States for the county of Alexandria, District of Columbia, Decree of said Circuit Court reversed, and cause remanded, with directions to cause the same to be re instated as to the defendants against whom the bill was taken pro confesso, and set down for a hearing, and by the decree dismissed. And also with directions that the personal representatives of the defendants, who died pending the suit, who are known, and may be brought before the said Circuit Court, be made parties thereto, and the bill revived as to them. And also with directions that all the other defendants named in the bill who were not served with process. but against whom further proceedings may be had to bring them before the court (as to whom the bill was dismissed at the hearing) be brought before the court, if practicable. as parties—and that such further proceedings be thereupon had. as to justice and equity may appertain.

No. 12. *George Beach*, plaintiff in error, v. *Nathan Viles, et. al.* The argument of this cause was commenced by Mr. Webster, for the plaintiff in error, and continued by Mr. Simmons, for the defendant in error. Adjourned till to-morrow 11, A. M.

Friday, March 13.—No. 45. *John Inglis*, demandant, v. *The Trustees of the Sailor's Snug Harbour*, &c. tenants. The argument of this cause was concluded by Mr. Wirt, for the tenants. Adjourned till to-morrow, 11, A. M.

Saturday, March 14.—Pursuant to adjournment, the Court met this morning at the Capitol. Present as on yesterday. Proclamation being made, the Court was opened.

No 137. *David Canter*. claimant of 356 bales of cotton, appellant, v. *The American Insurance Company and Ocean Insurance Company of New York*.—The motion made by Mr. Cruger to dismiss this cause, was argued by Mr. Cruger in support of said motion, and by Messrs. Webster and Coxe, against it, to whom Mr. Cruger replied.

No. 139. *Jomes L. Cathcart. et. al.* appellants, v. *Wm. Robinson*. The motion of Mr. C. C. Lee, to dismiss this cause by reason of the insufficiency of the security in the appeal bond for costs, was argued by Messrs. Coxe and Key, against the motion, and by Mr. Lee, in support of it.

No. 68. *Anthony T. Chirac, et. al.* appellants, v. *George Reinicker*. The ar-

gument of this cause was commenced by Mr. Mayer, for the plaintiffs in error. Adjourned till Monday, 11, A. M.

New Associate Justice in the place of the late Mr. Justice Trimble. John M'Lean, of Ohio, late Post Master General, has been appointed to, and has accepted the office of an Associate Judge of the Supreme Court of the United States.

DISTRICT COURTS OF THE UNITED STATES.

THE following appointments have lately been made.—Thomas Swann, of the District of Columbia, Attorney for the said District; Ether Shepley, of Maine, Attorney for the District of Maine; John W. Smith, of Louisiana, Attorney for the Eastern District of Louisiana; Alexander Bracrenridge, of Pennsylvania, Attorney for the Western District of Pennsylvania; Wm. A. Griswold, of Vermont, Attorney for the District of Vermont;—John Gadsen, of South Carolina, Attorney for the District of S. Carolina; Nathaniel Williams, Attorney for the District of Maryland; Nathan Smith, Attorney for the District of Connecticut;—John H. Norton, Marshal for the District of Mississippi; Thomas Morris, Marshal for the Southern District of New York; John W. Livingston, Marshal for the Northern District of New York; Samuel D. Harris, Marshal for the District of Massachusetts;—William Trimble, to be a Judge in, and for the Territory of Arkansas; Benjamin Johnson, of Arkansas Territory, to be a Judge for said Territory; Samuel C. Roane, of Arkansas, Attorney for said Territory; George W. Scott, of Arkansas Territory, Marshal for the said Territory; John W. Campbell, of Ohio, to be District Judge of the District of Ohio; Andrew Dunlap, Attorney for the District of Massachusetts.

LATE AND INTERESTING DECISIONS.

In the Supreme Court of the United States the three following cases have been argued and decided.

Authority of Executors.—A sale of Testator's real property in Rhode-Island, made by an executor, appointed in Vermont, is valid, provided the sale has been ratified by the Gen. Assembly of Rhode-Island, and the proceeds of the sale have been applied to payment of testator's debts. Leland v. Wilkinson.

The Bank of Commonwealth of Kentucky, plaintiff in error, vs. *John Ashley, and John Ella, Jun.* on a writ of error to the Circuit Court of the United States, for the District Court of Kentucky. Judgment of said Circuit Court affirmed without costs in error, upon the defendants in error entering a remittur in this court, of the debt omitted and damages pro tanto.

[This was an action of debt, against the Bank of the Commonwealth, upon a parcel *of its notes*, amounting to $6350. The defence set up, was, that the Bank was a corporation, created by an act of the General Assembly of Kentucky, in which the state was the sole stockholder, or corporation, and that, as no suit could be maintained against a *sovereign state*, so none could be maintained against a corporation in which a state was the sole stockholder. This plea was overruled by the court; and judgment rendered upon the demurrer, for the debt $6350, with interest from the 22d Sept. 1825.]

The Bank of the Commonwealth of Kentucky, plaintiff in error, v. *John Wister, et. al.* on writ of error to the Circuit Court of the United States for the District of Kentucky. Judgment of said Circuit Court in this cause affirmed with costs.

[This was an action of assumpsit, upon *a deposit*, and the cashier's certificate thereof, made in the Bank, of its own notes, amounting to $7,730 81; the object of the suit being, as in Ashley's case, to recover specie, for the notes deposited. The defence was the same as in Ashley's case, and in like manner overruled; and a verdict and judgment rendered for $8703 in damages. This judgment was afterwards set aside, and a trial granted. Upon which an attempt was made *to seal the debt*, upon the allegation, which was admitted, that the notes, when deposited in the Bank, were worth *only one half the nominal amount*. But the court refused to give the instructions required to maintain this defence, and the second jury found a verdict for $9100; and judgment was rendered accordingly. Which judgment, the Supreme Court affirmed.]

Jurisdiction.—Common Pleas—New York—before Judge Irving. Thomas J. Parmell, v. *Wm. H. Weeman.* This was an action brought to recover damages for an assault and battery committed on the person of the plaintiff, who is a private in the United States army, against the defendant, who is an orderly sergeant in the same service. Mr. Bixley, on the part of the plaintiff, produced several, witnesses, who swore that the defendant struck the plaintiff three or four blows upon the back, with the flat part of a naked sword. The assault was alledged to have been committed on Governor's Island, on the 15th of August, and that there was no just cause or provocation. For the defence, the officers of the company were produced, who testified that no com-

plaint was ever made by the plaintiff, nor did he ever solicit a Court Martial on the defendant. One of the Lieutenants stated that the blows were given on account of the plaintiff not complying with the customary salute on passing an officer. The case here rested, and the counsel left it to the charge of the court.—His Honour stated there was an important question arising out of this suit, and, that was—had the civil courts jurisdiction in the case, both the parties being soldiers in the United States army, and consequently subject to the military law of the country? This was a question of such a serious nature, that he thought the most proper course would be for him, to reserve it for mature deliberation. He would, therefore, merely call upon the jury to pass upon the present, as any other simple case of assault and battery, confining themselves to the merits, without any reference to the law as applicable to the case. His Honour said, that there were no important features in the testimony on either side, and that the whole subject for their consideration was simply the amount of damages, as it was very evident an assault and battery had been committed, by one of the parties in this suit, upon the person of the other. The jury retired for about fifteen minutes, and returned into court with a verdict for the plaintiff, six cents damages, and six cents costs.

Sailing of steam boats—Superior Court, New York—before Mr. Justice Oakely. Walsh, v. *Jenkins and Stevens.* This was an action brought to recover the amount of damages sustained by the plaintiff under the following circumstances: The plaintiff was the owner of the scow Hope, engaged in the lumber trade on the North River, and one of the defendants was the owner and the other a pilot of the steam boat Albany. On the 14th of May last, about 10, A. M. the scow was lying at anchor with a cargo of lumber, in the North River, opposite Stoney Point. The steam boats Independence and Albany, left the wharf in the city of New York, on the 14th of May, at about the same time, and a race immediately commenced between them—the Albany occasionally baffling the Independence by crowding her from her course. They finally, however, came so near to each other before they reached the scow, that the passengers were shaking hands with each other over the respective railing of the steam boats, and in this manner, to the great alarm of some of the passengers, the two steam boats continued for several miles. It appeared that this course of proceeding was usually adopted by slow boats to keep up with fast boats, the suction of the water as it was called by the witnesses, causing the slow boat to keep up with the faster one. In this condition the said boats endeavoured to pass plaintiff's scow, but just when they approached the scow, the Independence changed her head more to the east, which brought

her into her true course, out of which she had been pressed by the Albany; and the Albany endeavouring to vary her position, came in contact with the scow, upset and sunk her. She was afterwards raised and repaired at an expence of one hundred and eighty dollars.

Mr. D. B. Ogden, for the defence, insisted that the injury proceeded from the act of the Independence, and that the plaintiff ought to have sued the owner of that boat, and not the owner of the Albany.

Mr. Anthorn, for the plaintiff, insisted that the proceedings of both boats were unlawful, the statute having imposed a penalty of $250 on all boats coming within twenty yards of each other on the North River, when travelling the same way, and that the owner of the scow, instead of being compelled to sue one in preference to the other, might have joined the owners of both the boats in the same suit, and therefore the objection of the counsel for the defence was untenable.

The court charged that the Albany ought to have stopped her machinery, or to have gone to the east side of the scow, the river affording sufficient room; it was in proof that she might have done either; and that inasmuch as she had placed herself in a situation to do an injury to the plaintiff's scow, the owner of that boat was responsible.

The jury retired, and after an absence of a few minutes, returned into court with a verdict for the plaintiff, damages five hundred and fifty dollars.

Law of Foreign Arrest.—A point of some importance has lately been decided at Brussels—namely, whether a person can be arrested abroad upon a bill of exchange given in England, by the bill being transferred to some person residing in the same realm as the acceptor, or indorser. The facts of the case, by which it will be best explained are these:—

When in England, a Mr. Fowler accepts a bill, for the accommodation of another. From this person Mr. Fisher, an attorney in Walbrook-building, receives the bill, and indorses it to Messrs. Cunliffe & Co. the bankers, who indorse it again to a Mr. Clegg of Antwerp, requesting that he would pass the bill to his Belgian banker, in order to enable an arrest. The bill became due, and payable here, previous to which the Belgian banker sends it back again, so as in due time to be presented and protested. The bill in that state is returned to Brussels, and Mr. Fowler arrested upon it.

Against this arrest Mr. Fowler (after having been overruled in the Court de Premere Instance) appealed to the superior court. The grounds of appeal, and the questions discussed by the court, were—

"1. Whether a court, which has no power to subpœna wit-

nesses from another country to prove or disprove the equities of the bill, could be qualified to give judgment upon it.

"2. Whether the law, which authorises the provisional arrest of foreigners, embraced the case of debt contracted between foreigners in a foreign country, or whether it was not merely intended to give natives a summary recourse against foreigners, who had incurred debts with them on the spot; or,

"3. Whether, after all the mere allegation of a native, that he was the holder of a foreign engagement *bona fide*, was sufficient ground of arrest?"

Upon all these grounds the Superior Court decided against the power of arrest—a decision which will settle a point of some consequence, not only to commercial men, but many others.

English Paper.

Imprisonment of Seamen.—It appears from the National Gazette, that in a case lately decided before the District Court of the United States, in Philadelphia, some principles were declared, which may be of practical use to masters of vessels.

Judge Hopkinson said—The practice of imprisoning disobedient and refractory seamen in foreign goals, is one of doubtful legality. It is certainly to be justified only by a strong case of necessity; it is not among the ordinary means of discipline put into the hands of the master. I am inclined to think there should be danger in keeping the offender on board, or some great crime committed, when this extreme measure is resorted to; it must be used as one of safety rather than of discipline, and never applied as a punishment for past misconduct. The powers given by law to the master to preserve the discipline of his ship and compel obedience to his authority, are so strong and full, that they can seldom fail of their effect; they should be clearly insufficient before we should allow the exercise of a power which may so easily be made an instrument of cruelty and oppression; and may be so terrible in its consequences. A confinement in an unwholesome jail, in a hot and pestilential climate, may be followed by death or some disabling disease. In this case the libellants were taken from the prison when the vessel sailed on her return, and although one of them was able to do duty, the other was prevented by sickness for the whole voyage. I would rather altogether deny a power, which can be so seldom necessary, than trust it in hands in which it is so likely to be abused and so difficult to be regulated. The master may, without the aid of foreign police officers, and dungeons, which he cannot control, even if kindly disposed in the treatment of his men, take measures of great strength to enforce the discipline of his ship. He may there confine a refractory sailor; he may stop his provisions; he may inflict reasonable personal correction, according to the enormity of the offence and the obstinacy of the offender; and, if he be incorrigibly dis-

obedient and mutinous, he may discharge him; and withal he incurs a forfeiture of his wages. A firm and judicious exercise of these powers can hardly fail of reducing the most perverse to obedience.

Without deciding the general question, whether the master of a vessel, may, in any case, imprison a seaman in the jail of a foreign port, under the control and discipline of a foreign police and its officers, for the mere maintainance of his own authority, I will examine the circumstances of the case under the principles mentioned.

The Judge decided that the circumstances of this case did not warrant the imprisonment of the men; and proceeded:

If the imprisonment in this case was unauthorised, the men cannot be charged with the expenses attending it—especially with their boarding which the master was bound to provide; nor is it just to forfeit their wages, or what is the same thing, charge them with the pay given to another hand. They have been punished for their misconduct by their imprisonment, and it would be to double the punishment, if these penalties were inflicted.

I will take this occasion to notice an error which I fear, has frequently, as in this case, misled our masters of vessels. They seem to believe that they may do any thing, provided they can obtain the consent of the consul to it; which consuls are apt to give on very little consideration. When the master on his return, is called upon to answer for his conduct, he thinks it is enough to produce a consular certificate approving his proceeding, or to say he consulted the consul and acted on his advice.—This is altogether a mistake. It is certainly a very prudent precaution to consult the consul in any difficulty; and if the case were fully and fairly stated to the consul, and his advice faithfully pursued, it would afford a strong protection on the question of malicious or wrongful intention, but it can give no justification or legal sanction to an illegal act, nor deprive those who have been injured by it of their legal rights and remedies.

LAW INTELLIGENCER.

VOL. I. MAY. No. 5.

CASES ADJUDGED IN PENNSYLVANIA.

Reports of cases adjudged in the Supreme Court of Pennsylvania, by Thomas Sergeant and William Rawle, Jun. with a General Index and Table of Cases, vol. 15—Philadelphia: M'Carty & Davis.

THE higher and more independent branches of the judiciary department of the Commonwealth of Pennsylvania, have, for a great number of years, been remarkable for a rare combination of learning, talent and integrity. This fact, in connection with the circumstance, that no inconsiderable number of the cases submitted to their determination have been of a nature extremely interesting and peculiar, has given to the Pennsylvania Reports, a reputation, of which that Commonwealth may be proud, and a value for which the whole country should be grateful. These Reports cover a very considerable space of time. The earliest cases ruled and adjudged by the Courts of that Commonwealth, are contained in the Reports of cases, by A. J. Dallas—the first volume of which was published in the year 1790. The first case, in the volume just mentioned, was adjudged as long since as the September Term of the Supreme Court, in 1754, when William Allen was Chief Justice. This case is succeeded by six others, decided before the same Chief Justice, at the April Term, 1759, but which are very briefly reported. The latter are followed by two cases, more fully reported, as of the April Term, 1760; and these are succeeded by a small number of cases in each year, down to the period of the Revolution, with the exception of the years 1761; '69; '70; '71; '72, and '75. Mr. J. Chew, presided in the Su-

preme Court from 1774, to the dissolution of the colonial government. On the organization of the Courts, under the constitution, (established by the General Convention, elected for that purpose, and held at Philadelphia, in 1776,) Thomas M'Kean, LL. D. was appointed C. Justice of the Supreme Court in 1777. From 1778, there is a regular series of cases decided by that Court, in the first volume of Dallas, down to 1784, when several cases decided by the Court of Common Pleas for Philadelphia county, of which Edward Shippen was President, meet the attention of the reader. Judge Bryan, it seems, was appointed Chief Justice of the Supreme Court, in 1780, and Judge M'Kean re-appointed in 1784. The remaining part of the volume is taken up with the cases decided by the before-mentioned Courts (with the exception of a few cases which came before the High Court of Errors and Appeals) down to the years 1788 and 89—Judge M'Kean continuing Chief Justice of the one, and Judge Shippen, President of the other. The second volume of Dallas' Reports is made up of the cases of the same Courts, together with a considerable number of the cases of the Circuit Court of the United States, for Pennsylvania district; and the decisions of the Supreme Court of the State are brought by the second volume, down to 1797, M'Kean still being Chief Justice. The third volume of the same Reporter is principally made up of cases decided by the Supreme and Circuit Courts of the U. States. It, however, brings the cases adjudged by the Supreme Court of the State down to the year 1799. The cases of the Court of Common Pleas for the fifth Circuit, are embraced from 1791 to 1799, in Addison's Reports. The fourth volume of Dallas' Reports contains cases of the Supreme Court, in '97 and 8, and the cases from September Term, 1798, to 1806, Dec. Term inclusive, besides cases in the Courts of Error, in Pennsylvania, Delaware, &c. On the election of Judge M'Kean, to the office of Governor of the Commonwealth, in 1799, Judge Shippen, who since 1792, had been an Associate Justice of the Supreme Court, was appointed the Chief Justice, which office he retained till 1805, when he resigned. Judge Shippen's decisions are

therefore contained in the "Reports of cases adjudged in the Supreme Court of Pennsylvania, by Horace Binney, from 1799 to 1814," which are in six volumes. The Reports of Judge Yeates, also contain some cases of the Supreme Court, together with some select cases in several of the inferior courts, between the years 1791 and 1808. These are in four volumes. Brown's Reports, in two volumes, are composed chiefly of cases in the Court of Common Pleas, for Philadelphia county, and other inferior courts, which were decided between the years 1806 and 1814. But the Reports of Thomas Sergeant and William Rawle Esqrs. are a regular continuation of the cases of the Supreme Court of Pennsylvania, from the last volume of the Reports of Horace Binney, Esq., that is, from June, 1814. During the period which is embraced by the Reports of Pennsylvania, the office of Chief Justice of the Supreme Court has been held by Judge Allen—Judge Chew—Judge Bryan—Judge M'Kean—Judge Shippen, and Judge Tilghman. A full and exact delineation of the characters and judicial pretensions of these distinguished personages, if it would be appropriate on the present occasion, would too far exceed the limits allowed. A brief and general narration of their qualifications as Judges, it is conceived, however, will not be deemed impertinent; and it will serve to show that the decisions under their administration, and subject to their particular investigation and immediate control, could not have been otherwise than instructing, interesting, and authoritative. The predilection of Judge Allen, for general literature, is strong testimony in itself of his accomplishments in legal literature;—and this presumption is reduced still nearer to certainty, by his decisions, which are preserved in the Reports of Dallas. His attachment to learning and the arts generally, is very fully evidenced by his patronage of Benjamin West, and his co-operation with Benjamin Franklin, in establishing the college at Philadelphia. Judge Chew enjoyed the advantage of a legal education, acquired at the Temple in London, and was conspicuous when on the bench, for the extensiveness of his legal attainments. Judge Bryan, besides a legal education acquired under great advantag-

es, was endowed by nature, with a more than usually sound judgment and vigorous understanding. Judge M'Kean, who held the office of Chief Justice, for a very considerable period, and until he was appointed Governor of the Commonwealth, in 1799, was remarkable for great energy and decision of character—for his veneration for established precedents, and for his skill and success in adapting those precedents to the situation and circumstances of this country. Judge Shippen completed his education at the Temple in London, where he was admitted a barrister;—and such was his reputation on his return to America, that he received the office of Judge of the Admiralty Court of the Province, when only at the age of twenty-four. From 1792, till 1805, when he resigned, he retained the office of Chief Justice of the Supreme Court. In commercial law, he was particularly well versed; and he shew himself no less a master of all that related to judicial practice and process. This Judge, on his resignation, was succeeded by the late venerable Judge Tilghman, who presided in the Supreme Court until his death, which happened on the 30th of April, 1827. The legal studies of Judge Tilghman were commenced in 1772, under the direction of his predecessor, Judge Chew, and were continued with unintermitting industry, until 1783. Few Judges, perhaps, have better understood the philosophy of jurisprudence, and few were ever more conversant with the fundamental principles, or kept more steadily in view the grand land-marks of the common law. In general, his decisions, comparatively speaking, are accompanied with but few references; but, as has been very justly observed, "it is not usual for men of philosophical minds, who arrange the learning of their profession by the aid of general principles, to be distinguished by their recollection of particular facts."[1] From the time that Judge Tilghman took his seat on the Bench, at March Term, 1806, he delivered an opinion in every case but *five*, the arguments in four of which, he was prevented from hearing by indisposition. And in more than two hundred and

[1] Vide Mr. Horace Binney's Eulogium, p. 19.

fifty cases, he either pronounced the judgment of the Court, or his brethren concurred in his opinions and reasons, without a comment.[1] His opinion was never overruled, except in a single instance.[2]

But it is time to bestow some attention on the volume before us. About one half of this volume consists of a general *index* and *table of cases*, to the whole work. It contains, notwithstanding, between forty and fifty cases decided by the Supreme Court, and three or four cases which came before the High Court of Errors, all of which are more or less valuable. The case of Gardner, and another, Administrators, v. Ferriee, p. 28 is a case of some importance. The surety upon a bond, a short time before he died, directed his wife to request the obligee to sue out the bond, as he could get the money then of the principal. Five months after the death of the surety, the wife, not being administratrix, communicated this message to the obligee, who offered her the bond, to bring suit on, which she refused. These circumstances, the Court held, did not discharge the surety; though by delay in bringing the suit, the property of the principal was levied on by another judgment creditor and sold. Chief Justice Tilghman took no part in the judgment, as he was indisposed;—but Gibson, J. who delivered the opinion, remarked, that Courts of Equity had gone to an extreme in favour of sureties, and that he was unwilling, in cases of this sort, to go beyond the rule in *Cope*, v. *Smith*, 8. S. & Rawle, 110—" that the surety shall be exonerated only where the obligee has refused to bring suit, or to suffer the surety to do it in his name, after a positive request and explicit declaration by the surety—that he would otherwise hold himself discharged." In relation to a query which was made, viz:—whether the surety would be discharged, if it should appear that the insolvency of the principal would have prevented the money from being obtained, if suit had been brought when required;—he replied, "surely not." The case of the Commonwealth, v. Shryock, p. 69 also related to the obli-

[1] Ib. p. 14. [2] Ib. p. 22.

gation and release of sureties. It was held, in this case, that if a person entitled to a distributive share of the estate of an intestate, takes the bond of the administrator for the payment of the amount of the share, the surety in the administration bond is discharged to such amount. *Tilghman*, C. J. who delivered the opinion, took occasion to re-iterate the disinclination of the Court to extend the law in favour of sureties further than it had been already carried; though he held himself bound by principles that appeared to be well settled.

In the case of Dougherty, v. Snyder, p. 84, the plaintiff offered to prove by an advocate of Louisiana, stating his knowledge of the Laws of Louisiana, that the wife might legally contract with the husband for such property as she held in her paraphernal right, &c. and that by those laws, she could lend it or let him have the use of it, &c. But the evidence was objected to, on the ground, that it was to prove the laws of a foreign country by parol. The Court were, however, of opinion that the evidence was admissible and relied on the authorities in Mostyn, v. Fabrigas Cowp. 145, Church, v. Hubbard, 2 Cranch, 236, and Livingston, v. Maryland Insurance Company, 6 Cranch. 274. In the same case, it was also ruled, that a voluntary payment by an executor to legatees, without taking a refunding bond, does not excuse him from the charge of *devastavit* at the suit of a creditor: That a wife cannot be a citizen of a State different from that in which her husband's domicil is, so as to sue in the Courts of the United States; and that, in general, a feme covert cannot sue her husband in Pennsylvania; and therefore she has six years after discoverture by his death, within which she may sue his executors, on a valid contract between them.

In the case of Train, v. Fisher, p. 8, the Court recognized the principle—that when there is a limitation of a chattel, by words, which if applied to freeholds of inheritance, would create an estate tail in personal estate, the whole interest vests absolutely in the first taker. And on this principle, it was held, that where the testator directed his executors to sell his real and personal estate, and that the interest of one half of the proceeds should

yearly be paid by his executors to H. N., her heirs and assigns forever, during her natural life; but that in default of the issue of the said H. N., the said moiety of the principal and interest should descend to the next of kin, or heirs at common law, and their heirs, &c.—H. N. took the moiety absolutely. In Davis, v. Havard, p. 165, an award of arbitrators, under a submission at common law, fixing a boundary line between the parties, was adjudged conclusive. (Vid. S. P. in 5 Cowen, 383.)

By the case of Heger's Executors, p. 64, which was an appeal from the *Orphan's Court*, the Court recognize and are governed by the law as administered by Courts of Equity; and they adjudged that where executors purchase the notes of a bank at a discount, and with them pay a debt due by the testator to the bank, the estate shall have the benefit of such discount, and not the executors. "If this (the Court said) had been an answer to a bill in chancery, calling on the executors to discover what they had actually advanced from their own money, to discharge this debt, we cannot hesitate or doubt but the Chancellor would decree, that they should have credit only for that sum." The case of Kuhn, v. Nixon, p 118, shews that the Courts of law in Pennsylvania are in the habit, in particular cases, of affording relief conformably to Courts of Equity; and that equitable principles are to be applied by a jury in the former, under the direction of the Court, in the same manner as legal principles.

It appears somewhat surprising that in a State which has been so long remarkable for the excellence of its law courts, there has never as yet been constituted a distinct tribunal for the administration of justice, according to the settled rules and practice of chancery. Attempts have, however, been made for the establishment of such a tribunal, though they have proved unsuccessful. The inconveniences which generally result from the failure of these attempts, have in a great measure been avoided in Pennsylvania by the assumption on the part of the Supreme Court, of an equitable jurisdiction not naturally belonging to it, and which is considered to be peculiar to a Court of Chancery. It was declared many years since, by Judge M'Kean,

"that equity was a part of the common law of the State," and that the ordinary courts of law were competent to apply its rules under their own forms of proceeding.[1] This work, we have been told, by one of the leading members of the Philadelphia Bar, "was not achieved at the expence of any innovation upon legal forms;" while, at the same time, a large body of equity principles (to borrow the language of the gentleman referred to) "were clothed in the drapery of the law."[2] An action of ejectment, for example, is made an equitable action. That is, whenever chancery would execute a trust, or decree a conveyance, the Courts, with the interposition of a jury, will direct a recovery in the action just mentioned. The Court determine, whether the plaintiff is entitled to relief, and of the extent and mode of it, and the jury are merely to ascertain the facts.

But one of the most interesting cases in this volume, is that of *Bushel, et. al.* v. *Commonwealth Insurance Company*, p. 173, in which the single question was, whether a foreign attachment will lie against a corporation incorporated by the laws of another State, as the act of assembly only granted writs of attachment against foreign "*persons.*" The plaintiffs, it seems, issued a foreign attachment against the Com. Ins. Co. of Boston, Mass. and attached certain property belonging to them, in the hands of R. and L. as garnishees. A rule was obtained on the plaintiffs, to shew their cause of action, and why the attachment should not be dissolved, on the ground that it had been issued against a foreign corporation. Mr. C. J. Tilghman being indisposed and absent, Mr. J. Rogers gave the opinion. He thought that foreign corporations were within the spirit of the act; and could not be persuaded that the Legislature ever intended, that citizens of Pennsylvania, who had the property within their grasp, or a lien upon it, should be deprived of that lien and depend for the payment of their debts, on the laws of a sister State, or a foreign

[1] Vid. Mr. Du Ponceau's Eulogium on Judge Tilghman, delivered before the Am. Phi. Society, p. 32.

[2] Vid. Mr. Horace Binney's Eulogium, upon Judge Tilghman, delivered before the gentlemen of the Bar, in Philadelphia.

government. If it were a case of doubtful construction, he thought the argument *ab inconvenienti* would be exceedingly strong, and would go far with him, in the determination of the case. Mr. J. Duncan, however, it seems, dissented, from the above opinion, and did not view the question as one of so much magnitude as had been represented, or consider that such serious mischiefs would arise from deciding, that the effects of a corporation created by a sister State cannot be attached. As to the argument *ab inconvenienti*—he remarked "Inconvenient it may be to the party entering into a contract with a foreign corporation to be obliged to apply to the forum of another State for justice; but the man who contracts with a foreign corporation takes his risk of that, and judges for himself whether that inconvenience is, or is not, counter-balanced by the lesser premium, and contracts accordingly, as in his judgment, the scales of advantage or inconvenience preponderate." But he mentioned this "not because he thought courts ought to be governed by considerations of this kind, where a law is plain and the uniform construction has prevailed for more than a century." As to whether a corporation was a "*person*" within the meaning of the act relative to foreign attachment, he observed that, in his humble judgment, there was a demonstration in the act itself, that natural persons were alone intended and alone comprehended. The legislature, he said, intended to give to all debtors whom they subjected to foreign attachment the right to dissolve it on entering *special bail*, which corporations could not give, because it would not be taken: That the debtor corporation was not such an entity as could enter special bail: That it could not be arrested, because invisible: That it could not be delivered in bail, because, it could not be in custody, or surrendered: He also placed much stress upon the case of *M'Quin* v. *The Middletown Manufacturing Co.* in New-York, (16 Johns. Rep. 6,) in which it was held, that the legislature of New-York, in a similar enactment contemplated the case of a liability to arrest.

The case last above mentioned reminds us of a discrepancy of opinion in respect to the term "*children*" as used in statutes

of descent and distribution. The statute of descent and distribution in Connecticut gives the estate to the "*children*" of the intestate. It was held in a case before the Sup. Court of Errors in that State, *Heath* v. *White* reported in the 5 vol. of Conn. Rep. p. 228, that by virtue of this word, which is substituted for "*lawful issue*" an illegitimate child is capable of inheriting real estate from the mother. Mr. *C. J. Hosmer*, who gave the opinion of the Court, said, that was he to be governed by the source from which the above mentioned statue derived its origin, and from the reprobation of the English law of descents; he should hence deduce an argument in favor of the customary meaning of the word "*children.*" But he placed no stress upon that ground. He admitted also, that upon principles of policy, to secure domestic tranquillity and to discourage illicit commerce between the sexes, the law inhibiting a bastard from inheriting was originally introduced. But he was not prepared, he said, to march abreast of the plain words of the law, and he concurred with the late Ch. J. Swift—that where the meaning of a statute is plain and evident it must be construed according to the words; and it never could be admitted to give a construction to the statute different from the import of the words, from a conjecture that the legislature had a different meaning. It was settled, he said, nearly 30 years since in *Brown* v. *Dye* 2 Root 280, that natural children by the same mother are heirs to each other. And on the whole, he adhered to the plain meaning of the words of the statute, confirmed by a determination in point, and could not admit any influence on his opinion from the common law of England; nor from any arguments of political expediency, as furnishing a better ground for the legislature to recur to, than for those whose province it is—*jus dicere non dare.* But from this construction of the learned judge, Bristol J. dissented; and it was rejected also by the Sup. Co. of Massachusetts in the case of *Cooley* et al. v. *Dewey* et al. 4 Pick. 93. The statute of descent in Massachusetts, in providing for a descent to an intestate's mother, like the beforementioned statute of Connecticut, makes no distinction between legitimate and illegitimate "*children;*" and yet the court

held, that the mother of the latter cannot inherit their estate. Mr. Ch. J. Parker, who gave the opinion of the court, expressed his respect for the opinion of the Sup. Court of Connecticut, but was not able to adopt the opinion, that the legislature of Massachusetts, in using the same term, intended to apply the term to those, who, by the common law were not deemed children, in a relative sense to parents. It was intimated, he said, in the case referred to, that the legislature of Connecticut probably intended to adopt the principle of the civil law; but he was satisfied, that such was not the intention of the legislature of Massachusetts. And, it might be remarked, that in the statute of *Charles*, the word *children* is used as in the Connecticut and Massachusetts statutes, but that illegitimate children do not in England inherit, or participate in the distribution.

These cases bring to recollection the observation of Lord Coke,—"that in his time he never knew two questions made upon rights merely depending upon the common law;" and the same learned and experienced judge feelingly laments the confusion introduced by injudicious and unlearned legislators. The numerous questions which have arisen, and the different manner in which many of them have been determined, as to the intent and meaning of legislative enactments, it is apprehended however, are not invariably to be accounted for, on the ground alluded to by Lord Coke. For there are statutes which have been framed by those most skilled in the science of law, and which are the result of the fullest deliberation, that have long afforded a fruitful source of controversy; as for example, the statute of *frauds* and the statute of *limitations*. The evil must therefore be considered in some measure incurable, and one which will always, in spite of every caution, to a certain degree exist, as an evidence of the imperfection of every thing which is the invention and work of man. There is, notwithstanding, one general rule as to the exposition of statutes in which all seem to agree—and that is, the intention of the lawgiver is to be deduced from a view of the whole, and of every part of a statute taken and compared together; and that the real

intention, when accurately ascertained will always prevail over the literal sense of the terms. When the words are not explicit, (says the learned commentator on American Law vol. 1. p. 432, and who cites Plowden's R. p. 205) "the intention is to be collected from the *occasion* and *necessity* of the law, from the *mischief* felt, and the *remedy* in view; and the intention is to be taken and presumed, according to what is consonant to reason and good discretion." In this country, where there exist so many distinct and independent judicial tribunals, it is to be expected, that a rule thus general and indefinite, should be differently applied; and accordingly it appears, that in different states, which have similar statutes, there has been a difference of interpretation given to those statutes.

PRESUMED DEDICATION OF ROADS AND STREETS TO THE PUBLIC.

THE evidence requisite to establish public highways, is of two kinds, 1st—*direct*, as by shewing that the highway has been constituted a public one, by competent authority; and 2dly, *presumptive*; as by evidence of an acquiescence in the owner of the soil of the use of a highway, which is of public convenience, by the public. Whether, in the latter case, *time* be necessary to create a presumption of the dedication of a road, or street to the public, is a point on which there has not been an universal concurrence of opinion. Mr. J. Chambre maintained the negative proposition, and said that no particular time was necessary for such purpose; and that a dedication was not, like a grant, presumed from length of time. But that, if the act of dedication was *unequivocal*, it might take place immediately; and in support of this opinion, gives the following instance: Where a man builds a double row of houses, with a street between, opening at each end, into an ancient public highway, and sells or lets the

houses. In such case, he thought, the street became a highway *instantly*. (5 Taunt. 137.) In the case put by the learned Judge, he seems to have applied the well known principle in relation to personal property—viz. that possession is lost with the consent of the possessor, when he does some act which manifests his intention of abandoning possession, as when a person throws into the street furniture or clothes, of which he no longer chooses to make use. The instance he puts, is, however, a very extreme case, the strongest perhaps, which could be offered in support of his opinion. In relation to this opinion, it has been very judiciously observed—"Before the supposed street were finished, the question of dedication clearly could not arise; for although a way would be requisite, while the houses were building, for the purpose of conveying materials, it would not be necessary, in order to exclude the public, that such way should be inclosed. (Ib.) If so, surely the lapse of a few days, or of a few weeks after the completion of the street, before the erection of a gate at one, or each end of it, could not amount to decisive evidence of a dedication, or prevent the owner of the soil from confining the general use of the road (as might always have been his intention) to the accommodation of the particular householders." (Mathews on Presump. Ev. p. 318.)

The position advanced by Mr. J. Chambre is partially supported by a case reported in 2 Strange, p. 1004, upon a trial of an action of trespass, in which it appeared, that the place, where the supposed trespass was committed, was formerly the property of the plaintiff, who some years before built a street upon it, which had ever since been used as a highway. That the defendant had land contiguous, and parted only by a ditch—that he had laid a bridge over the ditch, the end of which rested on the highway. For the defendant it was insisted, that by the plaintiff's making it a street, it was a dedication of it to the public; and therefore, however the defendant might be liable to an indictment, yet the plaintiff could not sue him as for a trespass to private property. The Court said it was certainly a dedication to the public, so far as the public had occasion for it, for a

right of passage, but it never was understood to be a transfer of the absolute property in the soil. A similar opinion was advanced at *Nisi Prius*, by Lord Ellenborough, in *Rex* v. *Loyd*, 1 Camp. p. 260, which was an indictment for obstructing a highway. It appeared, that the place in question was a narrow passage lying on the north side of Snow Hill, in the city of London, called "Cock Court;" and being of an oblong shape, led from one part of this street to another, without having any outlet elsewhere. The houses about it, once belonged to the same individual; and the defendant, having purchased those at the top of the Court, built a wall across there, intercepting all communication between the two sides, unless by way of Snow Hill. Till then, the passage had been open as far back as could be remembered; and though it could, in general, be of no use to those walking up and down Snow Hill, the route being circuitous, yet it was a public convenience when the street was blocked up by a crowd. The passage had been long lighted by the city of London, and there had never been any chain across it, or any mark to denote it's being private property. Lord Ellenborough thought, that if places are lighted by public bodies, this is strong evidence of the public having a right of way over them; and to say, that this right cannot exist because a particular place does not lead conveniently from one street to another, would go to extinguish all highways, where there is no thoroughfare. "*If the owner of the soil* (he said) *throws open a passage, and neither marks by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it, by positive prohibitation, he shall be presumed to have dedicated it to the public.*"

Time, however, in every instance, where the question has come directly before the Courts, has been considered an important feature in the case. Indeed, it is certain, that other Judges have viewed the subject in a very different light, from Mr. J. Chambre; and it may confidently be laid down, that whenever a public right of way in a road or street, is claimed on the ground of a presumptive dedication, it is essential, in order to establish such presumption, that the owner of the soil has for

some period, submitted to the general usage. (Mathews on Presump. Ev. 318.) But what precise time may be considered demonstrative of the land owner's acquiescence has not yet been determined. Although the lapse of twenty years may not be necessary, yet the incompetency of a lapse of two, or three years has been expressly decided. Thus, in *Rex.* v. *Hudson*, Strange 909, which was an information in 5 Geo. 2 for stopping up a common footway: the defendant produced a lease made for 56 years, of the way, to the intent it might be a passage during the term; and the term expired in 1728. Raymond. Ch. J. held the defendant not guilty, and as to the leaving the way open since, he said, that would not be long enough to amount to a gift of it to the public. In one case *six* years, (vid. the case alluded in the note 11 East 376 n.) and in another, before Lord Kenyon, where the user began during the existence of a lease which had since expired, *eight* years were held sufficient. (*Rugby Charity* v. *Merryweather* in the note 11 East 376.) But Lord Kenyon's opinion has not received the general approbation of the later judges. If, said Lord Ch. J. Mansfield, "eight, or six years be enough to shew a relinquishment to the public, why may not one? Why may not half a year? It would then be necessary for every reversioner, he said, coming into possession of his estate after a lease, *instantly* to put up fences all around to prevent dedications." (*Woodyer* v. *Hadden* 5 Taunt. 142.) In the case of *Wood* v. *Veal* 5 B. and A. 454, Holroyd J. thought that the above opinion of Lord Kenyon "was somewhat shaken by the observations of Lord Ch. J. Mansfield in *Woodyer* v. *Hadden*." And in the same case, Best J. observed, "no man has a greater respect for the learned Judge who decided the case of the Rugby Charity, than I have, but I think that decision was a departure from principles usually received in the law."— Every case of this sort, it is probable, would be determined by its own circumstances; and as in the case put by Mr. J. Chambre, where an intention to dedicate is plainly signified from the outset, a submission to the public usage for six or eight years, or

possibly for a less period, would preclude the owner of the land from re-asserting his right.

But under whatever circumstances a street begins to be publicly used, the unmolested enjoyment of it for the time limited by the statute of limitations, with a knowledge of the owner of the inheritance, must be deemed conclusive evidence of a dedication. (*Gelatian* v. *Gardner* 7 Johns. 106.) For the general principle being admitted, that acquiescence for *some* period of time will establish the public right, it follows, by analogy to decisions concerning *private* rights of way, that twenty years will operate to establish that of the public. And the Sup. Court of the state of Vermont have lately decided to that effect. The period prescribed in that State, for the right of entry upon lands, is *fifteen* years. The case referred to related to the *green square* in the village of St. Albans, which was not laid out by public authority, or conveyed by deed, but was dedicated about 35 years before by the *then* proprietor of the land. It was cleared up and levelled by the inhabitants, and has been constantly used as a public square ever since. Recently, the grantee of the proprietor, asserted a claim to it; and an individual, under him, placed a building on the square. An indictment at common law, for a nuisance to a common highway, was found by the Grand Jury: the verdict of guilty rendered by the petit Jury: and the questions of law reserved to be settled by the Supreme Court. The Supreme Court decided, that in order to constitute a public highway, it was not necessary that it should have been surveyed, laid out, and recorded, &c. agreeably to the statute; but that a highway might be created by a simple dedication of the land to the public use by the proprietor, or owner, and the reception of it by the public; that fifteen years use, was sufficient evidence of the dedication, and acceptance; that therefore, the public would acquire a right to use it as a highway, which could be enforced against even the proprietor; and that for any obstruction to it, an indictment lay at common law.[1]

[1] Vid. The St. Albans' Repertory, of January 22, 1829.

WHETHER FRAUD IS A SUFFICIENT ANSWER, IN AN ACTION AT LAW, TO A PLEA OF THE STATUTE OF LIMITATIONS.

The very important question whether *fraud* committed under such circumstances, as to conceal a knowledge of it (and thus prevent a plaintiff's assertion of his right within the time limited by the statute of limitations,) be a sufficient answer to a plea of that statute in a court of law, is a question which has been the occasion of conflicting decisions. In Great Britain there is clearly a marked and manifest distinction between a plea of the statute of limitations in a court of law, and in a court of equity. The effect of such a plea in a court of equity is well given by Lord *Redesdale*. Although the statute, he says, does not, in terms, apply to suits in equity, it has been adopted there, as a rule prescribed by the legislature. And the reason he offers, why, if the fraud has been concealed by the one party, until it has been discovered by the other, within six years before the commencement of his suit, it shall not operate as a bar, is this: *that the statute ought not in conscience to run; the conscience of the party being so affected, that he ought not to be allowed to avail himself of the length of time.*[1] Indeed, it may be considered as a well settled maxim, in equity, that no length of time is a bar, in cases of fraud. The only instance, however, afforded by the English books, in support of this position, in a court of *common law*, is where the replication, after setting forth the means by which the plaintiff, had been defrauded, went on to state, that the plaintiff, at the time of the assignment, and of paying the money, was ignorant of the falsehood of the assertions, and of the fraud so practised upon him, and did not discover them, until within the space of six years next before suing out of the writ. Lord Mansfield was of opinion, that the replication had charged no fraud on the defendant, but said, "*there may be cases, which fraud will take out of the statute of limitations.*"[2] This *dictum* of Lord *Mansfield*, was considered by Mr.

[1] Hoveden v. Lord Annesley, 2 Sch. & Lef. 634. and vid. Kane v. Bloodgood, 7 Johns. Ch. Rep. 90. Coster v. Murray, 5 Johns. Ch. Rep. 522.

[2] Bree v. Holbeck, Doug. 654.

J. Spencer, in an important case in the State of *New-York*,[1] as the only instance, in which, such a position was ever advanced in *Westminster Hall*, and he thought, that as his Lordship had an inclination to intrench on courts of equity, that mere *dictum* could not be regarded *as authority*. It is stated, however, in a late English treatise on the law of contracts, (Chit. on Con. 313,) that it appears not to be settled, whether fraud in the defendant prevents, or suspends, the operation of the statute upon a pecuniary demand, arising against him upon such fraud. But, the same author in continuation says, there would probably be *much difficulty* at law, in setting up, even an undiscovered fraud, of which the defendant was conusant, as an excuse for not suing for a debt within six years.

It has, at any rate, been expressly decided, in this country, by courts of law, that where there is fraud, the statute does not operate, until the party is conscious of it.[2] Thus, in the Supreme Court of *Massachusetts*, a question arose on a replication which showed the impracticability, if not impossibility of discovering the fraud. The replication stated, that the defendant fraudulently and deceitfully concealed the bad foundation of *a road* he had engaged to make, the unsuitable materials, and the work unfaithfully executed, by covering the same with earth, and smoothing the surface, so that it appeared to the plaintiffs, that the contract had been faithfully executed. *Parsons*, C. J. held, that the replication must disclose a fraudulent transaction in the defendants, by which the time when the cause of action accrued, must have been fraudulently concealed from the knowledge of the plaintiff, until a period within six years before the action was commenced. And, that, where the delay in bringing the suit is owing to the fraud of the defendant, the cause of action against him ought not to be considered as having accrued, until the plaintiff could obtain a knowledge that he had a cause of action; and that if this knowledge is concealed from him by the defendant fraudulently, the court would violate a sacred rule of law, if they permitted

[1] Troup v. Smith, 20 Johns. 33.

[2] Jones v. Conoway, 4 Yeates, 109. Massachusetts Turnpike Company v. Field, 3 Mass. Rep. 201. Homer v. Fish, 1 Pick. 435. Wells v. Fish, 6 Pick. 74.

the defendant to avail himself of his own fraud.[1] The only cases referred to by C. J. *Parsons* are the before mentioned authority of Lord Mansfield, *Bree v. Holbeck*, and the *South Sea Company v. Wymonsdell.*[2] The Supreme Court of the State of *New-York*, discarded entirely the above doctrine. And *Spencer* C. J. while he admitted it to be sound in equity, thought that courts of law are expressly bound by the statute: That the statute related to specified actions, and declares that such actions shall be commenced and sued within six years next after the cause of such actions accrue, and not after,—thus, not only affirmatively declaring, that within that time, these actions are to be brought, but inhibiting their being brought after that period. He knew, he said, of no dispensing power, which courts of law possess, arising from any cause whatever, and it seemed to him, that where the legislature in the same statute, gives an extension of time in case of reversal of judgment, in cases of infancy, coverture of the feme, &c. that it would be an assumption of legislative authority to introduce any other proviso. The plaintiff's case, he said, might be a very hard one, but that afforded no reason for construing away a statute of great public benefit, and which, in many cases, is a shield against antiquated and stale demands.[3] The same doctrine is adhered to in *North Carolina and Virginia*, where the remedy in cases of fraud, &c. is confined to courts of Chancery.[4] But at the October term of the Circuit Court for the District of *New Hampshire*, 1828, Sherwood v. Sutton,[5] before Mr. J. *Story*, in an action on the case for deceitful representation in a sale, the statute of limitations was pleaded in bar. The plaintiff replied that there was a fraudulent concealment of the deceit until within six years. It was held, that the replication

[1] Massachusetts Turnpike Company v. Field 3 Mass. Rep. 201.

[2] 3 P. Wms. 143. The Supreme Court of the State of Maine have also recognized indirectly the same doctrine. Thus, they have decided, that where money has been paid more than six years for a consideration recently discovered to be of no value, and *no fraud is imputable*, the statute is a good bar. Bishop v. Little, 3 Greenleaf, 405.

[3] Troup v. Smith, 20 Johns. 33.

[4] Hamilton v. Sheppard, 2 Murphey, 115. Callis v. Waddy, 2 Munf. 511.

[5] Not yet reported.

was a good answer to the plea. The opinion of the learned judge, was founded on the ground, that in England there is a uniform course of equity decisions in favor of the doctrine, and no inconsiderable weight of common law authority in the same direction, and none, not even a dictum against it; that in America, courts of law in at least four States, have adopted it; that if a different rule be proper in States having a general equity jurisprudence, the same rigid construction ought not to apply to the other States, where it is excluded; and that in the State courts which are governed by a legal jurisprudence, most consonant with and influencing that of New-Hampshire, it has been established in the most solemn manner.

THE NEW LAW SCHOOL IN DEDHAM, MASS.

It will doubtless be recollected, that Theron Metcalf, Esq. of Dedham, Massachusetts, announced, several months since, his plan of opening a law school in that town. This plan has since been carried into effect. His course of lectures commenced on the first day of October last. It is gratifying to learn, that the prospects of this new institution are highly satisfactory. Mr. Metcalf, we understand, is desirous that the pupil, before he comes to him, should have an acquaintance with the standard writers on moral philosophy, and also some knowledge of natural law and the law of nations. The plan which this gentleman has adopted in his instruction is not so much to go over a great deal of ground, and give an acquaintance with a variety of subjects, as it is to bring his pupils to a very careful analysis and thorough understanding of a few of the most important subjects, and then teach them how to investigate all other legal topics as they advance in their professional studies, whether under other instructions, or alone, after their admission to the bar. Mr. Metcalf is one of those lawyers whom "*Juvat accedere fontes*," and he, accordingly, requires of his pupils a careful and even skeptical perusal of the *reported cases* referred to in his lectures;

expecting them to master these cases between the lectures. If they find time for other reading, he advises them how to employ it. Another thing required, is, the frequent discussion of questions put into the form of *real life*, at the bar—questions connected with the subject of a preceding lecture, and of Mr. M's own suggestion or selection. In the course of instruction adopted, Coke upon Littleton and the doctrines of the feudal system are discarded from the pupil's notice for the first two years.—The lectures commence with the subject of *contracts*, for this reason, that the law of contracts is principally founded on the basis of ethics and general law. It should not however be inferred that Mr. Metcalf entertains a disrespect for *ancient* law, for, we may venture to say, there is no lawyer in our country, who has explored the recesses of legal antiquity more thoroughly, or who has attached more importance to Glanville, Fleta, the Year Books &c. than that gentleman. But when he assumes the office of conducting the inexperienced student to a competent knowledge of jurisprudence, he judiciously avoids the danger of discouraging him in the outset, by the perplexing and complicated doctrines of tenures and estates; to comprehend which, the student is too often obliged to have recourse, in the words of Lord Coke, "*to some other time*, and *some other place*."

The manner in which Mr. Metcalf lectures on the subject of contracts is as follows: Beginning with *simple contracts*, he treats at large of every part of the extended definition of a contract, as given by Mr. Chitty Jun. viz: "a mutual assent of two or more persons, competent to contract, founded on a sufficient and legal motive, inducement, or consideration to perform some legal act, or omit to do any thing, the performance whereof is not enjoined by law" (vid. Chitty on contracts p. 3.) As to the requisite of *mutual assent*—he undertakes to shew that the assent must be *free* as well as mutual; and discusses in relation to the same point the law of *duress* and also the law as it regards *mistake*, or what the civilians call *error in re*, shewing the distinction between the civil and common law in the application of the principle. He then proceeds to shew, that the *assent* must be

fairly obtained, referring to the *fraud* which will annul the contract. The *parties* competent to contract are made the next subject for consideration; and here, the incapacity of *idiots, lunatics, drunken persons, slaves, infants, femes covert, outlaws,* and *persons attainted* receive a due share of attention. The doctrine as regards *infants* Mr. Metcalf investigates very minutely. *Outlaws* and *persons attainted* are considered in reference to the provision of the constitution of the United States as to attainder. The law as to *agents, attornies, partners, guardians, corporations, administrators, &c.* is the next subject of attention. Then comes the subject of *consideration,* which Mr. Metcalf treats with great particularity. In considering "the thing to be done or omitted," the doctrine of *illegal* contracts is very fully investigated, more especially, of those contracts which are collateral to those that are confessedly illegal. Then comes the *interpretation* of contracts, and their *obligation* under the Constitution of the United States. The distinction between *simple* and *speciality* contracts in relation to the abovementioned points is regularly noticed. Then the different kinds of simple contracts, as *bailments, sales* &c. &c. receive attention. Next, the *remedies* for breach of simple contracts, with the rules of *pleading* and *evidence* are carefully stated; and next, the remedies &c. for a breach of *specialty contracts. Pleading,* it is intended, shall be treated of with great thoroughness.

It is not our design in giving this notice to eulogize the gentleman who has assumed the important duty abovementioned.—We shall nevertheless hazard the assertion, that the strictest inquiry can result in nothing short of the most complete conviction of his ability and qualifications.

The Supreme Court, and Court of Common Pleas of Massachusetts each sit four weeks in Dedham, which affords a great advantage to the law students. For beauty of situation and salubrity of air, that town is surpassed by few, if any, in this country. Its vicinity to Boston and Cambridge (the distance being only about ten miles) will doubtless be considered as another advantage. The terms of instruction are One Hundred

Dollars per annum, and *pro rata* for a less period. *Two dollars* and *fifty cents* per week will obtain unexceptionable board and lodging.

EFFECT OF THE CONFESSIONS OF A PRISONER

UNDER A HOPE OF PARDON.

[FROM A LATE ENGLISH PAPER.]

The case, which was tried at the last assizes at Taunton, before Mr. Justice Littledale, now came on for argument before the twelve judges, upon the point of law reserved by the learned judge. The prisoner was indicted for the wilful murder of Maria Bagnell, his fellow servant, at the house of a lady of the name of Cox, residing at Bath. On being apprehended, he denied being concerned in the murder, and endeavored to make it appear that the deed had been perpetrated by thieves, who had broken into the house. A day or two after his apprehension, and while he was laboring under the greatest depression of mind, the chaplain of the gaol, whom he sent for, so strongly excited his feelings by representations of the inefficacy of all religious services unless he made a full confession of his crime, that the prisoner was induced to confess his guilt, which he had previously denied in the most positive manner, both to the chaplain and gaoler, by the latter of whom the confession was given in evidence against him on his trial. Previous to its being received, Mr. Serjeant Bompas and Mr. Moody (the prisoner's counsel) objected to it as inadmissible; but, after considerable discussion, the learned Judge received it, reserving the question of its inadmissibility for the opinion of the twelve judges. The prisoner was convicted, and received sentence, but his execution had been respited until the decision of the judges should be known. Their Lordships now assembled to hear the arguments of counsel upon the point submitted for their consideration.

Moody appeared as counsel for the prisoner, and commenced his address to their lordships by reading a portion of the evidence given on the trial. It appeared that when the chaplain first visited the prisoner, he found him in a perturbed state of mind, with the Bible, Prayer-book, and Whole Duty of Man before him. The prisoner requested the chaplain to read and

pray to him, saying that he was unable to do so himself. The chaplain then entered into conversation with him, and read to him the Communion Service, commenting upon it as he proceeded. He then, in a very impressive manner, exhorted the prisoner, if he had any weight of sin pressing upon his mind, to make confession of it, telling him that unless he did so, no religious consolation could be afforded him. The reverend gentleman also explained to him the nature and qualities of repentance, and recommended him, if he was guilty of the crime of murder, to avail himself of the promises of Scripture by making a full disclosure. The gaoler, it seemed, had previously told the prisoner that he believed him to be the murderer; and the chaplain also, at one part of the interviews, communicated his suspicions to the same effect, and repeated, that while the prisoner concealed his guilt, no religious advice could afford him any real comfort. The prisoner became greatly agitated, and the chaplain thinking he was about to make a confession, proposed sending for the gaoler to receive it. The prisoner did not, however, make the disclosure on that occasion; but after a second interview with the chaplain, (having become very much affected by his discourse,) he made a full confession to the gaoler, who, as stated above, deposed to it on the trial. The chaplain, who was also examined as a witness, stated, that he did not tell the prisoner that if he made a confession, it would be better for him in this world, but only that it would be better for him before God. The gaoler stated, that he cautioned the prisoner before making the confession, and recommended him not to disclose any thing unless it was what he wished the mayor and magistrates to be made acquainted with; for every thing he said would be communicated to them. A subsequent confession was made before the mayor of Bath, after a formal caution to the prisoner to avoid making it if he wished to avert the consequence of its being used against him. This second confession was reduced to writing, and given in evidence on the trial. The prisoner afterwards made other confessions to the constables, who also deposed to them at the trial. The learned counsel having read the evidence disclosing the facts as stated above, proceeded to argue, that the conviction was illegal, having been founded on evidence that could not be legally received. It was an admitted rule of law, that no evidence could be received against a prisoner, unless it had been made voluntarily, uninfluenced by threats or promises, or hopes or fears. In the present case, the prisoner had asserted his innocence, so long as he had retained his self-possession, and had not made the confession that was given in evidence against him until he had been practised upon by the chaplain, who had worked both upon his spir-

itual and his temporal hopes and fears. It was clear that the chaplain, acting perhaps with the best motives, had lent the influence of his sacred character in aid of the police, with whom he was in constant communication. The learned counsel then proceeded to comment upon the facts contained in the evidence of the chaplain, showing the efforts he had used, during two successive days to bring the prisoner's mind into a state to confess his guilt. He had positively asserted his innocence until, suffering under the extreme of depression and agitation, his feelings had been worked upon, and then he was induced, under the belief of bettering his condition in this world, to make the confession he had done. The learned counsel then cited several cases from Burn's Justice (where, he said, all the important decisions upon the subject were collected) to show that a confession made under such circumstances was not admissible evidence. In the case of Rex *v.* Sarah Neate, who had been convicted of arson, on confession made, first to her mistress, whose house she had burned, and who told her that if she confessed, God would forgive her, but did not tell her she herself would not forgive her, and also had the next day made the same confession, to a person who told her that her mistress had declared to him that she had confessed having burned the house, the twelve judges, after a solemn argument, decided that the prisoner's mistress, when she told her, that if she confessed, God would forgive her; having concealed from her that she herself would not forgive her, the confession was not voluntary, and could not be received in evidence against the prisoner, and as the second confession was the consequence of the first, that was also inadmissible. In the case of Rex *v* Sexton, (for Burglary) which was tried before the present Chief Justice of the Common Pleas, at Norwich, evidence was given by the constable who had the prisoner in custody, that the prisoner said, "If you will give me a glass of gin, I'll tell you all about it." Two glasses of gin were given him, and he made the confession which was tendered in evidence, but the learned judge refused to receive it, as not being made voluntarily, and observed that officers ought not to be allowed to tamper with prisoners for the purpose of extorting confessions from them. In the case of Rex *v.* Retford, (for murder) which was tried at the Devon assizes for 1823, the same learned judge directed an acquittal under circumstances very similar to the present. In that case it appeared that the clergyman had gone to the prisoner, who was in custody at a public house, and without giving him any caution that his confession, if he made any, would be used against him on his trial, obtained from him a confession, after having dwelt upon the heinousness of the crime and the denunciations of Scripture

against it. The learned Judge in that case said, the prisoner had been thrown off his guard, having considered his spiritual adviser his confidential friend, and therefore the confession could not be given in evidence against the prisoner. In the present case the confession had been made under a hope of the prisoner's of obtaining some immediate temporal and spiritual consolation, after he had been tormented by religious pains and terrors. The learned counsel repeated his observation, that the chaplain had exceeded his duty in this case. He had perverted the influence which his sacred office gave him over the mind of the prisoner, and had extorted from him the confession by exciting his hopes and fears. The chaplain had, in fact, made himself the tool of the police, who, finding that the charge could not be established against the prisoner without his own confession, employed the chaplain to practise upon the prisoner in that way, which no other person had the opportunity of doing.

Lord Tenterden said he saw no ground whatever for imputing to the chaplain that he had improperly lent himself to the purposes of the magistrates. He had gone to the prisoner at his own desire.

Moody said, he was aware that the prisoner had expressed a wish to have the chaplain sent for, but it appeared that before he went to the prisoner, the chaplain had an interview with the mayor, whom he also saw after his first interview with the prisoner; and the inference to be drawn from that circumstance was, that the chaplain was acting as the immediate agent of the police, and assisting in their purposes. It was, he contended, impossible that the conviction could be held legal upon evidence of a confession obtained under such circumstances as the one in question had been. The prisoner had been led to believe that an open confession was essential to absolution; and thus had a false impression been created on his mind. He had been worked into a state of religious terror, and thought that unless he made a confession he should be entirely deprived of comfort or consolation in this world. Their Lordships had no idea of the impressive manner of the chaplain, and how much it was calculated to influence the mind of a person in the situation of the prisoner. Those only who heard him give his evidence on the trial could imagine the effect of his exhortations and admonitions to the prisoner. The impressiveness of his manner was felt by every one in court, and by none more than by the learned judge. *Littledale J.*—His manner was certainly very impressive. The Learned Counsel then proceeded to make some further general obervations, and referred to a case in 1. Haggard, in which Lord Stowell had declared, that confessions of prisoners was a species of evidence, which ought to be

regarded with distrust as being likely to be received in evidence against him. It would have the effect of altogether depriving prisoners of spiritual assistance; for it would go forth to all the gaols in the kingdom, that if any of their unhappy inmates, with the painful feelings that became their situation, were to accept of the pious services of the clergyman, the probable consequence would be, that he would work so on their religious feelings, and the agonized state of their minds, as to induce them to make a confession which would afterwards be given in evidence against them. With such an impression they would abandon all idea of having any communication with the clergyman, whose sacred character, too, would suffer materially by the opinion which would then prevail, that they took advantage of the religious distresses of prisoners, and exerted the influence which their spiritual office gave them, to procure confessions of guilt for the purpose of securing the prisoner's conviction. At present the prevalent opinion in gaols was, that the chaplain never interfered with the temporal concerns of the prisoners unless at their own request, and the prisoners therefore reposed confidence in their spiritual advisers; but if once they should be imbued with an impression that the clergyman comes to them, not to administer religious consolation, but to induce them, by the exercise of spiritual influence, to make a confession of their crimes before trial, in order to use those confessions against them, they would henceforth consider that sending for the clergyman, was the same thing as delivering themselves up to the executioner; and those who stood most in need of religious consolation would be then totally deprived of its blessings. Such a consequence as this would be a greater evil than allowing a prisoner to escape from the hands of justice. At the conclusion of the learned counsel's argument, which occupied nearly three hours, their lordships adjourned the further consideration of the case. [*To be continued.*]

JUDICIARY INTELLIGENCE.

Supreme Court of Maine.—The fifth volume of the Reports of Cases adjudged in the Supreme Court of Maine, is now preparing for publication by Mr. Greenleaf, and is already in press.

Supreme Court of Massachusetts.—After a laborious term in Boston for several weeks, it being the regular term for hearing

and deciding law questions, this court, on Monday, fifth April, adjourned until Tuesday, the ninth day of June next, when some interesting and important cases are to be heard.

The Reports of Cases adjudged in this Court have lately been published in No. 1, of the sixth volume of Pickering's Reports.

Supreme Court of the State of Connecticut.—The sixth volume of the cases adjudged in this Court, has lately made its appearance.

Supreme Court of New York.—The volume 1st, of Mr. *Wendell's* Reports, containing the cases adjudged in this Court, has lately been published. Mr. Wendell's predecessor, it will be recollected, was Mr. Cowen, who has been created a Circuit Judge of the state, for the fourth circuit.

Court of Chancery of New York.—Vice Chancellor.—The following bill has been brought into the House of Assembly: An act for the appointment of Vice Chancellor for the first circuit.

The people of the State of New York, represented in Senate and Assembly do enact as follows:

Sec. 1. There shall be an officer of the Court of Chancery who shall reside in the city of New York, and be denominated the Vice Chancellor of the First Circuit.

Sec. 2. He shall be of the degree of Counsellor of the Court of Chancery; shall be appointed in the same manner, and hold this office by the same tenure as the Circuit Judges, and shall receive an annual salary of —— dollars, to be paid quarterly out of the general fund of the State.

Sec. 3. After the thirty first of December next, he shall have and execute the jurisdiction and power, and perform the duties, which by the revised statutes are conferred upon and required to be performed by the Circuit Judge of the first Circuit, as a Vice chancellor of the Court of Chancery—and as to such jurisdiction, powers and duties shall be substituted in the place of the said Circuit Judge. And all the provisions of the Revised Statutes which are applicable to the said Circuit Judge as a vice Chancellor, shall be considered as applying to the Vice Chancellor of the first Circuit, to be appointed under this act.

Sec. 4. Until the third part of the Revised Statutes shall commence and take effect as a law, the Vice Chancellor of the first circuit shall hear and decide such matters and causes in in Equity, pending in the Court of Chancery, as may be referred to him by the Chancellor for that purpose, under such regulations as the Chancellor may prescribe—but all decrees and orders made by him shall be subject to the appellate jurisdiction of the Chancellor.

Supreme Court of the United States.—The Supreme Court ad-

journed on Friday, the 20th March. During the session *fifty-three* causes were disposed of, which left on the docket one hundred and one causes, one week of the term, it will be recollected, was entirely lost, in consequence of the absence of several of the Judges, whose arrival at Washington was, by unavoidable circumstances, delayed. Had it not been for this circumstance, the docket would have been still more reduced.

The decisions of the late term will be published in Philadelphia, in the course of July next.

Circuit Court of the U. S. First Circuit.—The fourth volume of the Reports of the Cases adjudged in this Circuit, before Mr. J. Story, has been for some time in press, and will very soon be published. Mr. Mason is still the Reporter.

LATE AND IMPORTANT DECISIONS.

Aquatic Rights. At the Yorkshire Summer Assizes, in August last, in the case of *Burbeary* vs. *Greaves*, the plaintiff contended he had a right to have the water of a rivulet come to his land; and complained that the defendant had wrongfully prevented the water from coming to his land, and that thereby he had sustained a damage. Mr. J. *Bailey* said "If the diversion was intended to be for temporary purposes only, then, unless actual damage was done, the plaintiff was not entitled to make a complaint, or to bring an action. But if he was deprived of the water in such a way, that he sustained damage; or if the deprivation was intended to be permanent, a verdict must be found for the plaintiff." The Jury gave a verdict for the plaintiff, and 40s. damages. Mr. J. Bailey,—"Do you find that the plaintiff has sustained any damage?" The Foreman,—"Yes." [*Sheffield Mercury of August* 2, 1828.

Liability to Military Duty. In the case of the *State* v. *Fort*, lately determined in the Superior Court of Georgia, the question presented was, whether the defendant, who was one of the Justices of the Inferior Court, could be required to perform military duty. Judge *Davies*, who gave the opinion of the Court, referred to the Constitution of the U. States, which gives to Congress the power to provide for the organizing, &c. of the militia; and also to the act of Congress of 1792, for carrying this power into effect,—the first section of which exempts all persons who were, or might thereafter be exempted by the laws of the respective States, from Militia duty. His opinion was that under this ex-

emption, must be included, as well those persons who were exempted by the *statute laws* of the States, as those who were exempted by the *Common Law*, in those States, where the latter had been adopted. It was admitted, that by the common law, all Judicial Officers are privileged from Militia duty; though they had not been expressly excepted by the Legislature of Georgia. The Judge concluded his opinion as follows :

"Upon the whole and after the best investigation which I am enabled to give the subject, I am constrained to believe that the Legislature was disposed to leave the subject of exceptions to be regulated by those rules and principles which were of force before the passage of the act of 1792, so far as they were applicable to the condition of the country, and our system of government. I am not disposed to consider this question with reference exclusively to the common law principle which is applicable to such questions, but to consider it with reference to those principles which grow out of the existing state of things, and the form and structure of our government, and the order and arrangement of its various departments. Without laws no government can exist, and unless the laws are regularly administered, they become a mere mockery, and inefficient for the purposes for which they were designed. Subject those officers to whom the Constitution has given the power, and upon whom it has imposed the duty of expounding and administering the laws to the performance of militia duty, and you prostrate and render dependent one of the departments of the government, and deprive the citizens of that security for their lives and property which it should be the object of every government to secure to them, and in no government, in a more eminent degree than that under which it is our happiness, and should be our pride to live.

The defendant is therefore discharged."

Trover.—English Court of Common Pleas.—Stephenson v. Hart.—This was an action of trover, to recover the value of certain goods which the defendant, who is a carrier, had undertaken to convey safely from Birmingham to London, but which by his alleged negligence, were not delivered at the place to which they were directed, in consequence of which they were lost to the plaintiff. The case was tried before Lord Tenterden at Warwick, during the last summer assizes, when it appeared that the plaintiff, who is a person in business in Birmingham, had disposed of goods to the value of 30*l.* to a man who stated his name to be West, and who tendered a bill of exchange, drawn as it appeared, by a person named La Conte, and accepted by another person equally unknown to the plaintiff, who notwithstanding, agreed to take the bill in payment and received instructions from West to send the goods by the carrier's wagon, directed to him at No. 27, Winchester-place, London. The plaintiff

accordingly packed them up, and having directed them as instructed, he sent them to the defendant's office, and booked them for carriage to London, to be delivered as directed. The goods arrived in London in due course, and were carried to No. 27, Winchester-place, where it was ascertained that no such person as West had ever resided there, and they were therefore carried back to the defendant's booking office, where they remained for a very considerable time, until at length the defendant received a letter from West, directing him to send them to him at the Peahen at St. Albin's, which was immediately done, and West got possession of them. In the mean time the bill became due, and it was ascertained that no such person as the drawer and acceptor were in existence, and the bill was a mere fraud. The plaintiff then made inquiry about the goods, and finding that they had not been delivered as he directed, he brought the present action against the carrier, to recover their value ; and the jury having heard the whole of the evidence, returned a verdict for him for the full amonnt.

Wilde Serjt. in the course of the last term, moved for a rule calling on the plaintiff to show cause why that verdict should not be set aside, and a new trial granted, on the ground that the verdict had been returned contrary to the evidence given in the cause.

Bosanquet. Serjt. a few days since, showed cause against the rule, and the case was then fully argued by the counsel on both sides, but the court having a doubt in its mind, as to whether this action was maintainable as an action of trover, desired that Mr. Sergeant Bosanquet would address them on that point, which the learned Sergeant did at some length ; and after having heard him throughout.

Park. J. and *Burrough, J.* were of opinion that the action would stand as an action of trover, and they were further of opinion, that as the bill had been proved to be a complete fraud, and that the goods had been obtained from the plaintiff by a person who never intended to pay for them, that, in fact, he (the plaintiff) had never disposed of his right in them, and it being further proved that they were not delivered at the place to which they were directed, although it was true that they had fallen into the hands of the person for whom they were originally intended, that the plaintiff was competent to maintain this action ; and that from all the circumstances which appeared before them, they saw no reason to disturb the verdict, and were therefore of opinion that the rule which had been obtained should be charged with costs.

Gaselee J. agreed with the rest of the Court as to the correctness of the verdict; but was of opinion that the action could not have been maintained as an action of trover. His dissension on this point, however, would not alter the judgment of the court, as

his two learned brothers had decided against him,—Rule discharged.

Drawing Lots for a Verdict. In a late case in the English *Court of Exchequer*, a rule was moved for, to shew cause why the verdict found at the assizes should not be set aside and a new trial granted. One of the grounds upon which it was contended, that the verdict must be set aside, was, that the Jury had decided the issue of the question referred to them by *drawing lots*. The Counsel was aware, that the Court would not receive the affidavits of any of the jury in support of this fact; but he had the affidavits of the officer of the Court, by whom they were locked into the juryroom, and another person, who severally swore that they overheard the jury discussing the merits of the case; they at length came to a division, when there appeared six in favor of the plaintiff, and six for the defendant; that a second discussion took place, after which it was found that there were seven one way, and five the other. A juror then proposed to decide the verdict by tossing up a halfpenny, which proposition was rejected; that soon afterwards they heard a juror observe, that if they did not find their verdict before 12 o'clock that night, it being Saturday, the judge would order them to be locked up until Monday morning; that this observation was followed by a proposition to place two pieces of paper, one long and one short, in the hand of one of the party, and to decide the verdict by drawing lots in that way; that a silence for a short time ensued, after which they heard several voices exclaim, "There, then, 'tis for the plaintiff;" that the jury then knocked, and on their return into Court, gave their verdict for the plaintiff accordingly. The learned counsel cited several cases, showing that verdicts given in this way by lottery, had been set aside.

The Court granted a rule to show cause.

LITERARY INTELLIGENCE.

Law of Presumptive Evidence.—A gentleman of the bar of high professional standing in Boston, is now engaged in preparing an American Edition of Mathews, on the doctrine of Presumption and Presumptive Evidence. The plan which he has adopted, it is said, cannot fail to render the work extremely valuable to the American Lawyer.

Law of Fixtures.—The London edition of the work of Amos and Ferrard, on Fixtures and other property, partaking of a real and personal nature, with an Appendix containing partial rules and directions respecting the removal, purchase, valuation, &c. of Fixtures, is now in press in New-York, and will be published with notes and references to American cases.

LAW INTELLIGENCER.

Vol. I. JUNE. No. 6.

EQUITABLE JURISDICTION.—No. 1.

It has been observed by the celebrated Beccaria that "the laws are always several ages behind the actual improvement of the nation which they govern." This remark evinces that he did not admit the truth of the prevalent opinion, that existing political establishments are the result of reasoning and legislation *a priori*. That these establishments owe their origin to experience and change of circumstance, there can be no question. The laws of Wisby and of Oleron, for example, succeeded, and were the result of the discovery of the art of navigation, and the consequences which attended it. And but little reflection and observation is necessary to convince any one, that society must have long existed, and its different appearances frequently exhibited, before human foresight could devise a suitable plan for the government of nations. The first advantage which is suggested by the consequences of social intercourse is that of order; and accordingly regulations are made, and systems for obtaining justice are invented with the view of securing that advantage. As the commerce of mankind becomes more extensive, new regulations become requisite. But in every nation which has yet existed, civilization and commerce have always been in advance of civil and municipal institutions. The accumulation of wealth—the unequal division of it—and other circumstances created by the rapid progress of commerce, luxury and refinement, could never have been effectually provided for in anticipation. And thus, in deciding disputes by general rules, justice

may be often grossly violated, in consequence of the inapplicability of those rules to the circumstances of each particular case. "It is most certain," says Lord Hale, "that time and long experience is much more ingenious, subtle and *judicious* than all the wisest and acute wits in the world, co-existing can be. It discovers such a variety of emergencies and cases that no man would otherwise have imagined; and in most things relating to laws there are thousands of new occurrences, and entanglements and coincidences and complications, that could not possibly be at first foreseen."

Experience has indeed completely demonstrated, as it respects judicial remedies and proceedings, that certain deviations from the strict letter of the law, are occasionally inevitable. In Rome, when the *twelve tables* were established, it was supposed that the power of magistrates would be kept within certain and fixed limits; but in less than a century afterwards the Prætors assumed a power of much greater latitude, which was not disputed.—Upon their introduction to office, these magistrates, like others, were obliged to govern their proceedings by the *established law*. They however, soon perceived, that by adhering to the strict letter of the law, they would be unable to dispense justice according to its spirit; and hence it was that a more enlarged authority was assumed which gradually introduced a new and peculiar system. So the highest point of the authority of the Chancellor of Great Britain formerly consisted in cancelling the King's letters patent, when granted contrary to law, yet in time he became invested with the *jus praetorium*, and exercised a discretionary power entirely distinct from the one derived from the *leges* or standing laws. This acquisition of a new and distinct power by the Roman Prætor and the English Chancellor, was the inevitable result of the wants and necessities which were gradually occasioned by the progress of society and the extension of civilization and commerce. Even the commonwealth which boasts of the venerable Penn as its founder, like the above mentioned countries, has with respect to the constitution and regulation of courts of justice, shown itself far in the rear of the

growing exigencies of a flourishing, enlightened and commercial people. The legislative department of the commonwealth of Pennsylvania, while it has established various *legal* tribunals, has not yet created a tribunal similar to that over which the Chancellor presides in England; and the consequence has been, that its courts of law have been compelled, in order to administer the substantial principles of justice, to assume, in imitation of the Prætors of Rome, a latitude of jurisdiction not originally contemplated. And the action of *ejectment* in Pennsylvania has thus been made an equitable action in order to enforce the execution of a trust and the conveyance of an estate, without any authority expressly delegated to that effect. This assumption of jurisdiction may at first startle the reader, but it is not without authority to sustain it, and is not unprecedented. The Court of Sessions in Scotland, without any power expressly delegated, are governed by the rules of conscience in abating the rigour of the law, and giving aid to such as in a court of law are without remedy. And this power Sir George Mackenzie considers to be inherent in the Supreme Court of every country, where no separate court of equity has been established. *(Mack. Law of Scot. p. 29.)* By such means Pennsylvania has been placed in advance of many of the other States, whose interests have met with the same inexcusable neglect from the representatives of the people.

We are sensible that there is not any one feeling more liable to mislead opinion than national vanity. We nevertheless venture upon the assertion, that there is no country in which the body of the people are more honest and well informed than in our own. It is this honesty which induces them too often to confide unadvisedly in those who make professions for the prosperity of the body politic—but it is this knowledge which finally corrects their mistake by enabling them to detect incapacity and unfaithfulness in their public servants. Those politicians who have been finally convicted by the popular judgment of a complete subservience to selfish considerations, and of a settled plan to excite passions and prejudices, with the view of advancing

their own personal interests, have always been remarked for their attempts to defeat a sure and permanent administration of justice—for their hostility to every institution which is intended for the development of concealed frauds, and for their exertions to destroy every plan devised for the discovery and exposure of secret extortion. A court of equity, in the eyes of these men, has always appeared terrible, and consequently they have employed every artifice to render it a monster in the eyes of the people. The people in some of the States have nevertheless had the wisdom and energy to establish such a tribunal. The people of the other States have watched the experiment and the success attending it; and are accordingly growing more and more disposed to follow the example. They are beginning to perceive, that a discovery on oath is often the only mode for obtaining that redress which the most common intellect would decide to be just. They are beginning to perceive, that when a party, for a valuable consideration, agrees to convey, he must convey; and that when a dishonest partner seizes the papers and effects of a partnership concern, he should be compelled to restore them. They are beginning to perceive, that the subject of *trusts* alone (which is but one of the branches of equitable jurisdiction) embracing, as it does, the duties of executors, administrators, guardians, agents, and factors, affords frequent and complicated controversies, the adjustment of which requires an authority altogether distinct from the ordinary authority of a court of common law. They are, in fact, beginning to learn, that a Chancellor's authority so far from being an authority which is exerted perfectly *ad misericordiam*, is as much restricted by precedents as that of any judicial magistrate whatever;—while, at the same time, it is qualified to afford the relief which justice requires, but which is not attainable by any other means. Under these circumstances, the legislative bodies of this country cannot much longer remain inert spectators of the manifold and insufferable inconveniences arising from the defect of equitable jurisdiction.

We have alluded to the restraints imposed upon a court of

equity by *precedents*. That the celebrated Lord *Nottingham*, who has been styled "the father of equity," considered that cases in equity, however they may vary, are to be decided upon fixed principles, most clearly appears from the plan he adopted and partially executed, of reducing into one comprehensive view all the doctrines of the English Court of Chancery. It will be recollected too, that Lord Nottingham lived when equity science had not advanced very far, if at all, from a state of infancy. In *Bond* v. *Hopkins* (1 Sch. & Lefr. 428,9) we find the following declaration in relation to this subject, by Lord *Redesdale*—"Courts of equity have no more power than courts of law, and they decide new causes as they arise by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles: But the *principles* are are as fixed and certain as the principles on which courts of law proceed." In the case of *Vose* v. *Grant*, in *Massachusetts* (15 Rep. 522) the duty of a Court of Chancery was considered by Judge Jackson "not to establish new rules unknown to the common law, but to apply and enforce those principles of the common law which cannot be enforced by the other courts."

The report which was made to the legislature of *Massachusetts* in 1808, and printed by its order, recommending the establishment of an independent court of equity, deserves a perusal from every statesman, and indeed from every citizen in the country. The authors of this report refer to the fact so well known to every lawyer, that courts of equity are distinguished from courts of law by the jurisdiction exercised by the former, in those cases in which the latter, from their manner of proceeding, either cannot decide at all upon the subject, or cannot decide conformably with the principles of substantial justice. The report then proceeds as follows:—

"Whenever a *complete*, *certain* and *adequate* remedy exists at law, courts of equity have generally no jurisdiction. Their peculiar province is to supply the defects of law in cases of *frauds*, *accidents*, *mistakes*, or TRUSTS. In cases of fraud, where an in-

strument is fraudulently suppressed or withheld from the party claiming under it, where an unconscientious advantage has been taken of the situation of a party; where a beneficial property is injuriously misappropriated; equity interferes, and compels complete restitution. In cases of accident, or mistake, where a contract has been made respecting real or personal estate, and by reason of death it cannot be completed; or where by subsequent events, a strict performance has become impossible; where, in consequence of a defective instrument, the intention of the parties is in danger of being defeated; or where a want of specific performance cannot be compensated in damages; equity administers the proper and effectual relief. In cases of trust, where real or personal estate by deed, will, or otherwise, is confided to one person for the benefit of another; where creditors are improperly preferred or excluded; where numerous or discordant interests are created in the same subject matter; where testamentary dispositions, for want of a proper trustee, are not fulfilled; and where fiduciary estates are, by connivance or obstinacy, directed to partial or unjust purposes; equity applies the principles of conscience, and enforces the express or implied trusts according to good faith.

'Sometimes, by fraud or accident, a party has an advantage in proceeding in a court of ordinary jurisdiction, which must necessarily make that court an instrument of injustice, if the suit be suffered; and equity, to prevent such a manifest wrong, will interpose, and restrain the party from using his unfair advantage. Sometimes, one party holds completely at his mercy the rights of another, because there is no witness to the transaction, or it lies in the privity of an adverse interest; equity in such cases will compel a discovery of the facts, and measure substantial justice to all. Sometimes, the administration of justice is obstructed by certain impediments to a fair decision of the case in a court of law; equity, in such cases, as auxiliary to the law, removes the impediments. Sometimes, property is in danger of being lost or injured, pending a litigation; equity there interposes to preserve it. Sometimes, oppressive and vexatious suits are wantonly pursued and repeated by litigious parties; for the preservation of peace and of justice, equity imposes in such cases an injunction of forbearance.

'These are a few only of the numerous cases, in which universal justice requires a more effectual remedy than the courts of common law can give. In proportion as our commerce and manufactures flourish, and our population increases, subjects of this nature must constantly accumulate; and, unless the legislature interposes, dishonest and obstinate men may evade the law,

and intrench themselves within its forms in security. One or two striking instances, applicable to our present situation, will illustrate these positions. In this Commonwealth no adequate remedy exists at law to unravel long and intricate *accounts between merchants in general;* and *between partners* the remedy is still less efficacious to adjust the partnership accounts. A refractory or fraudulent partner may seize the books, papers, and effects of the firm, and cannot by any process be compelled to disclose or produce them. In many instances, therefore, neither debts can be recovered, nor accounts be adjusted by them, unless both parties are equally honest, and equally willing. Great evils have already arisen from this cause, and still greater must arise, unless equity be brought in aid of law. In cases of *pecuniary and specific legacies*, no complete remedy lies to compel a marshalling of the assets, or an appropriation of them according to the intention of the testator; and where the interests of the parties are complicated, great injustice must often ensue. In cases of *trusts*, created by last wills and testaments, which are already numerous, no remedy whatsoever exists to compel the person on whom the fiduciary estate devolves, to carry them into operation. He may take the devised property, and if his conscience will permit, may defy all the ingenuity and all the terror of the law. Mortgages afford a great variety of questions of conflicting rights, which, when complicated, are beyond the redress of the ordinary courts; nay, more, may often be the instruments of iniquity under their judgments. A discovery on oath seems the only effectual mean of breaking down the barriers, with which the cunning and the fraudulent protect their injustice. The process, by which the goods, effects, and credits of debtors are attached in the hands of their trustees, is often inefficient, and sometimes made the cover of crafty chicanery.—Perhaps too in *assignments of dower* and *partition of estates*, where the titles of the parties are questionable and intricate, or the tenants in possession are seized of particular estates only; it will be found that courts of equity can administer the only safe and permanent relief.

'The committee are not aware of any solid objection to the establishment of a court of equity in this Commonwealth. The right to a trial by jury is preserved inviolate; and the decisions of the court must be governed as much by settled principles, as courts of law; precedents govern in each, and establish rules of proceeding. The relief granted is precisely what a court of law would grant, if it could; *for equity follows the law.* The leading characteristics of a court of equity are, the power to eviscerate the real truth by discovery of facts upon the oath of the party

charged; the power to call all parties concerned in interest, however remote, before it; and the power to adapt the form of its judgments to the various rights of the parties, as justice and conscience may require.'"

For the above extracts from the report referred to, we are indebted to the very sensible and accomplished author of the article, entitled "Chancery Jurisdiction," in No. 2 of the North American Review, for 1820, who says, he *accidentally found* that important document when searching for papers for another purpose. The object of the report was unfortunately not accomplished, but since the period when it was made, the General Court of Massachusetts has cured many of the defects therein enumerated by extending the equity of powers of the Supreme Court of the Commonwealth. And so far as appearances may be relied on, many years will not elapse, before Massachusetts will be numbered among those States who have succeeded in establishing a separate and independent court of chancery.

The existence of a court of equity, as a *separate* and *independent* tribunal was first known in Great Britain. In other European countries the necessity for such a tribunal, has been, in a great degree, avoided by the rules and doctrines of the civil law, which very much resemble the principles and practice of the system of equity law, which has grown up, and been matured in England. The partiality of the ecclesiastics in that country, for the civil law, made it an object of great aversion among the people; and this, together with the impracticability of reconciling it with an institution, "the like whereof the whole christian world hath not" (says Lord Coke) meaning the *trial by jury*—had the effect of frustrating all attempts to introduce that law as a substitute for the indigenous law which had immemorially existed, and which was in many respects extremely well adapted to the genius of the English nation. The struggle between these two systems of law had not long terminated in England, in favor of the latter, before it was discovered, that it was necessary some power should exist, similar to that of the Roman Prætor for affording relief when the positive law was silent or inadequate; and for eliciting

truth upon the defendant's oath, when it was required by the substantial principles of justice. This is the power which is exercised by the English Court of Chancery, and which has been called by the appropriate name of *equitable jurisdiction.*

A general view of the origin and progress of equity jurisdiction in England may possibly aid in increasing the inclination in favor of its establishment in this country, which has been manifested during the last twenty years. We shall, accordingly, in our next number, offer some minute and illustrative information on that head, which has been gleaned from recent publications.

LAW OF HUSBAND AND WIFE.

POWER AND LIABILITY OF THE WIFE TO SUE AND BE SUED AS A FEME SOLE.

[The following communication is from the pen of a correspondent, who is remarkable for his strict examination of adjudged cases.]

In the second volume of Kent's Commentaries, p. 132, the learned author refers to Mr. Gwillim's opinion as expressed in his edition of Bacon's Abridgment, (*Baron and Feme* M.,) and to a dictum of Lord Loughborough, (2 Ves. Jr. 145,) that "if the wife be divorced *a mensa et thoro*, she can sue and be sued as a feme sole." "I do not find," says Mr. Kent, "any adjudged case to the point. I should apprehend that she could sue alone for any injury to her character or person, or separate property. It would seem to be indispensable that she should have a capacity to act for herself, and the means to protect herself, since she is withdrawn from the dominion and protection of her husband." An earlier intimation of this kind, was made in *Stevens* v. *Tott*, (Moore, 666,) where "it *seemed* to the court that in case of a divorce *a mensa et thoro* the wife might sue without her husband, as in case of his being exiled." Vid. also, 1 Dane's Abr. 358. In page 214, of the same volume of his Commentaries, Mr. Kent says, in a note,

" since the preceding sheets were put to press, I have met with the late case of *Lewis* v. *Lee*, in the English Court of K. B. reported in 3 Barn. & Cress, 291, (S. C. in 5 Dowl. & Ry. 98,) in which it was adjudged, upon demurrer, that though a woman be divorced, *a mensa et thoro*, and lives separate and apart from her husband with an ample allowance as, and for, her separate maintenance, she cannot be sued as a feme sole. Whether this decision is to be received as law in this country, in preference to the opinions of the editor of Bacon and of Lord Loughborough, must be left for future judicial discussion." In the case of *Dean* v. *Richmond*, (5 Pick. 461,) the Supreme Court of Massachusetts, in a judgment rendered in April, 1828, decided conformably to the opinion of Mr. Kent, that a wife divorced, *a mensa*, &c. may sue and be sued as a feme sole, for property acquired or debts contracted by her subsequently to such divorce. The same court had previously decided, (15 Mass. Rep. 196,) that a wife thus divorced might sue her husband for alimony decreed to her upon the divorce. And in South Carolina, a wife was allowed, (1 Const. Rep. 453, *Prather* v. *Clarke*,) by *prochein ami* to maintain a suit, in her own name, against a sheriff, for an escape of her husband who had been committed by attachment for not performing a decree for alimony. Vid. 2 Stark. Ev. 699, note 1, Metcalf's Ed.

In pages 130 and 131, of the second volume of Kent's Commentaries, the author states, (as an exception to the general rule,) that the wife of a *foreigner residing abroad*, may sue and be sued, as a feme sole. He cites *Deerly* v. *the Duchess of Mazarine*, (1 Salk. 116. S. C. 1 Ld. Raym. 147.) 2 Esp. Rep. 544. 587. (two suits against the *Duchess de la Pienne*, in which Lord Kenyon held her liable on her contracts made while her husband was on the continent,) and 1 Bos. & Pul. 357, *De Gaillon* v. *L'Aigle*. In the case of a *native*, Lord Kenyon thought the law was different, as the *animus revertendi* would be presumed. Mr. Kent says, " this is the extent of the English authorities on this subject." But he overlooked the case of *Kay* against the same *Duchess of Pienne*, tried in 1811, (3 Campb. 123,) when Lord

Ellenborough held, that as her husband *had lived within the realm,* before he entered into the Swedish service, she was not liable to be sued as a feme sole. There was no impediment to his return into England, as there is in a case of abjuration and exile, and he non-suited the plaintiff—thus overruling the two prior decisions of Lord Kenyon. A motion was made to the full court, to set aside this non-suit, "but the court fully concurring with the direction of the Chief Justice at nisi prius, refused a rule to shew cause." The distinction therefore in the English law is not (what Mr. Kent supposes,) between the wife of a foreigner, and the wife of a native who is absent, but between the wife of a foreigner who has lived with her in England, and is not disabled to return, and the wife of a foreigner who has never thus lived there. In *De Gaillon* v. *L'Aigle, it did not appear* that the husband had ever been in England. In *Gregory* v. *Paul,* (15 Mass. 31,) it appeared that *he had never been* in this country—and Putnam, J. in giving the opinion of the court, in that case, relied, in part, at least, on that fact. "Her husband," says he, "is an alien, and never was, and is not expected ever to be, in this country." Such also was the case of the *Duchess of Mazarine.* Lord Ellenborough says, "her husband never was in England, (3 Campb. 124.) In *Abbott* v. *Bailey,* (6 Pick. 89,) the Supreme Court of Massachusetts decided, that a married woman who had long resided in that State—her husband having always been, and still being an inhabitant of New-Hampshire, and having driven her from his house by his cruelty, was entitled to sue as a feme sole. New-Hampshire was, for this purpose, regarded as a foreign country. It is noticeable that neither in this last case, nor in *Gregory* v. *Paul* was the decision in 3 Campb. 123, referred to by the Court, or the counsel, though the principles of that decision were adopted.

In the first volume of Peters' Sup. Court Reports, p. 108, Duval J. says, "if a husband voluntarily abandons his wife, and she obtains credit as a feme sole, it is settled law that she is liable to be sued for her debts so contracted." This, it is true, is an extrajudicial dictum. But coming from such a source, it tends to em-

barrass, if not to mislead the profession. The common law has no such principle, nor do the cases referred to by the Judge at all sustain him. It is doubtless a mere unfortunate slip, as we know that one of the Justices of the Supreme Court of the United States, on being enquired of concerning this point, expressed his total ignorance that any such principle had been adopted in any part of our country, and his surprise at finding this dictum in the printed opinion of his venerable associate.

In the very recent case of *Abbott* v. *Bailey*, Chief Justice Parker says, (6 Pick. 92,) " if a husband of Massachusetts deserts his wife, and removes into another State, making no provision for her, and forbidding her to follow him, the wife remaining in Massachusetts, working for her support, *the husband never intending to return*, it would amount to an *abjuration* of his native State, and his wife would have the privileges, and be liable to the burdens of a feme sole. This *obiter dictum* is quite as startling to those of the profession who regard settled doctrines as entitled to respect, as the above mentioned dictum of Mr. J. Duval. If any point is clear, it is this, viz.: that there is in England, no such thing at common law as abjuration of the realm in any legal sense, or with any legal effect, since the statute of 21 James 1, c. 28. Abjuration was a sworn banishment, or an oath taken to forsake the realm forever. It was a commutation of punishment for a crime, and induced civil death. The party, who had committed felony, might flee to a church or church yard, before he was apprehended, and could not be taken thence to be tried for his offence. But upon a confession of his offence, before the proper officer, he was admitted to his oath to *abjure* or forsake the realm within forty days. As this state of things was found often to operate only as a perpetual confinement to some sanctuary, the statute before mentioned abolished the privilege of santuary, and this abjuration thereupon ceased. That there was any thing of this sort in any part of the United States, nobody will pretend. Nor will any lawyer suppose, that the courts in England would regard the wife of an emigrant, who is naturalized in this country, and has abjured his allegiance to George IV, as a

feme sole for any purpose. The whole course of authorities shews the contrary. Vid. Staunford's Pleas of the Crown, Book II, c. 40. 2 Inst. 629. 4 Bla. Com. c. 26. 11 East. 300.

In the Minor, ch. 1, sec. 13, will be found this passage—"In the right of offenders, who by mischance fall into an offence mortal out of sanctuary, and for true repentance run to monasteries, and commonly confess themselves sorrowful, and repent—such offenders, being of good fame, if they require tuition of the church, king Henry II, at Clarendon, granted unto them, that they should be defended by the church for the space of forty days; and ordained that the towns should defend such flyers for the whole forty days, and send them to the coroner, at the coroner's view. It is in the election of the offender to yield to the law, or to acknowledge his offence to the coroners, and to the people, and to waive the law; and if he yield himself to be tried by law, he is to be sent to jail, and to wait for either acquittal or condemnation. And if he confess a mortal offence, and desire to depart the realm, without desiring the tuition of the church, he is to go from the end of the sanctuary ungirt, in pure sackcloth, and there swear that he will keep the straight way to such a port, or such a passage, which he hath chosen, and will stay in no parts two nights together, until that for this mortal offence which he hath confessed in the hearing of the people, he hath avoided the realm, never to return during the king's life without leave, so God him help, and the holy evangelists; and afterward let him take the sign of the cross and carry the same; and the same is as much as if he were in the protection of the church." Britton gives substantially the same description of this antiquated proceeding. Kelham's Britton, c. 16. By statute 35 Eliz. c. 2. *popish recusants* were required, upon their corporal oath to abjure the realm of England, and all other the Queen's Majesty's dominions forever—and thereupon to depart at such haven and port, and within such time, as should be in that behalf assigned and appointed by the officers before whom the oath was taken. Nothing like this ever existed in this country, and of course the incidents and effects of abjuration, whether upon the offender or his connex-

ions, have no place in our laws. What the law OUGHT TO BE, and what the law IS, are two entirely different questions.

LAW OF PARTNERSHIP.—No. I.

OF THE CONTRACT OF PARTNERSHIP AND WHO ARE LIABLE AS PARTNERS.

[The following valuable communication has been received from a correspondent.]

PARTNERSHIP may be defined an agreement between two or more persons, to join together their money, goods, labors, skill, either or all, for the joint prosecution of some lawful business; the gain or loss of which, is to be divided proportionably between them.[1] The evidence of this contract may consist either in instruments under seal, called articles of co-partnership, as is most usual, in proof of express oral agreements—or in mere inferences and presumptions, from the acts and declarations of the parties.[2] Any persons, *sui juris*, may enter into it. An infant may, by law, be a partner, and will be entitled to share the gains, if any, of a partnership; but by setting up his minority as a defence, may shield himself from its losses.[3] Femes covert are incapable of this, as of most other contracts; and though not unfrequently entitled to shares in banking houses and other mercantile concerns under positive covenants—yet, their husbands in such cases, become partners in their stead.[4] Partnership, as appears from the definition, implies an agreement between the parties to it. Hence, every joint possession does not constitute the possessors, partners;—for this may have arisen independently of the election of either.[5] Thus, legatees and donees of one

[1] Wats. on Partn. 1. Gow on Partn. 1—2. 3 Kent's Comm. 2. Forbes' Inst. Scot. Law, part 2. B. 3. sec. 3. page 184.

[2] Gow on Partn. 6—7.

[3] Goode v. Harrison, 5 B. & A. 157.

[4] Gow on Partn. 3.

[5] 3 Kent's Comm. 3.

and the same subject are not *as such*, partners.[1] For the same reason, the executors and representatives of deceased partners do not *as such*, succeed to the state and condition of partners ;[2] although there is a community of interest between them and the surviving members of the house, until the partnership affairs are closed.[3] The personal qualities of skill and industry which might have formed the sole inducements to the contract on the part of the survivors, may not exist in the *representatives* of the deceased member of the firm.

Again, partnership as defined, implies a voluntary joining of goods, &c. *for the prosecution of some common business.* Thus, joint purchasers, although their joint possession is by their own consent, yet, inasmuch as it may not have been gained for the purpose of carrying on a common business ; but for mere convenience in buying or holding, are not because joint purchasers, partners. To be partners, they must be jointly concerned, not only in the purchase, but the future sale.[4] If the purchase be on separate, and not on joint account, yet if the interests of the purchasers are afterwards mingled, with a view to a joint sale, the partnership exists from the time that the shares are brought into a common mass.[5]

The common business too, for the prosecution of which the contract of partnership is made, *must be lawful ;* that is, neither immoral in itself, nor prohibited by the laws of the country in which, as a contract, its validity is either directly or indirectly questioned ; since in this view, the law recognizes no distinction between *mala prohibita* and *mala in se.*[6] Thus, a partnership for importing prohibited goods,[7] would be held

[1] Roll, 114. Gow on Partn. 7.

[2] Pearce v. Chamberlain, 2 Ves. Sen. 34.

[3] Ex parte Williams, 11 Ves. 3.

[4] Hoare et al. v. Dawes and another, Doug. 371. Coope v. Eyre, 1 H. Blacks. 37. Holmes v U. Ins. Co. 2 Johns. Cas. 329. Post v. Kimberly, 3 Johns. Rep. 470. Osborne v. Brennar. 2 Nott & McCord, 427.

[5] Sims v. Willing. 8 Serg. & Rawle, 103.

[6] Bensley v. Bignold, 5 B. & A. 341. Aubert v. Maze, 2 Bos. & Pul. 371.

[7] Biggs v. Lawrence, 3 Term. Rep. 454.

illegal and invalid, as well as one for robbing on the highway.[1]

Lastly—it is, according to the definition, essential to the existence of a partnership, *that the parties to it share either in the profit or loss of the concern.* If the question of partnership is to be determined merely as between the supposed partners, this clause in the definition is critically correct, but one may be a partner or liable as such *to others,* who shares neither in the profit or loss of the concern by the contract of partnership; as if from friendship he lends his name to the firm for the credit it will give it.[2]

The contract of partnership, like all other contracts, binds only parties and privies; and many stipulations which may be of great importance in ascertaining their rights and liabilities among themselves, may be perfectly unimportant in ascertaining their liabilities to others. Partners may mould the contract which binds them together as they will; and provided it stipulates for nothing contrary to good morals, the law and policy of the country, as between themselves, it may be enforced. They may limit their connection to a certain species of business, so that one partner may not be involved in all the enterprises in which the other may chance to engage himself; and provided their acts and declarations are consistent with their agreement, they may thus limit not only their mutual rights and liabilities, but their rights and liabilities to others.[3] So too, if two persons not partners in general trade, draw a bill of exchange payable to themselves or their order, they are partners as to the transaction of the bill, but in every other respect continue perfectly distinct.[4] This principle has not been extended to the case of two persons signing a joint note, although, says Chancellor Kent, "it is not easy to perceive a distinction between the cases."[5] Where the con-

[1] Gow on Partn. 9, n. 2. London Law Mag. No. 1, Art. 1, p. 16, in note.
[2] Ex parte Langdale, 18 Ves. 301.
[3] Lord Mansfield. Willett v. Chambers, Cowp. 316. Code Napoleon, No. 1841.
[4] Carvick v. Vickery, Doug. 653, n. De Berkom v. Smith, 1 Esp. N. P. C. 29.
[5] Hopkins v. Smith, 11 Johns. Rep. 161. 3 Kent's Comm. 8.

tract of partnership is silent, as to the mode in which profit and loss shall be shared by the parties to it—the civil law implies that the loss is to be equally borne, and the profits equally divided.[1] By the law of England it remains yet questionable, though the better opinion is certainly in favor of an equal division. Lord Ellenborough in such a case, left it to the jury to decide what share of the profits was due the younger partner, under all the circumstances of the case.[2] In this case, however, there were facts which clearly shew that an equal division of the profits was not intended—and it cannot be considered as fairly decisive of the general principle. Lord Eldon expressed his dissatisfaction with this decision, (it being upon an issue out of Chancery,) and observed that he could have no conception of the principle by which the jury on the footing of a quantum meruit could have held, as was the case, the plaintiff entitled to a quarter share only; for as no distinct proportion was ascertained by force of the contract between the parties, they must of necessity have been *equal* partners, if partners in any thing.[3]

The mode, however, in which profit and loss are to be shared, is usually settled by the articles of co-partnership; and the rule of distribution may be such as the co-partners choose to establish.[4] They may, if they please, indemnify any one or more of their number against all losses in the concern, allowing him or them to share in the profits, if any. It has been suggested that this would be allowing the member thus indemnified, usurious interest on his investment. This, however, is not the case; for although the profits may amount to 15 or 20 per cent, yet the risk which the partner even thus indemnified runs of losing all profit on his investment, will preserve the excess over the legal per centage, from the taint of usury. And even if besides an indemnity from loss, the legal per centage was

[1] Inst. lib. 3. t. 26. sec. 1.

[2] Peacock v. Peacock, 2 Campb. 45.

[3] Peacock v. Peacock, 16 Ves. 56.

[4] Gow on Partn. 13. 14. n. 2. Stewart's Vice Adm. Rep. 23, 24. 3 Kent's Comm. 6. 7.

secured to a partner at all events, with liberty to share in the profits if they justified a larger dividend; yet even this contract would not be usurious. The indemnity cannot affect the rights of creditors—it may prove worthless, and the contingent liability of the partner for all the losses of the concern, will justify him in receiving greater profit than legal interest on his investment.

"But a partnership," says Chancellor Kent, "in which the entire profit was to belong to some, in exclusion of others, would be manifestly unjust and illegal. It would be what the Roman lawyers called *societas leonina*, in allusion to the fable of the lion, who, having entered into partnership with the other animals of the forest in hunting, appropriated to himself all the prey."[1] However this may be at the civil law, which has been thought rather nice than practical, in relation to some matters of contract, we know no rule either at common law or equity, by which the above agreement of partnership if made by parties legally competent, without fraud, and upon legal consideration could be set aside. Our law exercises no guardianship over mature men in relation to their contracts; but for the freedom of trade, leaves them to consult their own interests, in their own way, so that they infringe none of its rules. It is therefore well settled by the decisions of Judges, and the decrees of Chancellors, that inequality of privileges or inadequacy of price, where there is no fraud, does not impair the validity of a contract.[2] The maxim of the civil law is, *contractus legem ex conventione accipiunt*. That of the common law is, *modus et conventio vincunt legem*, which is stronger.

But whatever, by stipulation, may be the rights and responsibilities of co-partners among themselves, their contract can affect only parties and privies; and each member of the firm is liable

[1] 3 Kent's Comm. 7. Dig. 17. 2. 29. 2. Pothier Traite de Soc. No. 12.

[2] Termes de Ley. tit. Cont. Bro. Abr. Tit. Cont. pl. 34. 2 Bl. Comm. 445. Heathcote v. Paignon, 2 Bro. C. C. 167. Moth v. Atwood, 5 Ves. 845. Emery v. Wase, Ibid 846. Gwynne v. Heaton, 1 Bro. C. C. 9. pl. 5. Lowe v. Barchard, 8 Ves. 133. Keene v. Stukely, Gilb. Rep. 155. Willis v. Jernegan, 2 Atk, 251. Western v. Russell, 3 Ves. & Bea. 187. Taylor v. Obee, 3 Price, 83. Underhill v. Horwood, 10 Ves. 209. 9 Ves. 246. 10 Ves. 295. 2 Johns. Chan. Rep. 1. 14 Johns. Rep. 527. 11 Johns. Rep. 555.

in solido to the whole amount of its debts, without reference to his interest, share of profits, or indemnity from loss, by the articles of co-partnership.[1] Partnerships with restricted responsibility are unknown to the common law, though allowed for the encouragement of enterprise, upon being registered, in France, Holland, and indeed throughout the continent of Europe; and by statute in England, New-York, Louisiana and Connecticut.[2] Large unincorporated associations constitute partnerships; and every member, (whatever may be the stipulations in the agreement which binds them together,) is liable for all the debts of the society.[3] It has been held by some judges that the members of such an association, may limit their liability to those with whom they contract, if there be an express stipulation to that effect clearly understood by the latter at the time of contracting;[4] although in Chancellor Kent's opinion, such a stipulation would be looked upon unfavorably, as contrary to the policy of the law; and express notice of it must be given to the party dealing with the company to give it effect.[5] Between co-partners, who they are, and how liable and entitled, is to be determined by the contract they have made; but who are liable to others as partners, is to be determined by their acts and professions, to which the law annexes a liability.[6] Hence many *are liable as partners, to*

[1] Waugh v. Carver, 2 H. Blacks. Rep. 235. Hoare v. Dawes, Doug. 371. Grace v. Smith, 2 Wm. Blacks. Rep. 998. Hesketh v. Blanchard, 4 East. 144. Ex parte Hamper, 17 Ves. 404. Ex parte Langdale, 18 Ves. 300. Carlen v. Drury, 1 Ves. & Bea. 157. Cheap v. Cramond, 4 B. & A. 663. Smith v. Watson, 2 B. & C. 401. Purviance v. M'Clintee, 6 Serg. & Rawle, 259. Gill v. Kuhn, Ibid 333. Dob v. Halsey, 16 Johns. 40. Shubrick v. Fisher, 2 Dessaus Ch. Rep. 148. Osborne v. Brennar, 2 Nott & M'Cord. 427.

[2] Gow on Partn. 20. Wats. on Partn. 73. 3 Kent's Comm. 12. Pr Lord Loughborough, Coope v. Eyre, 1 H. Black. Rep. 37.

[3] Rex v. Dodd, 9 East. 516. Holmes v. Higgins, 1 B. & C. 74. Hess v. Werts, 4 Sergt. & Rawle, 356.

[4] Gibson J. Hess v. West. 4 Sergt. & Rawle, 491. Platt J. Sklnner v. Dayton, 19 Johns. 537. (Alderson v. Pope, 1 Campb. 408, case of private partnership.)

[5] 3 Kent's Comm. 4. 5.

[6] Lord Eldon Ex parte Hamper, 17 Ves. 312.

third persons, although no contract of partnership was ever entered into by them.[1] Where, however, men are liable as partners to others, the legal presumption is, that they are partners by contract, among themselves ;[2] for it cannot reasonably be supposed that any man would subject himself to the burthens, without sharing the benefits of a partnership.

Whether partners in reality or not, who then are liable as such to others ? In general terms, the fund, and the persons credited, are those liable to the creditors. The trading capital of a firm invested, is the fund to which credit is originally given. But credit rises with success. Profits therefore, which are the results of success constitutes a part of the trusted fund. They who share them take therefore from the fund to which credit has been given, and upon the equitable principle, that, *qui sentit commodum, sentire debet onus*, become justly responsible for debts contracted upon the faith of it. Hence all who share in the profits of a concern, are held liable as partners for its debts. Credit is also given to persons on the faith of their skill, exertions, honesty, property; and all who lend this credit to a firm, by acting or speaking as if members of it, become rightly responsible for its debts, even though they do not share in its profits. They who are liable to third persons as partners of a firm, may therefore be divided into three classes.

1st. They who share the profits, and at the same time represent themselves in any way as partners.

2dly. They who merely share in the profits.

3dly. They who do not share in the profits, but hold themselves out to the world as partners.[3]

Those of the first class are called by Gow, actual ostensible partners; and are clearly answerable for the debts and engage-

[1] Gill v. Kuhn, 6 Sergt. & Rawle, 337. Post v. Kimberley, 9 Johns. Rep. 489. Dob v. Halsey, 17 Johns. Rep. 40.

[2] Peacock v. Peacock, 2 Campb. N. P. Rep. 45.

[3] M'Iver v. Humble, Lord Ellenborough. 16 East. 173. Simpson v. Felts, 1 M'Cord's Cha. Rep. 213.

ments of the partnership.[1] For the liability of such, there is a double reason, since they both share the profits, and give credit to the firm by appearing to be members of it. The second class of those liable to third persons as partners, comprises all who merely share in the profits of a concern; and it may be laid down as an established principle of law, that such, for the reasons above stated, are chargeable to third persons for the debts of the firm, and are called *dormant*, or *sleeping* partners.[2] Another reason given why a dormant partner should be subjected to the debts of the firm, is, that otherwise he might receive usurious interest, since the investment would not be attended with any risk.[3] It is even held, that where the executors of a deceased partner, not known as partners, carry on the trade with the survivor exclusively for the benefit of an infant daughter of the testator, charging her with the losses, and crediting to her the profits, they are liable as partners to the creditors of the concern; for they actually do receive the profits of the trade, and their subsequent application of them to the benefit of the infant, cannot vary the responsibility they have thus contracted in a court of law.[4] The executors in this case ought to have carried on the trade under the direction of a court of equity.[5] In ascertaining, however, what is such a participation of the profits, as will render the participator liable as partner, it should be observed, that there is a well settled distinction between taking them as profits, and as a reward of services in the business propor-

[1] Gow on Partn. 15.

[2] Metcalf v. Royal Exch. Ass. Co. Barnard. 343. Grace v. Smith, 2 Blackst. Rep. 998. Ex parte Hamper, 17 Ves. 404. Ex parte Langdale, 18 Ves. 301. Ex parte Gellar, 1 Rose, 297. Purviance v. M'Clintee, and Gill v. Kuhn, 6 S. & Rawle, 259. 337. Osborne v. Brennar, 2 Nott & M'Cord. 427. Dob v. Halsey, 16 Johns. Rep. 40. Freel v. Campb. et al. 3 Hayward Rep. 78. Hesketh v. Blanchard, 4 East. 143. Cheap v. Cramond, 4 B. & A. 663. Muzzy v. Whitney, 10 Johns. Rep. 226. Walden v. Shelburn, 15 Johns. Rep. 409.

[3] Per Lord Mansfield. Hoare v. Dawes, 1 Doug. Rep. 371.

[4] Wightman v. Townroe, 1 Man. & Sel. 412.

[5] 3 Kent's Comm. 11, n. a. 4 Johns. Ch. Rep. 627.

tioned to the profits.[1] Thus, the agent who collects, and the factor who sells, for a certain per centage on the sums received, or the price of the goods, are not such partakers of the profits, as will render them liable to the debts of the house; since though their compensation is proportioned in some degree to the profits of the trade, this is rather a mode of paying for labor, than an interest in the profits.[2] So one who received a certain per centage on goods sold by his recommendation,[3] and a broker who sold goods under an agreement that he was to retain all that he could get for them over a certain amount, were held not liable for them as partners.[4] Where too, the owner of a lighter agreed with one, that he should receive one half of her *gross earnings* for working her, it was held by Lord Ellenborough, that the latter was not liable as a partner for repairs done to the lighter. His Lordship, however, was of opinion, that if the agreement had been that the lighter-man should receive one half of her *net profits*, he would have been liable.[5] So where one depastured cattle upon an agreement, that he was to share equally in all that could be obtained for them over £20—their original value—it was held, that he was not such a partner as rendered it necessary that his name should be joined in an action for the price.[6] An agent who has no interest in the goods, but is paid for his services about them by a certain share of the profits, is held not liable as a partner.[7] Seamen employed in the whale fishery, who are compensated for their labor by a certain share of the profits of the voyage—and freighters to India, upon an agreement that for freight, the ship owners are to receive half profits, are not liable as partners.[8] In all these cases it should be observed, that

[1] Reid v. Hollinshead, 4 B. & C. 867.
[2] Dixon v. Cooper, 3 Wils. 40.
[3] Cheap v. Cramond, 4 B. & A. 670,
[4] Benjamin v. Porteus, 2 H. Blackst. 590.
[5] Dry v. Boswell, 1 Campb. 329—30.
[6] Wish v. Small, 1 Campb. 329—30, in not a.
[7] Meyer v. Sharpe, 5 Taunt. Rep. 74.
[8] Wilkinson v. Frazier, 4 Esp. N. P. Cas. 182. Rice v. Austin, 17 Mass. Rep. 197. Muzzy v. Whitney, 10 Johns. Rep. 228.

the persons exempted from liability, are not known or represented as partners—that they have not contributed to the fund employed, the stock in trade, or the subject used, and are not interested in them—and lastly, that they do not participate in the profits as such; but that the compensation for their services is merely a sum proportioned to them. Lord Eldon, at the same time that he admits, deplores the existence of the above distinction, "as so thin, that he cannot state it as established upon due consideration."[1] It is indeed little better than nominal, and though too well established by authority to be questioned, is with difficulty supported on principle.[2]

A retiring partner, provided his retirement be properly notified, is not, because he receives a certain and defined annuity fairly proportioned to his former interest in the profits and good will of the house, to be held responsible for its debts and engagements.[3] The annuity must, however, be certain, defined, and independent entirely of the casualties of trade, else the annuitant will be interested in the profits, and still liable.[4] Where a partnership for seven years was terminated in one year, and the continuing partner gave the retiring partner a bond for the capital he had advanced with legal interest, and an annuity of £200 for six years, if the grantor should so long live, as, and in lieu of his share of the profits; the retiring partner to have a right to inspect the books—Lord Mansfield held that he was still liable as a partner, his annuity being casual, as depending upon the life of the grantor, and the reserved liberty of inspecting the books, evincing an interest in the profits.[5] So the reservation of a mere

[1] Ex parte Hamper, 17 Ves. 404. Ex parte Rowlandson, 1 Rose, 89. Ex parte Watson, 19 Ves. 461.

[2] Gow on Partn. 25. See, however, Cary on Partn. 11, who insists that the distinction is perfectly clear and just.

[3] Young v. Axtell, cited in Waugh v. Carver, 2 H. Blacks. 242, which last also see.

[4] Per De Grey C. J. Grace v. Smith, 2 Blacks. Rep. 998. In re Colbeck, 1 Buck. 48.

[5] Bloxham v. Pell, cited in Grace v. Smith, 2 Blacks. Rep. 998.

contingent interest in the concern by a retiring partner, will prevent a determination of the partnership.[1] If the retiring partner besides an annuity receive a per centage *on all sales to old customers*, and to new ones recommended by him, he will still be liable.[2] Where, however, in addition to his annuity, he merely receives legal interest on his invested capital, (allowed to remain as loan in the hands of the continuing partner,) this does not continue his responsibility.[3]

The third class of persons liable as partners, are those who do not share in the profits of a firm, *but hold themselves out to the world as members of it.*[4] The reason of the liability of this class is well expressed by Lord C. J. Eyre, in his judgment in the case of Waugh v. Carver.[5] "If," says he, "a man will lend his name as a partner, he becomes as against all the rest of the world, a partner, not upon the grounds of the real transaction between them, but upon general principles of policy, to prevent the frauds to which creditors would be liable, if they were to suppose they lent money to three or four persons, where in fact they lent it only to two of them, to whom, without the others, they would have lent nothing." It was accordingly held, by Lord Kenyon, that though in point of fact, parties were not partners, yet if one so represent himself, and by that means, get credit on goods for another, he shall with that other be liable for them.[6] The law cannot, of course define any particular acts as representations by one, that he is member of a firm. In De Berkom v. Smith & Lewis, the person sought to be charged as part-

[1] In re Colbeck, 1 Buck. Rep. 48.

[2] Young v. Axtell, cited in Waugh v. Carver, 2 H. Blacks. 242.

[3] Grace v. Smith, 2 Blacks. Rep. 998.

[4] Per Abbott C. J. Goode v. Harrison, 5 B. & A. 156. Per Lord Eldon Ex parte Langdale, 18 Ves. 301. Young v. Axtell, cited in 2 H. Blacks. 242. Guidon v. Robson, 2 Campb. 302. Parsons v. Crosby, 5 Esp. N. P. C. 199.

[5] 2 H. Blacks. 235.

[6] De Berkom v. Smith & Lewis, 1 Esp. N. P. C. 29. Young v. Axtell, per Lord Mansfield, cited in 2 H. Blacks. 242. Ex parte Matthews, 3 Ves. & Bea. 135.

ner, directly represented himself as such to the plaintiff, and in such a case there could be no doubt.[1] In Young v. Axtell and another, it appeared that she suffered her name to be used in bills made out for goods sold to the customers; and this was held sufficient to render her liable, even though the plaintiff at the time of dealing, did not know she was a partner or that her name was used.[2] In this case however, besides the above fact, there was an agreement between Mrs. Axtell and the other, that she should receive an annuity, and also *a sum proportioned to the quantity of goods sold to her old customers*, and persons of her recommending.[4]

In order, however, to render one liable as a nominal partner, it must be shown that he directly or passively consented to the use of his name;[3] else he is no party to the imposition practised on the creditors; and ought not to suffer for it. It has therefore been held, that where ample notice has been given by a seceding partner of the dissolution of the partnership, he was not liable on bills of exchange, accepted in the name of the old firm, his name being used without his authority, and he never having interfered in the business of the concern, after dissolution.[5]

X.

EFFECT OF THE CONFESSIONS OF A PRISONER

UNDER THE HOPE OF PARDON.

[Continued from the last number of the Law Intelligencer.]

The Judges having met to hear the further argument of the Counsel in this case—

The Counsel for the prosecution, contended that the confes-

[1] De Beckom v. Smith, Sup.

[2] 2 H. Blacks. sup. see also, 6 Sergt. & Rawle, 336.

[3] Young v Axtell et another, Sup.

[4] Guidon v. Robson, 2 Campb. 302.

[5] Newsome v. Colet, 2 Campb. 617.

sion had been obtained by means quite distinct from any supposed influence of the chaplain. Their Lordships would remember that the prisoner had made three separate confessions—one to the gaoler; one before the mayor, which was reduced into writing; and another to the two constables. The first of them was made out about an hour and an half after the second interview with the chaplain, on Friday, the 1st of February, after the prisoner had had ample time to deliberate, and after a distinct warning given him by the gaoler, that what he disclosed would be communicated to the magistrates. It was clear, therefore, that the confession was not the result of hopes and fears excited by the chaplain, but had been brought about in consequence of what the gaoler told the prisoner he had heard from his wife. With respect to evidence by confessions generally, the law of England admitted such evidence unless there were circumstances to warrant a fair and reasonable inference that the confession was untrue. The great caution in receiving confessions arose from an anxiety to avoid any approach to the practice of the civil law, which had recourse to torture to obtain confessions. The opinions of two criminal judges, Foster and Blackstone, that confession was the lightest and least to be depended on of any evidence, had been quoted by his learned friend Mr. Moody; but it was observable that the observations of those learned judges applied more particularly to the statute of William, with regard to treason. Confession was acted on to a great extent in this country—so great, indeed, that he believed in one case out of every ten the confession of the accused was received in evidence. Lord Chief Baron Gilbert, in his Book on Evidence, had declered that confession was the best and most satisfactory evidence; but then it must be made voluntarily; our law, which will not force a man to criminate himself, differing in this respect from the civil law, and following the law of nature, which enjoins man to self preservation. Confession extorted by exciting hopes or fears in the accused were rejected, because, under such circumstances, they might be untrue; but it was a mistaken notion that confession could not be received because they had been obtained by improper means. The general rule was, that a confession must be free and voluntary, without the flattery of hope, or the torture of fear; but if there were circumstances to show that the confession was true, it could not be rejected. In the case of a prisoner tried before Chief Justice Erye, for receiving stolen goods, the prisoner's confession was tendered in evidence; but it being proved to have been made under a promise of forgiveness, it was rejected. It was then argued that the finding of the stolen goods, which had taken place in consequence of

the confession, could not be received in evidence; but Chief Justice Eyre said that was a mistake—the confession was rejected because the promise made to the prisoner might have induced him to confess what was not true; but that promise could not alter the fact of the finding of the stolen goods. Now, with respect to what had passed between the chaplain and the prisoner in the present case, a good deal had been said as to the impropriety of the chaplain's conduct. It was quite immaterial to the question now before their lordships whether the chaplain had acted improperly or otherwise; and he, (Mr. Folett,) was not there as the advocate of the chaplain; but he would take the liberty of saying, that all who had heard him give his evidence at the trial felt convinced that he was most strongly impressed with a sense of religion, and that if he had erred on this occasion, he had erred from conscientious motives, and under a strong sense of sacred duty. He had betrayed no confidence—he had not gone to the prisoner uninvited, but was sent for by the gaoler at the prisoner's own request. On the trial he appeared, not as a witness for the Crown—he was not even examined by the Grand Jury. It was intended originally not to call upon him to give evidence at all. He was not in Taunton at the commencement of the assizes, and it was not until the prisoner's counsel, being advised of the circumstances under which the confession was made, intimated their intention to object to its being given in evidence, that he was sent for, the counsel for the prosecution having then determined to call him as a witness, in order that the prisoner might have the benefit of any thing that might arise in his favor from the chaplain's testimony. The learned counsel proceeded to comment on the facts proved by the chaplain on the trial, of his having strongly exhorted the prisoner if he were guilty, to confess his crime to God, and to make all the atonement in his power to man; as otherwise prayer could be of no benefit to him; but if he were innocent to maintain his innocence. The learned counsel contended, that in thus acting, the chaplain had strictly conformed to his duty as a clergyman, and that such exhortations could not possibly be considered likely to make the prisoner confess what was not true, but to have quite a contrary tendency. It never could be thought that the rev. gentleman advised the prisoner to endeavor to find relief from the agony of mind under which he suffered by addressing a falsehood to his God; nor to make atonement to any man by confessing a crime of which he was not guilty. The case of Rex v. Radford, to which his learned friend had referred, was totally different from the present. That the clergyman had gone uninvited to the prisoner, assured him that he was a friend, and without previous caution, addressed observations to him which induced him to

make the confession. The learned judge thought, under these circumstances, that the confession ought not to be received. He was of opinion that the clergyman had acted officiously, and betrayed the confidence reposed in him by the prisoner; and the counsel for the prosecution did not press for the reception of the confession, there being evidence enough to convict the prisoner without it. The only question for their lordships to decide in this case was, whether any hope or fear had been held out to the prisoner that could induce him to confess what was not true—to declare himself guilty of a crime which he had not committed. There had been no pardon, or worldly favor of any kind, held out to him; he was not told that if he made a confession it would be better for him in this world, but only it would be better for him before God. The question therefore was whether the confession had been made under circumstances which led to the supposition that the statement it contained was untrue; and unless their lordships were of opinion that it was so made, he submitted, both upon authority and principle, that it afforded good legal evidence, and had been properly received on the trial.

Moody replied. Their lordships' experience had been appealed to whether they ever knew an instance in which they had reason to believe that a confession received in evidence was untrue; but the reason they had not known such instances was, that the law had cautiously guarded against receiving confessions in evidence in any case in which it might have been made under any influence that could affect its truth; and he felt confident that their lordships would not in the slightest degree, depart from that rule. In the state trials their lordships knew that there was a recorded instance of three persons being executed for a murder, on the confession of one of them, and the person said to be murdered afterwards being proved to be alive: and in the legal history of witchcraft, there were many instances of confession of that crime, and some even of having committed murder by such practices. The humanity of judges had always induced them to set their faces against confessions obtained through the excitement of hope or fear; and hence it was, that judges had always advised a prisoner who was disposed to plead guilty, not to do so, in order that he might have the benefit of any informality in the indictment or evidence. The learned counsel argued at length that the representations of the chaplain to the prisoner, though certainly made with the best intentions, were calculated to make him think that no spiritual comfort could be afforded him unless he confessed himself guilty of murder; and that a confession made under the influence of that impression, could not be received in evidence. It was inconsistent with the duty of a Protestant clergyman, to advise confession to man as the condi-

tion of absolution. The duty of a clergyman as expounded by St. Chrysostom was not to advise confession to man, but to God. "Do not go and confess thy sins before thy brother, who may upbraid thee of them, but make thy confession before God." If this had been the case of an exhortation to confess after conviction of the prisoner, there would have been nothing to object to, but here the parties had clearly mistaken their duty. The gaoler, on seeing the prisoner in great distress of mind, tells him that he thinks he should not do his duty if he did not declare his belief that he, (the prisoner,) was the man who committed the murder. Now it was no part of the duty of a gaoler, to make use of the influence which he possessed, in order to obtain a confession of guilt; but here both the gaoler and the chaplain had exercised their influence for the purpose of inducing an acknowledgment of guilt, which the prisoner would not otherways have made. After some further comments upon the observations of Mr. Follett, the learned counsel, in conclusion, said he trusted he might be allowed to indulge a hope that the life of the miserable man for whom he was concerned would be spared; and he entreated their lordships, if they entertained any doubt of the propriety of the reception of the confession, to give the prisoner the benefit of that doubt and thus extend that mercy which they were in the habit of enjoining elsewhere.

The auditors, including the gentlemen of the bar, of whom there was a numerous attendance, having, by order of the Judges retired, their lordships remained in deliberation about half an hour, and then pronounced their judgment, deciding that the confession had been properly received.

LATE AND IMPORTANT DECISIONS.

Law of Patents. The Supreme Court of the United States have decided, that an inventor who suffers his invention to go into public use cannot afterwards sustain his claim to a patent. This was decided at the late term of the Court. The opinion of the Court concludes as follows: "It is admitted that the subject is not wholly free from difficulties; but upon most deliberate consideration, we are all of opinion, that the construction of the act is, that the first inventor cannot acquire a good title to a patent, if he suffers the thing invented to go into public use, before he makes application for a patent. His voluntary act or acquiescence in the public sale or use, is an abandonment of his right,

or rather creates a disability to comply with the terms and condition on which alone the Secretary of State is authorised to grant him a patent." *Pennock, &c.* v. *Dialogue* from the Cir. Court of the Eastern Dist. of Penn.

Bills of Exchange. The Louisiana Advertiser contains a decision of some importance, involving property to the amount of more than $400,000, made on the 6th of April by the Supreme Court of that State. Judge Martin delivered the opinion of the Court which was unanimous. The house of Morgan, Dorsey & Co. in 1813, drew several bills of exchange in favor of William Keener & Co. upon the house of Duncan & Sons in Liverpool, payable in London at sixty days after sight. The bills were endorsed by the party in whose favor they were drawn. They were afterwards presented to the drawees and accepted, payable at a certain banking house in London ; the drawees at the same time fixed a day for the payment, which, however was not mentioned in the acceptance, nor did the day when the acceptance was made, appear on the face of the bills. The bills not being paid at the time agreed upon by the acceptors, which was sixty three days after they were presented, they were protested. The question before the Court was, whether upon such an imperfect acceptance the drawers and endorsers were holden to pay the bills. The Supreme Court of Louisiana having had the case before them for ten months, and making it the subject of careful and mature deliberation, decided that the acceptance and protest were good and sufficient to entitle the holders to their remedy against any of the other parties.

Trover for Money. A legal opinion has been delivered lately by Judge Bay, and been published in the Charleston papers, which involves a point of some interest. One Main, the clerk of S. & M. Allen, had in his possession bank notes belonging to his employers, amounting to $2500. He went to a gambling establishment, a Faro table, kept by Henry L. Watson, James H. Watson and Nicholas Spalding. Main was induced to stake the money, and being the loser, paid it over to those persons. An action of trover was brought by the owners of the money against the keepers of the Faro table—aud on submitting the affidavit of of the clerk who had played away the money, touching the facts of the case, and on making proof that the money had been demanded of the banker, and that he had refused to restore it—an order was made that he be held to bail in the sum of $2500. It was on a motion to set aside this order for bail, on the part of the defendant, that the opinion of the judge is given. After taking notice of the authorities which illustrate the case, the judge decided, that the action of trover would lie: and that the order for

bail—to the value of the goods converted—was preperly made. Motion to set aside the order for bail, was dismissed.

Religious Congregations.—In the matter of the First Baptist Church in Philadelphia, the Supreme Court of Pennsylvania have been occupied for several days in hearing testimony and the arguments of the learned counsel. No change was effected in the minds of the judges, who heard the former argument; and on Saturday last, judge Smith delivered an opinion concurring with the former opinion of chief justice Gibson and judge Huston. Judge Todd delivered a second opinion, with which Judge Rogers was understood to concur, different from that of the court. By the majority of the court, the right of the minority of the congregation to have a charter, under the name of the First Baptist Church, was established; and at the same time, an equal right on the part of the majority to obtain a charter, under the same name, was admitted, and a charter for them was accordingly submitted for the certificate of the judges. This decision was made expressly on the ground that the grant of a charter in the name of the First Baptist Church, could in no respect affect the rights of property. After the opinions were delivered, the chief justice made some very just and forcible remarks to the parties, earnestly recommending to them an amicable adjustment of their differences in regard to property. It was evident to him, as was usually the case in these religious disputes, that it was a contest for property, carried on in an angry and bitter spirit, unbecoming the christian character The decision now made would confer no rights to property. These stand as they did before. What is the rule of justice, which would govern these parties, is plain and palpable to every man of common sense. It is that the majority should continue to hold the property ; but it is their duty to make compensation to the minority, in proportion to the respective numbers of the parties. This minority have not been deprived of their civil rights, by an expulsion from the church, by a majority exercising an arbitrary power for party purposes. If the majority do not do justice on this plain principle of natural equity, the minority may pursue their legal remedy, in which the charter will only be a means of facility; when it will probably turn out that they will be entitled to their proportionate interest in the church property. An adjustment on this principle, should be made without litigation.

Intercourse with British Colonies. Judge Story has given, at the May term of the United States Supreme Court at Portland, a learned decision upon a case brought before him by appeal, involving principles important to our frontier inhabitants. It decides the following points.

1. That under the act of 15th March, 1820, ch. 122. prohibiting Commercial intercourse from the British Colonies in British ships, British owned vessels are included in the prohibition, although not registered or navigated according to the British Navigation and Registry Acts.

2. But open boats without decks are not included in the prohibition.

3. The forfeiture under the act attaches to the *cargo* on board at the time the vessel enters or attempts to enter our ports; and not to any cargo subsequently taken on board at the time of the seizure.

4. Where goods are seized and claimed as forfeited as part of the cargo, the burthen of proof is on the government to prove that such goods were part of the cargo on board at the time of the offence.

5. The claimant may file a special defence on that point, if he chooses; but it is also open in issue on the general denial of the allegations of the libel.

Canal. The completion of a canal does not divest the owner of the *fee* of the land occupied for the canal; the fee passes on the payment of the damages assessed. *Brinckherhoff* v. *Wemple*, 1 Wendell's Rep. 470.

Partnership. A promissory note endorsed by one of the members of a firm in the partnership name as security for the debt of a third person, with the knowledge of the creditor, is not binding upon the other partner, unless he was previously consulted, or subsequently assented to the transaction. *Laverty* v. *Burr*, Ib. 529.

Power of Attorney. An authority to execute a deed must be by deed; but in the conveyance of a chattel interest, a seal is not necessary, and the authority to execute such conveyance may be by parol. *Ostrand* v. *Reed*, Ib. 424.

JUDICIARY INTELLIGENCE.

Supreme Court of the United States. John M'Pherson Berrien, of Georgia, and late of the Senate of the United States, has been appointed Attorney General, in place of Mr. Wirt, resigned.

Circuit Court of the United States for the District of Maryland. This Court commenced its session on Friday, the 8th ult. in Baltimore. In his charge to the Grand Jury, Judge Glenn took occasion to call the attention of that body to the reports for some time in circulation, of certain piratical and unlawful acts having been committed by vessels alleged to have been fitted out or manned in whole or in part in that city. It is said that the Grand Jury have had this subject before them, and several persons were summoned to give their testimony upon it.

District Courts of the United States. The following appointments have lately been made. Samuel Herrick to be Attorney for the District of Ohio, vice Jos. S. Benham. Samuel Cushman, of New-Hampshire, to be Attorney for the District of New-Hampshire, vice Daniel M. Christer. Samuel M. Roberts, to be Attorney for the District of Illinois, vice Sydney Breeze. Garret D. Wall to be Attorney for the District of New-Jersey, vice L. Q. C. Eimer. Samuel Judah to be Attorney for the District of Indiana, vice Charles Dewey. John G. Stower, of New-York, to be Attorney for the Southern Judicial District of Florida, vice Wm. A. M'Rhea. Benj. F. Fenton, to be Attorney for the Western District of Louisiana, vice John Brownson. James A. Hamilton, to be Attorney for the Southern District of New-York.

North Carolina Judiciary. The Governor has called a meeting of the Executive Counsel to be holden on the 7th inst. for the purpose of appointing a Judge of the Supreme Court, to supply the vacancy occasioned by the death of Chief Justice Taylor.

Kentucky Judiciary. The sixth of April was the day appointed by law, for the commencement of the spring term. But there was no court. *The office of Chief Justice*, it is known, by reason of the outrageously factious conduct of certain senators, upon the *various* nominations made last session, *remains vacant.* Judge Underwood has been prostrated by a fever, since the adjournment in February; the effects of which have hindered his arrival in town. We hear however, that he was convalescent; and notwithstanding some alarming symptoms of a relapse, intended to start from his residence in Warren county, on the 31st ult. and come on by slow stages. We trust he will be able to get here, and that court will be opened in the course of the week. Judge Robinson arrived yesterday morning.—*Ken. paper.*

Alabama Judiciary. A late Alabama paper observes: The Circuit Court of this county, commenced its spring term on Monday last, Judge White presiding. It is thought the Court will ad-

journ on to-morrow, or next day at farthest' The industry of Judge White, and the facility with which he despatches the business before him, commands the praise of all who are attendant on the Court. General satisfaction appears to have been given —an admirable commentary on Mr. Kelley's charges of "total incapacity," &c.

New Jersey Judiciary. The Legislature of New-Jersey have appointed Samuel L. Southard, formerly Secretary of the Navy, Attorney General of that State for five years.

LITERARY INTELLIGENCE.

Hoffman's Legal Outlines. Professor Hoffman, of the University of Maryland, has lately published the first volume of his work entitled "Legal Outlines, being the subject of a course of lectures now delivering in the University of Maryland." This volume is to be followed by two others. Mr. Hoffman, in his preface, says, "These volumes, it is supposed, may be placed in the hands of students previously to their reading the Commentaries of Mr. Justice Blackstone; or the recent very able Commentaries on American Law, by Chancellor Kent." The volume just published treats of *natural, political* and *feudal* jurisprudence. The two other volumes will treat of the elements of *municipal* law, in its most extended sense, and including various titles of British, American and Roman law which have been scarcely alluded to by the profound and accomplished Commentator on the laws of England.

Damages on Bills of Exchange. Professor M'Vickar, has lately published a pamphlet entitled, "Considerations upon the expediency of abolishing Damages on protested Bills of Exchange, and the effect of establishing a reciprocal exchange with Europe." This publication has been made the subject of strictures by Publicola.

American Jurist. The 2d number of the American Jurist, for April, 1829, was published in the course of that month. This number contains, in addition to several interesting articles, and considerable valuable intelligence, a digest of the principal cases in the 1st volume of Peters' Reports, and in No. 1, volume 6, of Pickering's Reports. The intention of the Editors, is to

make the department of *intelligence* still more extensive than they have in the late number of their work.

London Law Magazine. The third number of this new and valuable work, for January, has lately been received in this country. The work is a quarterly publication and was commenced in June, 1828. The numbers have hitherto been replete with interesting and valuable matter. The object of the work is to comprise original articles on the principles, progress and present state of jurisprudence; reviews of new publications; digests of recent decisions, and short essays on disputed points in the common law, in equity, and conveyancing; abstracts of important statutes, official appointments, &c. &c.

Equity Digest. The following work is advertised as in press, in New-York, "A Digest of Reported Cases on points of practice and pleading in the British Courts of Equity." This work, it is said, is intended to supply a deficiency in Bridgman's Equity Digest—all decisions upon practice and pleading being excluded from that work.

OBITUARY NOTICES.

Death of Mr. Jay, formerly Chief Justice of the Supreme Court of the United States.

Died, at his residence, in Bedford, Westchester county, in the State of New-York, on the 17th ult. the venerable JOHN JAY, at the advanced age of 84. Mr. Jay was a descendant of one of the Huguenot families which fled from France at the revocation of the edict of Nantz, and sought refuge in the colony of New-York, from the persecution which followed that event. When the revolution commenced, he was settled in the practice of the law in the city of New-York. During the revolutionary contest he took an active and decided part in the cause of his country, and occupied various public stations in which he displayed uncommon energy and ability. On the 17th of October, 1777, he was appointed Chief Justice of the state of New-York, under the State Constitution, most of which bad been drafted by his pen; and he continued in that office until the 28th of Octo-

ber, 1779, when he resigned and was succeeded by Richard Morris. In 1779, he was appointed Minister to Spain, where his firmness of character was made very conspicuous. In 1783, he assisted in forming the treaty of peace at Paris. When the constitution of the United States, prepared by the convention of 1787 was submitted for adoption, great apprehension existed in the State of New-York, as well as in many other States that it would be rejected. He accordingly assisted, in exhibiting the principles of the proposed form of government, Hamilton and Madison, whose discussions upon the constitution, with those of Mr. Jay, are contained in the FEDERALIST. When the new government was organized, Mr. Jay was nominated by Washington, Chief Justice of the Supreme Court of the United States, the duties of which he performed with the highest honor to himself and country. He continued in that office until 1791, when he was appointed by Washington, Minister Extraordinary to Great Britain. Mr. Jay succeeded in forming a treaty with the British Government, in 1794, which has since proved highly beneficial to his native country. On his return to the United States, he was elected Governor of the State of New-York, and on quitting this office he retired to private life, where he has remained till the time of his death.

Death of Judge Gaillard, of South Carolina. Charleston papers have announced the death of Judge GAILLARD. This melancholy event occurred, it seems, at Darlington Court House in South Carolina, in the latter part of March last.

Late Savannah papers have announced the death of Judge DAVIES, of the Superior Court of Georgia, and contain the fullest expressions of respect for his character as a judge and as member of society.

LAW INTELLIGENCER.

Vol. I. JULY. No. 7.

EQUITABLE JURISDICTION.—No. 2.

Many attempts have been made to fix upon the origin of equitable jurisdiction in England. Lord Chancellor Ellesmere, in his observations concerning the office of Chancellor, states that there were no petitions of the chancery, remaining in the office of the record, of older time than the making of the statute 15 Hen. 6, which enacted that no writ of subpœna should be found to satisfy the defendant for his damages and expenses, if the matter contained in the bill could not be made good; and he adds, that the most ancient to be found were of the 20th year of that king. The researches, however, which have been made among the records of the Tower, within the last twenty years, have resulted in the certainty, that many hundreds of suits, for nearly fifty years before the period mentioned by Lord Ellesmere, are still extant. They commence in 17 Rich. 2, as appears by a work recently published in England, under the authority of the commissioners of the public records, entitled, "*A Callendar of the proceedings in Chancery in the reign of Queen Elizabeth;*" to which are prefixed examples of earlier proceedings, viz. from the reign of Rich. 2, from the originals in the Tower. A very detailed review of this work is contained in the *London Jurist* for January, 1828, accompanied by an analysis of its interesting contents. By the reviewer's extracts from the preface of the first mentioned work, it appears that in the 17 Rich. 2, a statute was made, enacting that when the suggestions of the plaintiff were proved to be untrue, the Chancellor

should be entitled to award costs and damages to the defendant according to his *discretion;* and it is considered probable "that the bills or petitions of this year were the first that were regularly filed." It also appears, that the chief business of the Court of Chancery, in those early times, did not arise from the introduction of *uses of land*, according to the opinion of most writers on the subject; and that very few instances of applications to the Chancellor, on such grounds, occurred among the proceedings, during the four or five reigns after the equitable jurisdiction of the Court was apparently fully established. Most of the ancient petitions seem to have been presented in consequence of assaults, trespasses, &c. which were cognizable at common law, but for which the party complaining was unable to obtain redress, in consequence of the protection afforded to his adversary by some powerful baron, or officer of the county where they occurred. The petitions in the reign of Rich. 2, it is stated, are very numerous, and are all in the French language. It is shewn by some few of them, that even at the early period referred to, the practice prevailed for the plaintiff to find sureties to satisfy the defendant for his costs and damages, in case he failed to prove the matter contained in the bill. The Reviewer has extracted the earliest Bill in that reign, and as it is the earliest specimen of a Bill in Chancery, it is presented in the original French and followed by a translation into English. It is without date, but as it is addressed to Thomas of Arundel, Archbishop of York, and as he discharged the office of Chancellor from 1392 to the 23d of November, 1396; and as Thomas, Earl of Stafford, is mentioned as then deceased, who died on the 4th of July, 1395, the date is pretty nearly ascertained. The following is the translation referred to of this truly interesting relic:

"To the very reverend Father in God the Archbishop of York, Chancellor of England, sheweth, Thomas, Duke of Glocester; That, whereas by an inquest taken before the Escheator of our Lord the King in the county of Salop, by a writ of *diem clausit extremum*, after the death of Thomas, late Earl of Stafford, it was found by the same inquest that the said late earl died seis-

ed in his demesne as of fee, among other lands and tenements in the said county, of a messuage and certain other lands and tenements, with the appurtenances, in the town of Bridgenorth in the said county, the custody of which lands and tenements, among other lands and tenements, which were of the said late earl, was committed to the said duke, to have under a certain form, as in the letters patent of our said Lord the King thereupon made to the said duke is more fully contained. And so it is that Thomas Othale, with divers other persons, hath entered into the said lands and tenements in the said town, on the possession of our said Lord the King. Wherefore may it please your sage discretion to consider the matter aforesaid, and to grant a writ directed to the said Thomas Othale, for to be before you in the Chancery of our said Lord the King at the octaves of the Trinity next coming, under the penalty of £100, to answer the matters aforesaid done in contempt of our said Lord the King."

In this record, it will be observed, that no allegation is made, that the matters of complaint are "remediless at law." It will also be observed, that no relief is prayed; but merely that a writ may issue. The writ prayed for was the celebrated "*subpœna*," invented by John de Waltham, Bishop of Salisbury, about twenty years before,—a writ which greatly assisted in extending the power and jurisdiction of the Court of Chancery, and which has not since assumed any material variation. In relation to the *second* bill in the collection referred to, the Reviewer says, "It would be difficult to class it under any of the heads of modern equitable jurisdiction. The plaintiff seems to have been afflicted with a disease not very peculiar to the age in which he lived—delay of justice—and he very simply comes into the Court of Chancery for a remedy, a course of proceeding which the experience of later ages has very justly exploded." The *third* Bill is more illustrative of the domestic history of the age, than it is conformable to modern notions of equitable proceedings. But the case made by the *fourth* bill is a clear case for an Injunction, though only general relief was prayed. The bill states that the plaintiff having purchased certain lands in Cornwall, late the property of Sir Robert Tresilian, and which were forfeited to the Crown on his attainder, with a clause of indemnity in case of eviction, John Tresilian, a son of Sir Robert, had

by maintenance of the Sheriff set up a claim under an annuity deed, by colour of which the said Sheriff had distrained, *charging circumstances from which fraud is inferred*, and praying "such remedy as to his Lordship should seem reasonable, for the love of God and for the indemnity of our said Lord the King, and in salvation of the estate of the suppliant." Very few bills were addressed to the Chancellor during the reign of Henry the Fourth, and that of his successor Henry the Fifth. Of these, the earliest is distinguished for being in the English language, and likewise as relating to a matter of *trust*; and the next following contains a more distinct allegation, than any which preceded it, of the inability of the plaintiff to have *redress at law*. The next but one to this is a case of *wardship*, which, says the reviewer, "deserves attention as probably the oldest on record involving this most important branch of the Chancellor's jurisdiction." It seems, however, that this branch of jurisdiction was first established by virtue of a *statute* passed, (4 Hen. C. 17,) with the view of empowering the Chancellor to send for the superiors of religious houses, (into which children had been decoyed by monks and friars,) and to punish them according to his discretion.[1] The late case of Mr. Long Wellesley has been the occasion of a thorough review of the authorities respecting this subject, and of a publication entitled, "*Observations upon the power exercised by the Court of Chancery, of depriving a father of the custody of his children*," which has been attributed to the pen of Mr. Beames. The bills and proceedings in the Court of Chancery, appear, from the reviewer's extracts, from the collection referred to, to have been preserved with more regularity in the reign of Henry the Sixth; and the use of the English language during that reign, which had been in the reign preceding it, but partially introduced, became generally adopted. After citing several anomalous cases in the reign of Henry the Sixth, the reviewer has cited a clear case for equitable interfer-

[1] Vid. Parke's Hist. of the Court of Chan. and the London Jurist, No. 4, for 1828, p. 72.

ence, which was a bill to set aside a bond and conveyance of land sold by plaintiff to the defendant, who had made him intoxicated, and otherwise taken advantage of his weakness of intellect, when absent from his wife and friends. But the case which makes a nearer approach than any which has been mentioned to the form and substance of modern pleading in equity, is that of William Lord Harrington. In the case of William Arundell, Esq. some further progress is remarked, and the prayer is that it may like his Lordship "to sende by a serjeant at armes for the defendants to appear before you in the King's Chancery, at a day by you to be limited, and then there to be examynd of the matter forsayd, and thereupon to compelle them to make a sufficient and suer estat, to the said beseecher, and to the heirs of his body comyng." This is an earlier case of the jurisdiction of the Court of Chancery in decreeing the specific performance of agreements, than the one referred to by Mr. Maddocks as the earliest trace of that Court's jurisdiction in this respect, which is in the year book of 4 Ed. 4, where it is said by Justice Genney, "that if I promise to build you a house, and do not perform my promise, you have your *subpœna*." (Vid. 1 Maddock's Chancery, 361.) The analysis of the contents of the above mentioned curious volume, to the end of the reign of Henry 6, is very minute and extensive, but the cases which have been here described are among the most important For many years the defendant had been brought before the Chancellor and subjected to a *viva voce* examination, but at the end of this reign, which lasted about twenty-eight years, a course of examination, corresponding more nearly to the present practice, was resorted to. Few of the decrees of this reign have been discovered, though in many cases the answers and proceedings are preserved as of record. The few decrees which have been discovered, are generally found endorsed on the bill, which practice continued to be observed to, at least as late, as the reign of Henry the Eighth.

The successor of Henry the Sixth, was Edward the Fourth, and in the fourth year of the latter reign occurred the first case in Chancery relative to a *mortgage*, in which a redemption is in

effect prayed for, though not in terms, and which was dismissed for want of sufficient proof of the allegations made by the plaintiff. No case is contained in the "*Calendar of Proceedings*," concerning the same subject, until the 40th and 41st of Elizabeth, when the record shews a bill, answer and replication in the cause of "John Shakspeare, of Stratford, upon Avon, and Mary his wife v. John Lambert, which we are informed by the reviewer, has not escaped the industry of the poet's commentators, and which is printed in the appendix to the second volume of Malone's last edition. The earliest instance of a specific prayer for an injunction to *stay proceedings at law*, is the case of Henry Astel v. John Causton, in 22 Edward 4; though it does not appear that an injunction was actually applied for. But in 1 Richard 3, an injunction was actually decreed. A bill to *perpetuate testimony* appears among the proceedings of Henry 7; a bill to *quiet possession* among those of Edward 6, and a bill to *distinguish boundaries* among those of Elizabeth. The oldest reported case in relation to the latter subject is in Nelson's Rep. p. 14. The records shew, that from the time of Henry 6 to Elizabeth, the equity system grew more and more distinct and independent. Considerably the larger number, it seems, relates to matters of trust and confidence, the most extensive field of modern equitable jurisdiction. Many of these were the result of *feoffments to uses*, but not by any means, says the reviewer, "a sufficient proportion to justify the notion derived by Blackstone from Spelman, and too hastily adopted by an excellent living historian,[1] that the Chancellor's peculiar restraining jurisdiction, originated in the practice of such feoffments." (p. 350 *of the Review.*)

It has already been mentioned that the writ of *subpœna* owed its origin to Waltham, Bishop of Salisbury, and Chancellor to King Richard 2, who by a "strained interpretation," says Blackstone,[2] of the statute of West. 2, made to give a remedy by new

[1] Hallam's Constitutional History, vol. 1. p. 370 is referred to.

[2] 3 Bla. Com. 52.

writs according to the equity of the case, devised it and made it returnable in the Court of Chancery alone. From that memorable era in the history of Chancery jurisdiction, a jealousy arose between the Courts of Law and Equity which was inveterate and long continued. As early as the 5 Richard 2, it was petitioned that the most wise man should be made Chancellor, and "that he seek to redress the enormities of the Chancery."[1] The same request was repeatedly urged in the reigns of Henry 4 and 5; and though in Henry 4, judgments at law, in consequence of this importunity, were declared irrevocable unless by attaint, or writ of error, yet the process by subpœna soon became the practice of the court. The jurisdiction of the Court was much enlarged by Cardinal Wolsey, who was Chancellor to Henry 8. The celebrated controversy between the courts of Law and Equity occasioned by Sir Edward Coke, when Chief Justice of the King's Bench, in the time of Lord Ellesmere, viz. *whether a Court of Equity could give relief against a judgment at law*, resulted in a complete triumph of the latter court, and placed it upon strong and elevated ground. The course pursued by Lord Coke on this occasion, it is generally admitted, was overbearing and violent, though it shews him to have been unconcerned as to the consequences of giving offence to majesty. The Court of Chancery, as has been shewn, had long exercised a jurisdiction which, however frequently complained of, was generally conceded. One of the articles against Wolsey was—his correction of judgments obtained in the courts of law. This power was not however seriously questioned until the reign of James. Sir Edward Coke, and the other Judges of the King's Bench, it seems, were remarkably tenacious of the authority of their Court, and strenuously maintained that an appeal from a judgment at law, could not legally be made, except to parliament. In support of this doctrine, they had recourse to the language of a statute of Edward 3, made for the purpose of preventing appeals to the courts of Rome. The statute alluded to provided

[1] Vid. Parke's Hist. of the Court of Chancery

generally, that whosoever should, after the delivery of a judgement in the King's Courts, impeach its authority in any other Court, (*en autrui* court,) should incur the penalties of a *præmunire*. The jurisdiction of the Court of Chancery, over matters adjudged in courts of law, was held, in consequence of this express declaration, to be entirely illegal, though *papal courts*, alone, were meant to be included by the statute. Accordingly, the grand jurors of Middlesex were directed to present any persons who had called in question a judgment of the law courts; and two recent cases of appeal to the Chancellor were selected for an example. All the parties who had been concerned in the proceedings, including solicitors, suitors and officers of court, it was determined should be indicted on the beforementioned statute of Edward 3. Unfortunately for Sir Edward Coke and his associates, the cases which they selected happened to have been unjustly decided by the court of King's Bench, and were in fact evidence of the expediency of allowing the interposition of Chancery; and the grand jurors were resolute in their refusal to bring in the bills required of them. Lord Ellesmere, it appears, was unable in consequence of a severe illness to act in the defence of the Court of Chancery. But the Commissioners who were appointed to review the proceedings, certified "that the precedents of that kind were many and precise in the point, and constant, and in good times, and allowed many times by the judges themselves." The question was then put, whether if a judgment be once passed at common law, the Chancery shall relieve upon apparent matter in Equity? The answer was, that "the Chancery was not restrained by any statute in that case."

The above historical sketch, general and imperfect as it is, of the origin and progress of the English Court of Chancery is sufficient to show,—1st, that equitable jurisdiction in England, was created by *necessity*;—2d, that like many other useful institutions, it had, in the outset, to encounter great jealousy and opposition; and 3d, that like all such institutions, it was ultimately made, by the good sense of the community, sure and stedfast.

PARTNERSHIP:—No. 2.

We inserted in our last Number, an article received from our Correspondent X, under the head of *Partnership*. His design was to have continued the subject in the present number, but, owing to unavoidable circumstances, the article which he intended for the present number, and which is upon *The power of one Partner to bind the firm*, must be deferred until the next. We have, therefore prepared the following article for the present number, in lieu of it.

INVESTMENT OF PARTNERSHIP CAPITAL IN LAND.

Every lawyer is doubtless aware, that a grant of land to two or more persons in fee-simple, fee-tail, for life, for years, or at will, creates, by the Common Law, an estate in joint-tenancy. The equitable construction has been however, that if the purchasers are partners in trade, and, as such, have invested their capital for the benefit of the company, they are *tenants in common*. And in this country, in those States, where the *jus accrescendi* has been abolished, they are tenants in Common at *law* as well as in equity, (*Deloney v, Hucheson et al.* 2 Rand. Rep. 183.)

The power of one partner to convey or charge the estate thus owned by all the co-partners, in common, has been discussed in a number of cases in England and in this country. In the case of *Thompson* v. *Dixon*, reported in 3 Brown's Ch. Rep. 198, where land, on which there were mills for partnership purposes, was held by the partners who were paper makers, as tenants in common, Lord Thurlow was at first of opinion, that, after the dissolution of the partnership, this estate should be considered as personal property; but upon reflection, he changed his mind, and decreed that it should retain its original nature, inasmuch as the partners had made no agreement sufficient to convert it into personal estate. Upon this ultimate opinion of Lord Thurlow, the Master of the Rolls, (Sir Wm. Grant,) founded his decrees in the cases of *Bell* v. *Phyn*, (7 Ves. Jr. 453,) and *Balmain* v. *Shore*, (9 Ves. Jr. 500.) In the first case partners living in England, purchased an estate in the island of Grenada, and paid for it *out of the partnership stock*. It was held, that it remained real property. In the other case, the partners were *potters* and

made use of the property in the course of their business—yet it was decreed to be real estate. Lord *Eldon*, however, in the case of *Selkrigg* v. *Davies*, (1 Dow's P. C. 231,) said "his own individual opinion was that all property involved in a partnership concern, ought to be considered as personal; and he afterwards decided in the case of *Townsend* v. *Devaynes*, (reported in the Appendix to Montague on Partnership, 97, and cited in Gow on Partnership, 54,) that real estate was to be considered as personal where it was purchased, in whole, or in part, with partnership funds. And it is considered to be the better opinion in England, that whenever partnership capital is invested in land for the benefit of the company, it is in equity, a tenancy in common, and forms a part of the partnership fund. The person in whom the legal estate is vested is regarded in equity as the trustee for the whole concern, and the property will be entitled to be distributed as personal. (3 Kents' Com. 14, and the authorities there cited.)

There have been two cases however on the subject in this country which it is extremely difficult to reconcile with what is considered the established rule in England. In the Supreme Court of Massachusetts (*Goodwin* v. *Richardson* 11 Mass. Rep. 469) it seemed to be considered, that partners, purchasing an estate out of the joint funds, and taking one conveyance to themselves as tenants in common, would hold their undivided moieties in separate and independent titles, and that the same would go, on the insolvency of the firm, or on the death of either, to pay their respective creditors at large. In *Coles* v. *Coles* in the Supreme Court of New York(15 Johns. Rep. 159) it was declared, that the principles and rules of law applicable to partnerships, and which govern and regulate the disposition of the partnership property, *did not apply* to *real* estates, and that in the absence of special covenants between the parties, real estate owned by partners, was to be considered and treated as such, without any reference to the partnership.

Other American cases have recognised the English rule on this subject, but its application has been made with reference to

the rights of purchasers without notice, that they may not be affected by a claim of partnership rights of which they are ignorant. In *Forde* v. *Herron*, in the Supreme Court of Appeals of Virginia, (4 Munf. 316,) two partners took a conveyance of real property in fee, as tenants in common, which was paid for, in part at least, out of the partnership funds, but there was no evidence of any specific agreement that it should be considered as partnership stock. One of the partners who was indebted to the partnership, conveyed his moiety in security for a private debt of his own, and it was decided, that the other partner had no equitable lien on the property sold, because the purchaser had no notice of the transactions between the partners, but trusted to the title papers by which they appeared to be tenants in common. In *Edgar* v. *Donnally*, in the same State, a right to land had been acquired with partnership stock, and a title taken in the name of the surviving partner, and a claimant under the deceased partner was held entitled in equity to a moiety of the land, against a purchaser from the survivor, with notice of the partnership right.[1] In the case of *M'Dermot* v. *Lawrence*, in Pennsylvania, (7 S. & Rawle, 438,) it was decided, that real estate taken by partners on ground rent, and buildings erected thereon, for the purpose of carrying on glass works, afterwards mortgaged by one partner without notice to the mortgagee of partnership debts then existing, is to be considered as between the mortgagee and the partnership creditors as real estate, and liable in the first instance to the mortgagee. Chief Justice Tilghman gave the opinion of the Court in this case, and he considered that although *land* was not naturally an object of trade or commerce, except for the purpose of erecting buildings; yet there was no doubt, that by the agreement of the partners, it may be brought into the stock, and considered as personal property, so far as concerns themselves and their personal heirs and representatives. But that if a conveyance of land is given to partners, as tenants in common, without mentioning any agreement for considering it as stock, and

[1] 2 Munf. 387.

afterwards a stranger purchases from one of the partners, it would be unjust, if without notice, he should be affected by any private agreement. These cases have been cited with approbation by Chancellor Kent, in the 3d volume of his commentaries p. 15, who conceives the weight of authority and the reason and justice of the case to be, that real estate acquired with partnership funds, and held by partners in common, may be conveyed or charged by one partner, on his private account, to the extent of his legal title, whether that legal title covers the whole or a part of the estate, provided the purchaser or mortgagee dealt with him *bona fide*, and without notice of the partnership rights, and there was nothing in the transaction, from which notice might reasonably be inferred.

In the State of Tennessee, it is provided by Statute, "that estates held in joint-tenancy, for the purpose of carrying on and promoting trade and commerce, or any other useful work, or manufacture, established and pursued, with a view of profit to the parties therein concerned, shall be vested in the surviving partner, or partners in order to enable him or them, to settle and adjust the partnership business; and pay off the debts which may have been contracted in pursuit of the joint business; but as soon as the same shall be effected, the survivor or survivors, shall account with, and pay and deliver to the heirs, executors and assigns respectively of the deceased partners, all such part, share, sums of money, as he or they may be entitled to by virtue of the original agreement, or according to his or their share or part in the joint concerns, in the same manner as partnership is usually settled between joint merchants or the representatives of their deceased partners." Under this act, it has been held, that the surviving partner has a complete and perfect right to sell the real estate, without regard to the state of the partnership accounts, to which a purchaser from him was not obliged to look—the power being absolute to sell, and not upon the condition, if needful for payment of debts. (*M'Alister* v. *Montgomery*, 3 Hayw. Rep. 94.)

POETRY OF THE LAW.

THEY who are unacquainted with the Common Law, are accustomed to regard it as a science without interest or entertainment, well calculated indeed to sharpen the wits of men, but destructive to the more etherial powers of Imagination and Fancy. With strange inconsistency gentlemen of the bar are nevertheless accused of a disposition to *romance*, and a bad pun on the word lawyer, current among the vulgar, supposes them highly gifted also with that creative faculty, which would enable them to indulge in it. The enemies of the law, and the enemies of lawyers seem, therefore, in legal phrase, *to be at issue*, and having but little respect for either, we shall leave them to reconcile their own differences in their own way. For the benefit, however, of well disposed persons who have erred through ignorance, who, enabled to view the desert from its borders only, can be supposed to know nothing about the green and shady oases which are reserved as rewards for the more enterprising travellers of the interior, we propose to give a short account of what may be emphatically styled, "The Poetry of the Law." "Poetry," as we are told by a celebrated writer of the present day, "is a creation." Though necessarily fiction, it must however be combined out of materials really existing in the world of Nature, and as a whole, present nothing at variance with its laws and appearances. Now this is precisely the case with fictions of the law, which according to Coke and Hobart, "must have no real essence in their own bodies,"[1] and according to Justice Doderidge, "must not be of a thing impossible, for the law imitates nature."[2] One objection urged against Poetry in general, is its inutility. This cannot lie at least against the Poetry of the Law, which allows no fiction but to avoid mischief or absurdity,[3] and to preserve rights.[4]

[1] Co. Lit. 265. b. Hob. 222.

[2] Radcliff v. Sheffield, 2 Roll. Rep. 502.

[3] Per Coke. Butler v. Baker, 3 Rep. 30. Per Doderidge Just. Radcliff v. Sheffield, 2 Roll. Rep. 502. Harper v. Derby J. 427.

[4] Per Gould J. 12 Mod. 290.

By the beautiful fiction of *abeyance*, the titles of estates are sometimes said to be transported "to the clouds," and sometimes to recline gently on "the bosom of the Law."[1] My Lord Coke, whom every legal gentleman considers as something lower than an angel, but better than a man, pursued of course a middle path, giving a right in abeyance neither to soar, nor to rest, but representing it as stalking over the earth with its head hidden by clouds, "and therein, he justly observes, it hath a quality of Fame, whereof the poet speaketh."

"Ingrediturque solo, et caput inter nubila condit."[2]

Before we leave this interesting part of our subject, we cannot help expressing our abhorrence at the nefarious attempts of Fearne and others, to deprive the law of this beautiful and sublime fiction.[3] Why should men whose tastes are purely scientific, seek to lessen when they cannot partake the pleasures of those who love beauty and sublimity, though they wear the garb of fiction? Was it not enough for these gentlemen, by their labors, to render necessary to a student knowledge, before them thought necessary only for a judge, without striving to root up the flowers which grow wild to refresh him, in the stony places of the law? We congratulate, however, our legal brethren that these attempts have been but partially successful, and that rights in abeyance mysteriously personified may still be seen either reclining, walking, or flying about the ample domains of all corporations sole, whether presentative, elective or donative.[4]

The legal fiction next in order is that of *Remitter*, by which, when one lawfully seised of lands, &c. is illegally deprived of his seisin, and subsequently acquires a defective estate of freehold

[1] 2 Bl. Comm. 106, n. 2. Mr. Coleridge in his notes to Blackstone, calls "in nubibus" and "in gremio legis," terms of *legal geography*." 2 Bl. Comm. 107. n. 2.

[2] 1 Inst. 342. b.

[3] Fearne Con. Rem. 513, 526. 2 Bl. Comm. 106. n. 2. 3 Christ. 107, n. 2. Coleridge.

[4] Co. Lit. 342. 2 Bl. Comm. 107. Lond. Law Mag. No. 3. Art. 4th, on Conveyancing, page 557. onwds.

in the same premises, the law, unless manifest injustice would follow, remits, or sends him back to his ancient and more worthy title.[1] Besides the beauty of utility in this fiction, there is something peculiarly touching in the delicacy which induces the law to blot out of existence the period of the owner's unjust deprivation of his estate, and to regard him as having always been seised according to his right. It would seem as if it annihilated the days of his sorrowing, lest they might alloy the days of his mirth; and remitter, like the delirium of painful sickness, though it cannot render us unconscious to passing pangs, is kindly sent to hide from our reflex view, the evils incident to an imperfect condition.

As a matter of taste, however, we prefer to all other "Poetry of the Law," the fiction of *Relation*. In producing this, imagination seems to have reproduced herself. Like her, it brings together in beautiful association, things distant in time and place, and combines for purposes of justice out of confused and disjointed materials, an orderly and connected series of events. Acts, thinly scattered over years, the relations of which are almost lost to sight, are crowded by it into a single day, and wrought into one animated scene.

But we must pass to the fiction of *Presumption*, by which one fact being established, the law supposes as a matter of course, the existence of another, whatever may be the truth in the individual case. The convenience of this as a mode of proof, may be easily discerned. Particular intents of the mind, for example, are incapable of direct proof, and must be presumed from the acts which they qualify, or the circumstances by which they are usually accompanied. Now the same act may be produced by different motives, and circumstances of guilt sometimes surround innocence. To render a decision easy in doubtful cases, the law by this fiction annexes an artificial force of evidence to certain acts, and they being made to appear, pronounces as a matter of course upon the motives of the actor. This fiction, it is true,

[1] Dyer fol. 68. num. 22. Co. Lit. 348. a.

prevents *a certainty of justice*, but who does not see that it promotes what is far more valuable, *the certainty of the law*. As a matter of poetry we have always regarded it in constancy and impartiality as truly sublime, its effects resembling in a near degree the rains of Heaven, "which descend upon the just, and unjust alike."

About the fiction of *Representation*, by which an heir, executor, or administrator is supposed to stand in the very place of his ancestor, testator, or intestate, we see nothing very remarkable as an effort of imagination, although we have always admired the fine judicial fancy with which the former personages are said to be "vested with the rights," and even "to stand in the shoes" of the latter.

These five fictions of the law are all the efforts we recollect of legal imagination, but who shall attempt to gather, into one bouquet, the flowers which legal fancy has scattered "from her pictured urn," over our text books, and reports. Bracton and Coke are usually regarded as mere men of logic, and yet we doubt whether many *poets* of these degenerate days, have ever so entirely substituted *fancy* for *reason*, as they sometimes did. Their philosophy of the first canon of common law descents, is a fine example. We are informed by them that estates of inheritance descend lineally, but cannot ascend lineally, because a heavy body, such as land would naturally descend "in a straight line, but never ascend,"[1] or as we should say, since the days of Sir Isaac Newton, because inheritances are regulated by the laws of gravitation. Sir Edward, indeed, not unfrequently introduced scraps of Latin poetry into his legal works; not for illustration, but as he avows, for the recreation of himself and readers. Thus, in the beginning of his chapter on the jurisdiction of forest courts, he says. "Seeing we are to treat of matters of game and hunting, (let us to the end that we may proceed the more cheerfully,) recreate ourselves with the excellent description of

[1] Bracton lb. 2. c. 29. 1 Ins. 11.

Didoe's doe of the forest wounded with a deadly arrow, stricken in her, and not impertinent to our purpose."[1]

" Uritur infelix Dido, totaque vagatur
Urbe furens, qualis conjecta cerva sagitta,
Quam procul incautam nemora inter Cressia
fixit
Pastor agens telis, liquitque volatile ferrum
Inscius : illa fuga sylvas saltusque peragrat
Dictæos, hæret lateri lethalis arundo."[2]

He pursues the wounded doe even into a marginal note, and compares her wound, to " an evil conscience in the false and furious officer of the forest, if any such be." In the case of the Swans, referring to the case of Lord Strange and Sir John Charlton, he shows a fervor of feeling in regard to the rewards of faithfulness in married love, which we should hardly expect from one to whom matrimony on second trial is said to have brought more wealth than happiness. " And in the same case it is said, that the truth of the matter was, that the Lord Strange had certain swans which were cocks, and Sir John Charleton certain swans which were hens, and they had cygnets between them; and for these cygnets the owners did join in one action, for in such case by the law of the realm, which is the common law in such case, the cygnets do bolong to both the owners in common equally, sc. to the owner of the cock, and the owner of the hen: and the cygnets shall be divided equally betwixt them. And the law thereof is founded on a reason in nature; for the cock swan

[1] 1 Inst. 4 chap. 73.

[2] Sick with desire, and seeking him she loves,
From street to street the raving Dido roves,
So when the watchful shepherd, from the blind,
Wounds with a random shaft the careless hind,
Distracted with her pain, she flies the woods,
Bounds o'er the lawn, and seeks the silent floods,
With fruitless care; for still the fatal dart
Sticks in her side, and rankles in her heart.
Dryden's Translation Æneis 4th.

is an emblem or representative of an affectionate and true husband to his wife above all other fowls; for the cock-swan holdeth himself to one female only, and for this cause nature hath conferred on him a gift beyond all others; that is, to die so joyfully, that he sings sweetly when he dies; upon which the poet saith:

> " Dulcia defecta modulatur carmina lingua,
> Cantator, cygnus, funeris ipse sui, &c." [1]

Lord Coke, however, is not the only legal gentleman who loved metaphor, or indulged fancy. We have *dead* pledges, and *living* pledges, *vested* remainders and *naked* possessions, *springing* uses, and *shifting* uses. Uses indeed, seem to have undergone strange metamorphoses. When future, they appear sometimes to have been compared to embryo horse gad-flies, since they are said " to be preserved in the bowels" of the land, upon which they are charged, and yet the metaphor being skillfully mixed, they are likened in the same sentence to buried men.[2] Others have thought future uses were preserved in " the clouds," and Baron Clarke sturdily declared of the uses in the case before him " be they below in the land, there they should be perpetually buried, and should never rise again; and be they above *in nubibus*, in the clouds, there they should always remain, and should never descend again."[3] With others, uses bear the similitude of *brooks*, and " are fed, we are told, by the common law estates, as by a fountain." Following the simile, the sages of antiquity declared with hydrostatic truth that the stream or use could flow no higher than the fountain or seisin, it was derived from. The doctrine of Trusts has been termed " the child of Equity," and Mr. Dixon, an English Chancery barrister, in his " Observations on the proposed new code," tells us, " that Courts of Equity trained up this Child of theirs in the way he should go, and it is to be hoped, that now he is old he will not depart from it."[4] Suits at law,

[1] Rep. Part 7, page 89.

[2] Baron Clarke, quoted in Chudleigh's Case, 1 Rep. 137.

[3] Same Case.

[4] Observations on the proposed new code, page 58.

have been literally tortured by the fancy of advocates. When continued so often, that justice is grievously delayed, they are said "to be hung up in court," and if the suspension is extremely painful to a party, "to be hung up by the eyelids." Cases long and vehemently argued are commonly termed "hard fought battles," and we would suggest that the hanged, branded, and transported, of the criminal list, might well be compared to the killed, wounded and missing of an official army report. Accounts are said "to be slipped out of the statute of limitations, by a new item,"[1] and principles and provisos "to ride over," cases and statutes. One very learned judge speaks of a case as "going on all fours" with the one under consideration;[2] another, of "marching abreast" of the plain words of a statute,[3] and a third of "trenching" on the rights of individuals.[4]

The learned Lord Kenyon is said to have been a man of brilliant fancy, and while discussing the last motion in a long litigated suit expressed great pleasure "at getting hold of the *last hair* in the *tail* of the case."

But the want of space rather than of matter, compels us to close this imperfect sketch of legal Poetry. We have shewn enough, we trust, to exculpate the law from the accusation stated in the commencement of our essay, and afforded another illustration of the assistance that the arts may, and do, render the sciences. X.

[1] Ch. Jus. North, Farringdon v. Lee, 1 Mod. 270.
[2] Lord Eldon, 1 Jac. & Walk. 284.
[3] Ch. Jus. Hosmer, 5 Conn. Rep. 228.
[4] Ch. Jus. Parker, 12 Mass. 466.

A BIOGRAPHICAL SKETCH OF MR. FEARNE.

[*From the London Law Magazine.*]

The lives of men devoted to scientific or literary pursuits can rarely be chequered by that diversity of incident, which gives biography its principal charm. They are, however, scarcely less interesting on this account to those who are treading the same paths, and who, fixing their eyes on the useful or splendid results of intellectual labor, naturally contemplate, with nearly an equal pleasure, the means of their production.

Charles Fearne was the eldest son of — Fearne, Esquire, judge advocate of the admiralty, who presided at the trial of the unfortunate Byng, and who, on that remarkable occasion, and in the general course of his profession, was esteemed a very able and learned man. He gave his son Charles the first rudiments of education himself, and at a proper age sent him to Westminster School, where he was soon distinguished for classical and mathematical attainments. Being designed for the law, as soon as he had finished his education at this seminary, he was entered at the Inner Temple, but with no fixed resolution to become a barrister. His life had hitherto passed in making excursions from one branch of learning to another, in each of which he made very considerable advances, and might perhaps have succeeded in any. During this state of irresolution his father died.[1]

The interest with which our author is regarded, as the first who successfully digested and elucidated the most abstruse, multifarious, and obscure department of our law of real property, will be much augmented when it is known that he was one of those who, in the commencement of their professional career, have had to struggle with the *res angusta domi*, and overleap "poverty's unconquerable bar." But the circumstance was far more honorable to him than those who have merely surmounted the obstacle of poverty. This will be shown by the following fact, which (it has been justly remarked[2]) may be looked on as the blossom of that independence and generosity which distinguished him through life. His father, besides being at a great expense for his education, presented him on his entrance into the Temple with a few hundred pounds, to purchase chambers and books; yet generously overlooking these circumstances, left his fortune, which was inconsiderable, to be equally partitioned between our author and a younger brother and sister. The former, however, sensible how much the family property

[1] 2 Chalmer's B. D. vol. xiv. 159.

[2] Percy Anecdotes, Bar, 159.

had been wasted on his account, nobly refused the advantage of the will, and gave up the whole residue to the other children. "My father," said he, "by taking such uncommon pains with my education, no doubt meant that it should be my whole dependence; and if that won't bring me through, a few hundred pounds will be a matter of no consequcnce."[1]

Those who know the absorbing nature of legal studies, when pushed to the extreme essential to success, or rather to eminence, will learn with surprise, that Mr. Fearne was not merely a general scholar, but "profoundly versed in mathematics, chemistry, and mechanics. He had obtained a patent for dyeing scarlet; and had solicited one for a preparation of porcelain. He had composed a treatise in the Greek language on the *Greek accent*; another on *the retreat of the ten thousand*."[2]

The following circumstance, while it shews the versatility of his talents, and the variety of his pursuits, will evince from how low a situation he climbed to the eminence which he subsequently attained. A friend of the reminiscent, (says Mr. Butler in his Reminiscences,) having communicated to an eminent gunsmith a project of a musket, of greater power and much less size than that in ordinary use, the gunsmith pointed out to him its defects, and observed, that "a Mr. Fearne, an obscure law-man, Breames' Buildings, Chancery Lane, had invented a musket, which, although defective, was much nearer to the attainment of the object."

Great attainments are sometimes the fruit of plodding and habitual industry, which, being unaccompanied by native comprehensiveness of mind, not unfrequently loses the end in the means; but they are sometimes the result of that fervid thirst of knowledge, and love of honorable distinction, which distinguish superior minds; and it is then that they become objects of rational admiration. That Mr. Fearne belonged to the latter class, that it was an ardent temperament which carried him forward in the the pursuit of information and professional character, will appear from the following fact, recorded by his friend Mr. Butler. He told that gentleman, that when he resolved to dedicate himself to the study of the law, he burned his profane library, and wept over its flames; and that the works which he most regretted, were *the Homilies of St. John Chrysostom to the People of Antioch, and the Comedies of Aristophanes.*[3] When men, remark-

[1] Chalm. XIV. 160. We are glad to say, that the brother and sister, who were equally amiable and delicate, were both of them afterwards happily settled.

[2] Butler's Rem. vol. 1. 118.

[3] Ibid.

[4] Butler's Rem. vol. 1. 119.

able for great attainments and love of literature, resolve to apply almost exclusively to a rugged, and, as they may deem it, a barren science, the sacrifice is always great; and if they are likewise ardent and sensitive, as Mr. Fearne appears to have been, it is keenly felt. His burning the compositions which he valued, may appear to vulgar minds simply an act of caprice or folly; but in the imposition of a painful, perhaps an unnecessary, restriction, those who are better acquainted with human nature, recognise that devotedness which indicates the energy of a concentrating mind, and the ardor of a generous ambition.

[To be continued.]

LATE AND IMPORTANT DECISIONS.

Authority of Marshals to adjourn United States' Courts.—At the late session of the United States Circuit Court in the city of N. York, the Court was opened by Judge Betts, in the absence of Judge Thompson, and was continued by adjournment from day to day, during the week. On Saturday the Court was adjourned until the next Monday, and Judge Betts, owing to sickness in his family, as is understood, returned to his residence in Newburgh, expecting that Judge Thompson would reach town in time to open the Court on Monday. Unfortunately such was not the case; and both Judges being absent, the Marshall at 5 o'clock, P. M. adjoined the Court until the next day at 11 o'clock, A. M., supposing himself authorised to do so, by the 6th section of the Act of Congress of 1789, "to establish the Judicial Court of the United States."

On Tuesday, Judge Thompson having reached town, the Court was opened, but doubts having been expressed as to the power of the Marshal to adjourn, the Judge took time until yesterday morning, to examine the statute and consider the subject, and accordingly decided, as we learn from the Commercial:

1. That the adjournment by the Marshal was not authorised by the statute, and was therefore ineffectual to continue the term of the court; and

2. That the court having been adjourned to a particular day, and not having been legally opened and adjourned on that day, the term must now be considered as at an end. The jurors and witnesses were therefore discharged by proclamation.—*N. York Gazette.*

The following is the account of the opinion of Judge Thomp-

son, in this case, from the New-York Journal of Commerce : The first question is, whether the Marshal had any authority to adjourn the Court, after the term had regularly commenced, and the Court was duly organized according to law for the transaction of business. This must depend entirely upon the laws of the United States. Independent of the power derived from them, the Marshal had no more authority to adjourn the Court than any other individual. The commencement of the tetm as fixed by law, was on the last Monday in May, and the Court was at that time regularly opened by the District Judge, who was authorised to hold the Court and transact business according to the provisions of the Act of 1802. (3 vol. L. U. S. p. 479 §4.) The sixth section of the Judiciary Act of 1789, declares that a Circuit Court of the U. S. may be adjourned from day to day by any one of its Judges, or if none are present, by the Marshal of the District *until a quorum be convened.* (2 vol. L. U. S. p. 59.) And by the act of 1794, (2 vol. L. U. S. p. 408,) it is provided that a Circuit Court in any District, when it shall happen that no Justice of the Supreme Court shall attend within four days after the time appointed by law *for the commencement of the session,* may be adjourned to the next stated term by the Judge of the District, or in case of his absence also, by the Marshal of the District. When these laws were passed, the Circuit Court was composed of two Judges of the Supreme Court and the District Judge of the District where the Court was held. Under these laws the authority given to the Marshal to adjourn, is antecedent to the formation of the Court by a competent number of Judges. When the Court is once duly organized for the transaction of business, his powers are spent. In the Act of 1802, by which one Judge is authorised to hold the Court, there is no provision as to adjournment, and the authority of the Marshal must rest upon the other laws which have been referred to, and construing them all together, the Marshal's power to adjourn is clearly spent as soon as the Court is legally organized for the transaction of business. If the adjournment by the Marshal was without authority and void, the next question is, whether the want of a legal adjournment to some specified time puts an end to the term. It is not necessary that the Court should be adjourned from day to day, but the term is not continued unless the adjournment be to a specified time. The duration of the term of this Court is not limited by law: its commencement is only fixed, and its continuance can only be kept up by a regular adjournment. If this were not so, the Court would be open during the whole time, from one term to another, and parties would not know when to attend for the transaction of business. If one

day may intervene without an adjournment, upon the same principle any number of days may, and parties are liable to be taken by surprise. The powers of a Court ought not to be so construed as to involve such practical inconvenience and injustice. It is believed that the invariable practice of the Courts of the United States is conformable to this rule, and may therefore be considered the law of the Court. The books furnish us with but little aid upon this question. The practice and decisions under Judicial Commissions in England are somewhat analogous; and a distinction would seem there to prevail, with respect to the necessity of an adjourment between the case of a Commission where no time is limited for its continuance and where it is for a specified time. In the former the want of an adjournment puts an end to the authority. In the latter, if the Court breaks up wtihout an adjournment, it may be holden again on a new summons. (Bac. Ab. Tit. Courts, let. C. 1 Halep 6 C. 498, 2 Halep 6 C. 24. 4 Inst. 165.) So far as these cases are analogous, they go to show that the want of a regular adjournment puts an end to the term of the Court, for its duration is not limited by law. His Honor concluded by saying, that not the slightest blame was to be attributed to the Marshal, on the contrary, he did what was prudent and proper.

Rights of ship owners.—In the case of the brig Seneca, at Philadelphia, owned by Davis & Brooks, of this city, and Captain Levely, Judge Hopkinson some months ago decided that a Captain owning one half of a vessel, had a right to take her to sea, giving security to the other half owners for the safe of said vessel. Davis & Brooks contended for public sale of the vessel, to close the concern, and appealed from the decision of Judge Hopkinson.—The case was re-argued before Judge Washington whose decision reverses that of Judge Hopkinson, and orders the vessel to be sold at auction.

Meaning of the term "High Seas." In the Circuit Court of the United States, for the Massachusetts District, at the late term, in the case of the *United States* v. *Grush*, the indictment charged an offence alleged to have been committed on the high seas, and on board of a vessel which lay at anchor at the time the offence was committed in Boston harbor. It was admitted that the place where she lay was between certain islands which belong to the city of Boston, as part of its territorial limits. The Statute of the United States on which the indictment was founded, (Stat. of 1825, ch. 276, s. 22,) declares "that if any person or persons upon the *high seas*, or in any *arm of the sea*, or in any

river, haven, creek, basin or bay within the admiralty jurisdiction of the United States, and *out of the jurisdiction of any particular State*, on board any vessel, &c. &c. shall with a dangerous weapon, or with intent to kill, &c. commit an assault on another, such person, shall on conviction thereof be punished, &c. &c." The question was, what was the true meaning of the words "*high seas*" in this statute; and whether the place where the offence was committed was within the jurisdiction of the Court. Mr. J. *Story* concluded an elaborate and learned opinion in the case, as follows: "Upon the whole my opinion is, that this court upon the facts has no jurisdiction."

Case of usury. On the 17th March last Mr. J. Johnson delivered the opinion of the Supreme Court of the United States, in the case of the *Bank of the United States* plaintiff in error v. *Wm. Owens.* The following account of the facts and the opinion of the Court is from the Kentucky Commentator: The President, Directors and Co. of the Bank of the United States, brought their action of debt against Owens, Waggener, Miller, and Wagley, upon their joint note, for $5000; dated the 7th February, 1822, and payable the 7th of February, 1825, with interest. The defendants Waggener, Miller, and Wagley, appeared to the action, and pleaded that they executed the note as sureties for Owens, to enable him to obtain a loan from the Bank; that Owens presented the note at the office of the Bank in Lexington, for discount, which was refused: that afterwards, viz. on the 21st of May, 1822, it was corruptly agreed between the Bank, by their agents and managers, at their office in Lexington, and the said Owens, that the Bank would discount the note, and Owens would receive the proceeds in notes of the Bank of Kentucky at their nominal value, and pay his note when due, in current money of the United States, with interest; and that they received the note sued upon, and delivered to Owens the Kentucky Bank notes accordingly; that the Bank notes were then so much depreciated, that $100 was worth only $54 in specie, and that this agreement was corrupt and *usurious*, and contrary to the fundamental articles of the corporation. To this plea there was a demurrer and joinder; upon the argument of which, a difference of opinion arose between the late Mr. Justice Trimble, and Judge Boyd, and the cause was referred to the Supreme Court for decision. "Upon the argument, (says the record,) of the plaintiffs demurrer to the special plea in bar of the defendants, Waggener, Miller and Wagley, in this cause, the following questions arise, namely,

"1st. Whether the facts set forth and the averments in said plea, make out a case in which the Corporation has taken more

than at the rate of six per centum per annum upon a loan or discount, contrary to, and in violation of, the 9th rule of the fundamental articles of the Corporation."

"2d. If the plea does make out such a case, whether the note sued on or the contracts therein expressed, to pay the plaintiffs $5000, is void in law, so that no recovery can be had thereon in the suit." And,

"3d. If not wholly void, whether the plea is sufficient to bar the plaintiff's recovery of any, and if of any, of what part of the said sum of $5000."

"And the judges being opposed in opinion upon the said questions, they are, upon the request of the plaintiffs, by their counsel, certified to the Supreme Court of the United States." These questions, it appears, are to be 'certified affirmatively,' that is, that the contract was usurious and the *note void.*

Law of Assignment and Registration of Deeds.—At the late term of the U. S. Circuit Court in Rhode-Island, Justices Story and Pitman both expressed a decided opinion, that the Assignee stands in the shoes of the Assignor; that he takes the property loaded with all liens, mortgages and incumbrances which existed at the time of the Assignment, and that such incumbrances, though unrecorded, yet being good against the Assignor are also good against the Assignee. (But see Day v. Dunham, 2 Johns. Ch. Rep. 182.)

[The Editor of the Law Intelligencer, some time since, made arrangements for receiving from England, a quarterly Digest of the cases adjudged in the principal Courts there. The Digest to January last has been received, from which has been selected the following for the present number.]

Landlord and Tenant. A memorandum of a demise contained the following clause: "It is stipulated and conditioned that the said G. G. shall not *underlet.*" *Held*, that a condition was thereby created, on breach of which *ejectment* was maintainable, though there was no clause of re-entry. *Doe Dem. Henniken* v. *Watt*, 1 Manning & Ryland, 694.

Land not appurtenant to Land. Trover for two barges distrained by the defendant on the river Thames, whilst lying between high and low water mark, and attached by ropes to a wharf, in respect of which the rent was due. A special verdict stated that the exclusive use of the land between high and low water mark, as well when covered with water as dry, was demised as appurtenant to the wharf; but that the land itself between high and low water mark was not demised. Held, that if it was to be inferred from the finding that the exclusive use was appur-

tenant, it would be a mere easement or privilege out of which no rent could issue; and if the verdict meant that the land between high and low water mark was appurtenant to the wharf, it was tantamount to finding that one piece of land was appurtenant to another, which in point of law cannot be. (See Co. Lit. 121 b. note.) *Buzzard* v. *Capel*, 8 Barnewall & Cresswell, 141.

Presumption. After the lapse of a century, and no evidence to the contrary appearing, the death of a party *without issue* may be presumed. *Doe* v. *Wolley.* 8 Barn. & Cres. 22.

JUDICIARY INTELLIGENCE

Circuit Court of the United States for the District of Kentucky.—John Speed Smith has been appointed District Attorney, in place of John J. Crittendon.

New-York Judiciary.—Ogden Hoffman is appointed District Attorney under the authority of the State of New-York, for the southern district of that State, in the place of Hugh Maxwell, resigned.

Connecticut Judiciary. Thomas S. Williams, Esq. of Hartford, has been elected by the Legislature, a Judge of the Superior Court of this State, in the place of Judge Brainard, resigned. Clark Bissell, Esq. of Norwalk, to be a Judge of the same court in the place of Judge Lanman.

Georgia Judiciary. William Law has been appointed by the Governor of Georgia, Judge of the Superior Court for the circuit in which the late Judge Davies presided.

Pennsylvania Judiciary. The report in circulation, that Henry Baldwin has been appointed Attorney General, is contradicted.

Vermont Judiciary. The legislature of Vermont has lately passed an act by which the Supreme Court and Court of Chancery shall consist of one Chief Justice, and four assistant Justices, three of whom, at least, shall attend each session, and shall be a quorum. They have also authorized the Governor to appoint some suitable person to procure to be printed five hundred copies of the reports of cases decided by the Supreme Court, during the year ending October, 1828, for the benefit of the State, and to direct such person to deposit the same in the office of the Secretary of State.

LITERARY INTELLIGENCE.

Digest of American Law. The Hon. Nathan Dane has prepared for the press, volume 9, of his General Abridgment of American Law, which consists almost wholly of select decisions, English and American, in law and equity, made in Supreme Court, within the last nine years, and is taken from more than thirty volumes, (among others,) of the latest Reports, of which it is understood there is no other abridgment or digest. This volume is formed so as to be used by itself, but to the best advantage with the other eight volumes, as each article and section in it continues the corresponding article and section in them, and to them expressly refers in each case. It is in the same form as the other volumes, and is in conformity to them as to paper, type, page, binding and lettering.

Criminal Law. The work by John Collyer, Esq. of Lincoln's Inn, entitled, "The Criminal Statutes of England analysed and alphabetically arranged, with notes," has lately been received in this country. The nature and objects of this work will appear from the following extract from the Preface: "At a time when so much has been done by the legislature, if not materially to alter, at least to simplify and consolidate the criminal code, it occurred to me that it might be no unprofitable task, to bring under one view, and for that purpose to compress within one volume, the statute law of crimes. In order to attain this object I have most sedulously endeavored to collect and arrange all those statutes which expressly relate to indictable offences. In this description, I include not only those upon which indictments may be be framed, but those also which afford additional remedies, by information or otherwise, to the remedies already provided by the common law. To these I have added the statutes which more particularly relate to the practice of the criminal courts."

LAW INTELLIGENCER.

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PRIORITY OF PAYMENT,

Given to the United States in cases of Bankruptcy, Insolvency, &c.

No. I.

One of the principal advantages of a periodical Law Journal is the opportunity that it affords of investigating those subjects, a treatise upon which would not be sufficiently extensive to warrant a separate publication, but which nevertheless are subjects of sufficient importance to be minutely considered and discussed. This may be said of the subject which stands at the head of the present article.

It was observed by Mr. J. *Story*, in the case of the *United States* v. *Hoar*, (2 Mason's Rep. 314,) that the true reason of the common law maxim *nullum tempus occurrit regi*, "is the great public policy of preserving the public rights, revenues and property from injury and loss by the negligence of officers." It is on the same principle, we apprehend, that government exercises the right of a privileged creditor and claims a preference in the disposition of the effects of its debtors in certain cases. This *right of priority*, as it is called, is in fact a prerogative *incident* to the very nature of government, because without it, the objects for which government is created might be delayed, if not defeated. It is, therefore, far from being an arbitrary right; and it is so obviously recommended by expediency, that it ought always to be conceded, even in those countries which are most distinguished for free and popular institutions. It certainly ap-

pears to have been hitherto exercised and acquiesced in, in all countries and under all governments. In Rome, debts due to the State were preferred to those due to other creditors, and the State had a lien on the property of the receivers of the public funds. The same has been the modern law of continental Europe and of Great Britain. Among what Blackstone calls the *incidental* prerogatives of the King, which are only exceptions in favor of the crown to those general rules that are established for the rest of the community, we perceive he ranks the preference of the King's debt to any debt due his subjects (1 Bla. Com. 240.)

It seems then, that both principle and authority would have made it obligatory upon the debtors of the government of the United States to pay the government before other creditors, even if it had not been expressly required by statute. The acts of Congress, it will appear, have not only limited this priority to certain specified cases, but they have also received a most liberal construction as it respects the rights of private creditors. The first act of Congress on this subject was passed on the 31st July, 1789, and gave the United States a preference only in the case of *bonds for duties*. On the 4th of August, 1790, an act in relation to the same subject was passed which repealed all former acts, and re-enacted in substance the 21st section of the former act relative to the priority of the United States. On the 2d May, 1792, the priority previously given to the United States is transferred to the *sureties* on duty bonds who shall themselves pay the debt; and the cases of insolvency, in which this priority is to take place, are explained to comprehend the case of a voluntary assignment, and the attached effects of an absconding, concealed or absent debtor. Such was the title of the United States to a preference in the payment of debts previous to the passage of the act of Congress of March 3, 1797, S. 5, by which it is provided, that all persons who from that time may become indebted to the United States and afterwards become insolvent; or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due the United States shall be first satisfied: It is also by the same act provided, that the pri-

ority thereby established shall extend, as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed. By the act of March 2d, 1799, S. 65, it is further provided, that in all cases of insolvency, or where any estate in the hands of the executors, administrators, or assignees shall be insufficient to pay all the debts due from the deceased, the debts due to the United States, on any revenue bond shall be first satisfied. And by the same act any executor, administrator, assignee, or other persons who shall pay any debt due by the person or estate from whom, or for which they are acting previous to the debt or debts due to the United States, from such person or estate being first satisfied, shall become answerable in their own person and estate, for the debt so due to the United States ; and actions at law may be commenced against them for the recovery of the said debts in the proper Court having cognizance thereof.

The foregoing acts, both by their spirit and letter, are not confined to *fiscal* debts, as bonds for duties, and debts due from accountable agents, but include all debts. In *Fisher* v. *Blight*, (2 Cranch, 358,) the question was, whether the United States, as holders of a *protested bill of exchange*, which had been negociated in the ordinary course of trade, were entitled to be preferred to the general creditors, where the debtor becomes a bankrupt. As it was plain, that the letter of the above mentioned act of 1797 gave to the United States the preference which they claimed in this case, an attempt was made to shew an intention different from what the words imported. And with this view the language adopted by the legislature was most critically examined, and arguments *ab inconvenienti* resorted to. It was also contended that so general a priority was *unconstitutional* ; and that if liens general or specific, if judgments and mortgages were to be set aside by the prerogative of the United States, it would impair the obligation of contracts. The claim of priority, it was al-

so urged would interfere with the right of the state sovereignties, and defeat the measures they had a right to adopt to secure themselves against delinquencies on the part of their own revenue officers. But the Court decided, that in *all* cases of insolvency or bankruptcy of a debtor of the United States, the United States are entitled to priority of payment out of his effects. And by this decision the judgment of the Circuit Court of the District of Pennsylvania was reversed.

The acts have also been construed to relate to *foreigners*, as well as to natives. And it was considered by the Court, in *Harrison* v. *Sterry*, (5 Cranch, 289,) that, as the priority forms no part of the contract itself, but is rather a personal privilege dependent on the law of the place where the property lies; the United States are entitled to a preference in the distribution of the bankrupt's effects in this country, although the debt was contracted by a foreigner in a foreign country. And the preference in this case, it was thought, existed, even where the United States prove their debt under a commission of bankruptcy in this country, and vote for an assignee.

The right of preference of the United States, it is considered, is not derived merely from the debtor's state of insolvency. His insolvency must be accompanied either by a voluntary assignment for the benefit of creditors, *or* by an attachment of his estate and effects as those of an absent, concealed or absconding debtor, *or* the commission of some legal act of insolvency or bankruptcy. The priority is limited to some one of these particular cases when the debtor *is alive*; but *after his death*, it takes effect generally. (*United States* v. *Fisher*, 2 Cranch, 358. *Same* v. *Hooe*, 3 Cranch, 73. *Thellusson* v. *Smith*, 2 Whea. 296.)

The insolvency which was to entitle the United States to a preference, was declared in *Prince* v. *Bartlett*, 8 Cranch, 431, to mean a legal and known insolvency, manifested by some notorious act of the debtor pursuant to law. This was giving to the world some reasonable and definite test by which to ascertain the existence of the latent preference given by law to the United States. In this case the effects of an insolvent debtor, duly at-

tached in June, were considered not to be liable to the claim of the United States on a *custom house bond* given prior to the attachment and put in suit in August following. The private creditor had acquired a lien by his attachment which could not be divested by process on the part of the United States subsequently issued. That a mere inability of the debtor to pay his debts, is not an insolvency within the meaning of the act of 1799, was also held by the court in the recent case of *Conrad* v. *Atlantic Ins. Co.* (1 Peter's Rep. 439.) The insolvency, it was held, *must be manifested* in *one* of the *three* modes above mentioned.

In the case of *Watkins* v. *Otis*, in the Supreme Court of Massachusetts, [2 Pick. Rep. 88,] the principal in a bond to the United States, having become a defaulter, and having left the country, his surety paid to the United States, without a suit, one thousand dollars, and then arrested the principal in *Matanzas* in a suit on a bond of indemnity, and upon receiving about two thousand dollars gave this bond up to the principal. The bond to the United States was afterwards put in suit and the judgment recovered upon it was satisfied by a levy on land supposed to belong to the principal, and which the United States afterwards sold without any covenant of seisin or warrantry, and the same paid by the surety was restored to him. After this the surety was summoned as the trustee of the principal, first, at the suit of an individual, and then, at the suit of the United States. It was held, that the principal was entitled to recover back the money paid in *Matanzas*, and that the surety, was therefore liable as his trustee; and that, as by the process of foreign attachment in Massachusetts, property is not attached as "the estate and effects of an absconding, concealed or absent debtor," the United States had not a priority of the individual creditor. Mr. C. J. *Parker*, who gave the opinion of the Court in this case, considered that the question as to the priority of the United States, had been settled by the courts of the United States, and relied more particularly upon the case before mentioned, of *Prince* v. *Bartlett*. He viewed this priority as a *high* prerogative, which "should be construed strictly, as it is in derogation of the rights of cred-

itors." If an attachment is taken out against a person, as a absent or absconding debtor, and is *afterwards withdrawn* by consent, without any proceedings under it, it is inoperative and gives to the United States no right of preference. (Per *Spencer* J. in *M'Lean* v. *Rankin*, 3 Johns. Rep. 370.)

As to the phrase "legal bankruptcy," it has been thought there is some obscurity. The question which arises is, what is "legal bankruptcy?" In 1797, when the act of Congress was passed there was no bankrupt law;[1] and therefore these words can have no reference to bankruptcy under a bankrupt law. The words seem in their connexion to have reference to the previous cases put in the section, and point out some legal insolvency, or some mode of proceeding by which the property of the debtor is taken out of his hands to be distributed by others. In a case in the Circuit Court for the Southern District of New-York, it was contended, on the part of the plaintiff, that the *concealment* of G. S. to avoid arrest by creditors, was an act of legal bankruptcy, and that this act alone gives the right of priority to the United States. Mr. J. *Thompson*, before whom the case was tried said "he knew of no mode of enforcing a preference while the debtor is going on in the management of his own affairs; the only mode of proceeding in such a case is, to commence a suit against the debtor and go on to judgment and execution in the ordinary way. The concealment therefore, *of itself*, would not be such a circumstance as to make the act apply and give rise to the attaching of the priority of the United States. (*United States* v. *Clark*, 1 Paine's Cir. Co. Rep. 629.)

When the priority is claimed by the United States on the ground of the debtor's *assignment* for the benefit of creditors, it must be shewn that the debtor has assigned his *whole* property. If however a trivial portion of the estate is left out, for the purpose of evading the act, it would be deemed a fraud upon the

[1] That the priority is not affected by an assignment under a commission of bankruptcy, was decided during the general bankrupt act in United States v. Fisher, 2 Cranch, 388.

law, and the parties could not avail themselves of such a contrivance. (*United States* v. *Hooe*, 3 Cranch, 73—*Conrad* v. *Atlantic Ins. Co.* 1 Peters' R. 439.) And if there is an omission of an article of property in an assignment which purports to be general, which omission does not shew, that the intention was, that the assignment should be a partial one, as opposed to a general one, it does not take the case out of the act. (*United States* v. *Clark*, 1 Paine's Cir. Co. Rep. 629.) In a case where the deed of assignment conveyed only the property mentioned in the schedule annexed, and the schedule purported not to contain all the property of the debtor, the *onus* was thrown on the United States to shew, that the assignment did in fact contain his whole property. (*United States* v. *Howland*, 4 Whea. 108.) The same construction seems to be supported by the case of *United States* v. *King*, (Wallace 13,) the case of *United States* v. *Mott*, (1 Paine's Cir. Court Rep. 188,) and the case of *M'Lean* v. *Rankin*, (3 Johns. Rep. 370.) In the latter case, it was held, that a consignment of goods by a debtor abroad, though insolvent, with directions to have them sold, and the proceeds paid to his creditors in New-York is not such an assignment as will entitle the United States to a preference. It is not necessary, however, that the assignment should be made for the benefit of all the creditors. It is only necessary that it should include the whole property. (*United States* v. *Mott*, 1 Paine's Cir. Co. Rep. 188.) In this case, it was also held, that an assignment may be *voluntary* within the meaning of the act of Congress, although made for a valuable consideration. As, where the assignment is made by a debtor of the United States when his property is about being levied upon under a judgment obtained against him by one of his creditors, in trust, first, for the debt of such creditor, and then for the debt of the United States. In such a case the assignment is voluntary and fraudulent, and is void as against the United States, notwithstanding the creditor should give up his intention of levying, in consideration of the assignment. (Ib.)

It was considered by the Supreme Court, in one of the earliest cases upon the subject, that the law establishing and limiting the

priority of the United States was not in the nature of a *lien* in favor of the United States, as was intimated by the counsel, but that it conferred merely a right of preference in certain cases. *Fisher* v. *Blight*, (2 Cranch, 358.) And that it did not extend to a *bona fide* conveyance in the *ordinary course of business*, or to a *mortgage* to secure a debt, or to a case where the debtor's property is seised under a *fieri facias*, before the right of preference has accrued, has since been adjudged in *United States* v. *Hooe*, (3 Cranch, 73,) and in *Thellusson* v. *Smith*, (2 Whea. 396.) In the still later case of *Conrad* v. *Atlantic Ins. Co.* (1 Peter's Sup. Co. Rep. 439,) the nature and extent of the priority received the particular attention of Mr. J. *Story* who gave the opinion of the Court. He viewed the priority as a mere right of prior payment, out of the general funds of the debtor, in the hands of the assignees, and not as a right which supersedes and overrules the assignment of the debtor, as to any property which the United States may afterwards elect to take in execution, so as to prevent such property from passing by virtue of such assignment to the assignees.[1] But we give his own language.

"Assuming that the words "in all cases of insolvency," indicate an entire class of cases, and that the other member of the sentence "or when any estate, &c.," is to be read distributively, as has been been contended for, on behalf of the United States; it does not, in the slightest degree, vary the construction of the statute. It will then read, that "in all cases of insolvency, the debt or debts due to the United States, &c. shall be first satisfied."

"But how are they to be satisfied? Plainly, as the succeeding clause demonstrates, by the assignees; who are rendered personally liable, if they omit to discharge such debt or debts. To enable the assignees to pay the United States, it is indispensable that the fund should pass to them; and if the mere priority of the United States intercepted it, or gave a right to defeat it,

[1] So considered also in Otis v. Warren, 16 Mass. Rep. 56, and in U. States v Sheriff of Charleston, Bee. 196.

the object of the statute would not be accomplished. If the legislature had intended to defeat the passing of the property to the assignees, as against debts due to the United States, the natural language in which such an intention would be clothed, would be to declare, that so far, such assignments should be void. Then again, the very enumeration of the cases of insolvency, in all of which the assignment passes, and is to pass the whole of the debtor's property, confirms the interpretation already asserted. They are the very cases, where by law there is no exception as to the extent or operation of the assignment to divest the debtor's estate. One of these is the case of a legal bankruptcy; and in the Act on this subject, passed in the next session of Congress, there is an express provision in the 62d section, that "nothing contained in this law shall in any manner affect the right or preference to prior satisfaction of debts due to the United States," as secured or provided by any law heretofore passed. Yet the bankrupt Act contains no exception as to the property to be passed to the assignees, in favour of any person. In the case of the United States v. Fisher et al. 2 Cranch, 358, which was decided upon great deliberation; this Court held, in the construction of a similar clause in the Act of 3d March. 1797, ch. 74, that "no lien is created by this law; no *bona fide* transfer of property in the ordinary course of business, is overruled. It is only a priority in *payment*, which under different modifications, is a regulation in common use; and this priority is limited to a particular state of things, when the debtor is living, though it takes effect generally, if he be dead." And this doctrine was again recognised in the United States v. Hooe, 3 Cranch, 73. 90."

AMERICAN LAW IN OLDEN TIME.

The following is Lord Peterborough's account of a visit he once made to the State of Pennsylvania, when it was an infant colony,—"I once took a trip," says he, "with Penn, to his colony. The laws there are contained in a small volume, and are so extremely good, that there has been no alteration wanted in any one of them ever since Sir William made them. They have *no lawyers*. Every one is to tell his own case, or some friend for him. They have four persons, as judges, on the bench; and after the case has been fully laid down, on both sides, all four draw lots; and he on whom the lot falls decides the question."[1] This delineation of the state of the laws and judicial proceedings of the early inhabitants of Pennsylvania, indicates a simplicity in manners and a morality in conduct which at the present day makes the story appear almost fabulous. Had it been told to the late Emperor of France, he would doubtless have exhibited the same marks of astonishment and incredulity which he betrayed on receiving the account of the Loo-Chooans from Capt. Basil Hall. And he would have been certainly as much at a loss to comprehend why there should be *no lawyers* in a European settlement as he was to comprehend why there were *no soldiers* among the simple people just mentioned.

Pennsylvania, however, is not the only State which in the days of "auld lang syne," was distinguished for simplicity in laws, originality in judicial proceedings, and the paucity of lawyers. The early inhabitants of Massachusetts, if they were not entirely without persons of that denomination, might have said, *Hujus modi civium magna nobis penuria est.* Hutchinson, vol. 1, p. 400, says "for more than the first ten years, the parties spoke for themselves; but sometimes when the cause required it, they were assisted by a *patron*, or man of superior abilities, but without fee or reward." The Secretary of Sir Edmund Andros, in

[1] Spence's Anecdotes, p. 155.

a letter to a correspondent in England, dated the 24th January, 1687, says, "I have wrote you the want we have of two or three honest attorneys, if any such thing in nature. *We have but two.*" Before the time of the charter, there was a great simplicity in the legal proceedings of Massachusetts. The judges, says Mr. Sullivan,[1] "exercised a patriarchal, rather than a judicial authority;" and this he thinks may be inferred from the fact, that in 1681, the Governor of Plymouth wrote to Mr. Stoughton, (who seems to have been the greatest judge of his time, though not a lawyer, but originally a clergyman,) for advice on a case which had occurred in Plymouth. The reply was, "The testimony you mention against the prisoner I think is clear, and sufficient to convict him; but in case your jury should not be of that opinion, then, if you hold yourselves strictly bound by the laws of England, no other verdict, but *not guilty* can be brought in. But according to *our* practice in this jurisdiction, we should punish him with some grievous punishment, according to the demerit of his crime, though not found capital."

In 1636, the colony of New Plymouth, recognised what they called their "*general fundamentals*," "the good and equitable laws of our nation suitable for us in matters which are of a civil nature, wherein we have no particular laws of our own." The trial by jury as in England, was recognized at the same time. The first settlers in the Massachusetts Bay Colony, however, paid no regard to the law of England, but declared their own laws and the law of God, to be the rule.[2] There can be no greater evidence perhaps of the simplicity of the period referred to than the fact related by Hutchinson, that the jury were, by law, allowed, if they were not satisfied with the opinion of the court, to "*consult any bystander.*" In 1647, according to Mr. Sullivan,[3] the Governor and Assistants ordered the importation of two copies of Sir Edward Coke on Littleton—two copies of the Book of Entries—two of Sir Edward Coke on Magna Charta—two of the New Terms of the Law—two of Dalton's Justice

[1] Mr. Sullivan's Address to the members of the bar of Suffolk, p. 24.
[2] Ib. p. 23. [3] Ib.

of the Peace, and two of Sir Edward Coke's Reports. This importation, it is probable, Mr. S. thinks, was the first introduction of the common law into the colony.

The great veneration which the first settlers of New-England had for the Bible induced them to have recourse to it in their legal controversies. And in cases in which their own laws were silent or inadequate, the law of the Bible was the law by which the case was disposed of. This was certainly the custom not only in Massachusetts but in Connecticut. The following case will show that the custom existed in Connecticut. A negro was brought before the Superior Court of Hartford for castrating his master's son. The Court were at first extremely puzzled in determining by what law the punishment should be inflicted. The English statute against maiming was cited, which in the opinion of the Court was not applicable, because it had not been re-enacted bythe General Assembly; and therefore the Court were about to remand the negro to prison till the General Assembly should meet. But an *ex post facto* law was objected to as an infringement upon civil liberty. At length, however, the Court was relieved from the difficulty, by having recourse to a vote of the first settlers of New-Haven, viz.: That the Bible should be their law, till they could make others more suitable to their circumstances. The Court were of opinion that the vote was in full force, as it had never been revoked ; and thereupon tried the negro upon the Jewish law, viz. Eye for Eye, and Tooth for Tooth. "The negro," says the historian, "suffered accordingly."[1]

But what seems to have been the greatest source of perplexity and inconvenience in Connecticut was the *avulsion* caused by the river Connecticut when swelled with floods. Large piece of ground on one side of the river were by means of floods and ice frequently cut off and carried to the opposite side. The tribunal before whom the controversies thus created were determined, was unfortunately equally prone to change its decisions, as the river was its bed. One of the cases recorded upon the subject

[1] History of Conn. by a gentleman of the Province, London, 1781.

just mentioned, is the following: A piece of land belonging to A. in Springfield, was removed by a flood to another town, and settled on land belonging to W. A. claimed his land and took possession: whereupon, W. sued A. for a trespass, and recovered. But A. afterwards obtained a reversion of the judgment. W. then again sued A. and got a decree that A. should remove his own land off from the land of W. or pay W. for *his* land. The litigation, however, still went on. It was pleaded by both parties that the act of God injured no man, according to the English law. The answer of the judges was, that the act of God in this case fell, *equally* upon A. and W.[1]

The principal motive in referring to these examples of the primitive jurisprudence of our country is to render, more apparent and striking, the improvement which has been made in American Law. It has certainly not been exceeded by that which has attended our commerce, or our manufactures. The first emigrants to America, it seems, have left strong traces of a spirit of innovation in the establishment of laws and legal proceedings, and though many of their new regulations were well adapted to their situation, yet the common law of England was soon introduced and incorporated with the customs already adopted. It could not well have been otherwise. Etruria furnished the elements of the first laws of Rome. And the pioneers of the American Republic, (though in some degree disposed so to do,) could not dismiss from their minds the recollection of the laws by which they were previously governed. They could not persevere long in rejecting a system of jurisprudence which allowed *trial by jury*, and the writ of *habeas corpus*, and whose fundamental rule in private controversies is "to do to others that which we would have done to ourselves." As the country has increased in population and wealth, the application of the common law, where the positive law is silent, with reference to the nature and principles of our government and the republican sentiments of the people, has been productive of the most beneficial results. There is another source, however, to which American jurists and judg-

[1] Ib. p. 299.

es have had recourse, viz. the *Roman Law*. By the discernment and learning of our courts of justice, that law has been made to yield no inconsiderable advantage to the country. With these aids, we have reared a system of jurisprudence which is admirably adapted to our wants and emergencies, which rests upon purely republican principles, and which has commanded the attention and respect of the most accomplished jurists and publicists of Europe. The time may be not far distant when the following prediction of the celebrated Dean Berkley, whose mind was directed to the state and prospects of the American colonies, is to be fulfilled with regard to American Law

> "Westward, the star of empire takes its way:
> The four first acts already past,
> A fifth shall close the drama with the day:
> Time's noblest offspring is the last."

LAW OF PARTNERSHIP —No. 3

THE POWER OF ONE PARTNER TO BIND THE FIRM.

THE objects of the contract of Partnership, are the extension of credit, by uniting the capital of different individuals, and increased facility in the transaction of business, by uniting their labors and skill. To answer these, it is necessary that partners should have power to bind each other, by acts done in the course of their joint trade; else, either the joining of capital would be of no use to the firm, each partner dealing on his individual credit, or the joining of labors would only encumber the transaction of business, the express assent of each being necessary to bind the concern. But every member of a firm wielding its whole power, this may be applied in different ways and in different quarters of the globe, at the same time. The foundation of such a contract as partnership supposes mutual confidence in the parties, and by it they constitute each other

general agents in the prosecution of their common concerns; so that in these, as a general rule, each may act at once as principal for himself, and an authorised agent for his copartners. As a partner may bind his firm—1st. By simple contract—2d. By deed—3d. In legal proceedings—we propose in this order to to consider his power so to do, with its various limitations.

Power of a Partner to bind the firm by simple contract.

It is beyond question that a partner may bind his firm by simple contracts made in its name, and in the ordinary course of the partnership business.[1] This power on the part of a single partner can be *implied* only, when the contract made by him is in the usual course of the business done by his firm; for in such case only can he with reason be supposed empowered to act as its agent, and upon its credit.[2] Each partner is presumed to be the general agent of his co-partners in their common business, and they are bound by his contracts as by those of any other general agent, only where their assent to them may be reasonably inferred. If, therefore, a partner makes contracts in the name of his firm, manifestly having no relation to its business, they with whom he deals have notice from the very nature of the dealings, that he is transgressing his power as agent, and cannot reasonably infer the assent of his co-partners.[3] Thus, where two persons were partners in certain patent rights and privileges for navigating vessels by steam, one of them on the mere ground of such joint interest or concern, is not responsible for any special contract or undertaking entered into by the other with any assignee of such right or privilege,

[1]Harrison vs. Jackson, 7 T. R. 207. Kelley vs. Hurlbut. 5. Cowen 534.—Per Parker, C. J. Whitney, et. al. vs. Dutch et. al. 14 Mass. Rep. 464.

[2]See Evan's note—vs. Layfield, 1 Salk 292. Pinckney vs. Hill, 1 Salk 126. S. C. 1 Ld. Raym. 175. Champion vs. Mumford, 1 Kirby's Rep. 170. Per Van Ness, J. Livingston vs. Roosevelt, 4 Johns' Rep. 265-6. See Bignold vs. Waterhouse, 1 M. & S. 259.

[3]Green vs. Deakin, 2 Starkie's N. P. C. 347. N. Y. Fireman's Ins. Co. vs. Bennett, 5 Conn. Rep. 574.

not connected with the enjoyment or exercise of their common privilege under the patent.[1] Upon the same principle a partner cannot pledge the partnership security for his individual debt, as will be seen. So if money be lent to one of two partners who says he borrows it for his firm, and he misapply it, and there be proof that the plaintiff lent it under circumstances of negligence, and *out of the ordinary course of business*, he cannot recover of the other partner.[2] If, however, the contract be made in the ordinary course of business, it is binding upon the firm though made by an individual member for his own benefit merely; for in such case the partner appears to act as the agent of his house, and they who enabled him so to do, must suffer for his abuse of the power they have given him.[3] And if a partner use the name of his firm in a transaction out of the ordinary course of its business, yet if it be known to his co-partners that he has engaged them in the transaction, and without their privity he makes a contract in their name incidental to it, this will undoubtedly bind them. Thus, where one employed a firm, his *navy agents*, to purchase for him an annuity, and one of the partners through whom the whole business had been done, guaranteed the annuity in the name of the firm, it was held that the other was bound with him by the guaranty, though made without his privity, he knowing, or under the circumstances being bound to know, that his house had engaged in a transaction to which the guaranty was incidental.[4] This case went upon the ground of an *actual* consent to the transaction on the part of the other partner, inferred from his passive privity. This pow-

[1]Lawrence vs. Dale, 3 Johns' Chan. Rep. 23.

[2]Lloyd et. al. vs. Freshfield & Kaye 2 Carrington & Payne 325 per Bayley.—See ex-parte Agace 2 Cox's Chan. Cas, 316. Livingston vs. Hastie, 2 Caines' Rep. 246. Livingston vs. Roosevelt, 4 Johns. Rep. 251.

[3]—— vs. Layfield, 1 Salk, 292. Lane vs. Williams, 2 Vern. 277. Willett vs. Chambers, Cowp. Rep. 814, Rapp vs. Latham, 2 Barn. Ald. 795. Bond vs. Gibson, 1 Camp. 185. Drake vs. Elwyn, 1 Caines 184. Per Spencer J. Walden vs. Sherburne, 15 Johns. Rep, 422–3.

[4]Sandilands vs. Marsh, 2 Barn. and Ald. 673.

er on the part of a single partner to bind his firm, usually implied from the nature and object of their connexion, may be wholly rebutted, or partially restrained, by a clause in the articles of co-partnership. Thus, if partners should stipulate among themselves, that one should not have power to bind the rest by negotiable instruments, and a third person apprised of the stipulation should take a joint security, he cannot sue the firm upon it, although it were truly represented to him by the partner giving the security that the money advanced on it was required for the purpose of, and in fact was applied to liquidating the partnership debts. (*Alderson* v. *Pope*, Sittings after M. T. 49 Geo. III. quoted n. a. 1 Camp. 404. Per *Parker*, C. J. *Boardman v. Gore* et al. 15 Mass. Rep. 339.)

As a contract binds, however, only parties and privies, to affect third persons, by such a clause, it is necessary to prove their knowledge of its existence. Thus, of two persons in partnership for the sale of horses, should agree never to warrant any horse, yet, if upon the sale of a horse, the property of the partnership, one of them should give a warranty, the other would be bound by it, provided the buyer knew nothing of the agreement.[1] Where a partner gives express notice that he will not be bound by a contract made with his firm, unless he expressly concurs in it, it is a question whether one who after the receipt of the notice deals with the firm contrary to it, can recover of such partner. It seems very clear, that where the agreement of co-partnership expressly gives each partner power to bind the firm in all or certain cases without the concurrence of the others, any notice of this kind, inconsistent with it, would be without effect. It seems as clear, that if the notice be but a publication of a clause in the articles of co-partnership, expressly stipulating that a single partner shall not have power to bind his co-partners, one who deals with a partner contrary to it, cannot recover of the firm.[2] This last might have been one of the

[1] Sandilands vs. Marsh, 2 B & A. 679. See also cases last cited in the text.
[2] Grant vs. Hawkes, Chitty on Bills (5th ed.) 42 n. Alderson vs. Pope. Sittings after M. T. Geo. 3d, quoted note a. 1 Camp. 404.

grounds of decision in the case of Minnitt vs Whitney.[1] Where, however, there are *but two partners*, and the articles of co-partnership being silent as to the power of an individual partner, it arises from ordinary implication, the effect of such a notice as the above does not seem settled by decisions.[2]

In the cases of Lord Galway vs. Matthew and Smithson, and Willis vs. Dyson, it was held that *the firm* was not liable to one who had contracted with an individual partner, after having received such notice. In Rooth vs. Quin and Janney, the question was re-argued, and upon these authorities being cited, the Court observed that it was with great reluctance that they received decisions at Nisi Prius, on questions brought before them for more deliberate consideration; and observing further, that the present "was a question of vital importance to commerce," they ordered a new trial, the verdict having been for the plaintiff, in order that a bill of exceptions might be tendered, or some other course adopted, by which the question might receive the most solemn decision. What was done with this case, does not appear from subsequent reports.[3]

If, however, the firm consists *of more than two members*, a notice by one that he will not be bound by a contract made with his partners without his express concurrence would, it seems, be ineffectual: since, as is remarked by Chancellor Kent, "the act of the majority must govern in these little communities, as well as in every other, unless special provision be made to the contrary."[4]

A partner may bind his firm, by purchasing goods in its name, and upon its credit.[5] And in such case the firm is bound, even though the goods were bought by an individual member for the

[1] 16 Vin Ab. 244.

[2] See Lord Galway vs. Matthew & Smithson, 1 Camp 403, S. C. 10 East 264. Willis vs. Dyson, 1 Starkie, N. P. C. 164. See also Rooth vs. Quin & Janney, 7 Price 193.

[3] See, however, Leavitt vs. Peck et al. 3 Conn. Rep. 124.

[4] Kirk vs. Hodgson et al. 3 Johns. Chan. Cas. 400. See ——— vs. Layfield, 1 Salk 292. Robinson vs. Thompson, 1 Vern 465.

[5] Hyatt vs. Hare, Comb. 383. Mills vs. Barber, 4 Day's Rep. 430. Dougal vs. Cowles, 5 Day's Rep. 515.

express purpose of defrauding his co-partners, and by pawning or otherwise converted to his own use, provided the vendor be not privy to the fraudulent intent. On the other hand, a firm does not acquire any property in goods obtained by the fraud of one of its members, though committed without the privity of the rest.[3] So one partner may sell the whole, or any part of the partnership stock, and in the absence of fraud on the part of the purchaser, the sale will be binding on the firm.[4] Where a vessel, belonging to a firm, was sold while absent on a voyage by the partner at home, and afterwards sold by a partner abroad, under whose control she was placed as consignee, *and possession delivered*, the title was held to be in the last purchaser, he having no notice of the prior sale.[5]

Where a branch of an English house was established in this country, and the managing partner being the only one resident here, assigned in the name of his firm its property in America in trust for certain of its creditors, the making of the assignment was held within the power of the partner.[6] In this case, Chief Justice Marshall laid much stress upon the facts that the whole commercial business of the Company in the United States was necessarily committed to the assigning partner, the only one residing here—that he had the command of the company funds in America, and could collect and transfer debts due the firm—and that the assignment under consideration was an act of this character, and so was within the power usually exercised by a managing partner. From this it may be well doubted whether the case is to be considered a precedent beyond its peculiar circum-

[2] Bond vs. Gibson, 1 Camp. 185, per Spencer, J. Walden vs. Sherburne, 15 Johns. Rep. 422-3.

[3] 1 R. & M. 178.

[4] Lambert's case, Godbolt 244. 1 Salk. 292, n. per Lord Mansfield, Fox vs Hanbury Cowp. 445, per Best, J. Barton vs. Williams, 5 Barn & Ald. 405, per Kent, C. J. Pierson, vs. Hooker, 3 Johns. Rep. 70. Livingston vs. Roosevelt 4 Johns. Rep. 277. Mills vs. Barber, 4 Day's Rep. 430. Lamb et. al. vs Durant, 12 Mass. Rep. 54.

[5] Lamb et. al. vs. Durant, 12 Mass. Rep. 54.

[6] Harrison vs. Sterry, 5 Cranch 300.

stances; and, above all, whether, as seems to have been considered by Mr. Ingraham,[1] it decides that a single partner has, in general, power to assign the company effects in trust for the creditors of the firm, upon the ground that such an assignment is a transaction in the usual course of trade. It is, indeed, the usual mode of proceeding in a certain emergency; but the emergency is an extraordinary one, naturally calling the attention of all the co-partners to provide for it; and that can hardly be termed a transaction in the usual course of the trade of a firm, the effect of which is to put an end to all its trading. It would seem as singular as dangerous, that a single partner should have power by ordinary implication from the nature of partnership, to break up at once the business of the firm, and destroy the credit of all its members. Upon principle and authority, it may be doubted whether a single partner, with but ordinary power, and under ordinary circumstances, can assign the partnership stock, &c. in trust for the creditors of the firm.[2]

In Dickinson vs. Legare, although the assignment being made by a prisoner, in the country of the captor, to an alien enemy, was clearly invalid on another ground, Chancellor Matthews set it aside for want of power in a single partner to make it, declaring that it was "unwarranted by any law or usage of merchants, inequitable and nefarious." In Harrison vs. Sterry, there were two assignments of the same purport, the first under seal, but the second without seal. The counsel for the assignees relied upon the last assignment, but the Court did not remark upon the first as invalid, on account of the seal attached to it. In Dickinson vs. Legare, it does not appear whether the assignment was under seal or not. Mr. Ingraham[3] intimates that if it had been, it would clearly have been bad as to the partners who did not execute the deed. It may be questioned, however, whether, if under the cir-

[1] Gow on Part. page 74, (marg.) n. 1.

[2] Dickinson vs. Legare, 1 Dessaus. Cha. Rep. 537. Pierpont et al. vs. Graham. C. C. U. S. P. Oct. 1821 cited, Cox's Digest, Partner and Partnership, page 516.

[3] Gow on Part. page 74 (marg.) n. 1.

cumstances a partner have power to assign, a seal affixed by him to the assignment would at all affect its binding power on his co-partners. Nothing, it is true, can pass by it though sealed, which would not pass by it unsealed. But as the property passes by delivery, we cannot perceive how the effect of that act is altered by a seal on the assignment, this instrument being after all, nothing more than evidence of the transfer and its objects. It is true, that an executory contract under seal, made by a partner in the name of the firm, will not bind his co-partners, though the same contract made without seal, would have been good against them. Here, to subject the firm by action, all the partners must be joined. The partner who executed the specialty, cannot be sued on a simple contract with the rest, because he is bound by the deed; and they cannot be sued on the deed with him, because he had no power thus to bind them. This difficulty can only arise in instruments to be enforced by action; and there seems to be no valid reason why an executed contract, as an assignment for the benefit of creditors, or a common bill of sale, made by a single partner in the name of his firm, should be held not binding upon it, from the mere addition of a seal. It is but evasion to speak of the danger of allowing a partner to bind his house by an instrument, the consideration of which cannot be enquired into: for, the very question is, whether the instrument is to be held a sealed instrument or not.

An individual partner has no authority to pledge or pawn partnership effects, this not being a transaction in the ordinary course of business. Yet a pledge by one partner of the partnership effects will bind his co-partners, though made without their privity and consent, if the pawnee have no knowledge that the property is partnership property, and there be no fraud or collusion in the transaction; and this whether they be partners in general trade, or only with regard to the particular property pledged.[1] The principle of the decisions upon this point is, that inasmuch as the firm by their personal confidence have enabled one of their

[1] Raba vs. Ryland, 1 Gow's N. P. C. 132. S. P. Tupper vs. Haythorne, 1 Gow's N. P. C. 135 n. Royal Exch. Ass. Co. Barnard, 343.

members to pledge their property as his own, they, and not the innocent pawnee who trusted to the goods merely, must suffer by the breach of confidence. The case of pawning is clearly distinguishable from that of a consignment by one partner, of the partnership effects for sale, and advances made by the consignee upon the faith of reimbursement from the proceeds. Here, though the consignee knew the goods were partnership effects, he may clearly retain his advances from the proceeds, and if these be not sufficient to reimburse him, recover the difference of the firm: this transaction being in the ordinary course of business.[1] Where, however, a house in Dublin, having with several firms in London jointly engaged to supply provisions for the Navy to be deposited in government stores, shipped a cargo of provisions to London, and sent a bill of lading, indorsed in blank and making the goods deliverable to the order of the shipper, to one of the firms in London, it was held, that the house in London could not pledge the bill of lading to their own banker, *who had notice of the original destination of the provisions*, for advances on their own account, though there had been other transactions independent of the contract between the house in Dublin and the London house, upon which account the former was indebted; and although the house in London was under acceptances to a considerable amount, in anticipation of this and other bills of lading of shipments to be made from Ireland.[2]

Upon the general principles already stated, one partner may order insurance *in the name of the firm*, on partnership effects, and render it liable for premiums and commissions.[3] Where a partner procures insurance on partnership property in his own name "as property may appear," only his individual interest in the same is covered by the policy.[4]

TO BE CONTINUED.

[1] Ex parte Gellar, 1 Rose. B. C. 297.

[2] Snaith vs. Burridge, 4 Taunt, 684.

[3] Hooper et al. vs. Lusby et al. 4 Campb. 66. 4 Day 430.

[4] Graves & Barnewell, v. Boston Mar. Ins. Co. 2 Cranch, 419.

BIOGRAPHICAL SKETCH OF MR. FEARNE.

[CONCLUDED.]

It was, however, a *misfortune* which first induced our author to revert to his original profession, with unremitting diligence. In his practice of experimental philosophy, he fancied that he had discovered the art of dyeing morocco leathers of particular colors, and after a new process. It appears that the Maroquoniers in the Levant (who are called so from dressing the skin of this goat, named the Maroquin) keep secret those ingredients which give their liquor its fine red. This secret, or what would answer equally well, Fearne thought he had found; and like most projectors, saw great profit in the discovery. It was his unlucky connection in this scheme with a needy and expensive partner, which opened his eyes to the fallacy of his hopes, and restored him to the law.[1]

He had not long been in chambers, when his habits of study, diligence and sobriety, were observed; and the extremely able manner in which he arranged and abstracted an intricate set of papers for an eminent attorney in the Temple, first gave him business.[2] After, however, he had established his reputation, and could have commanded what business he pleased as chamber counsel, he resolved not to throw up entirely his original pursuits, and accordingly contracted his practice within a compass just sufficient for his wants. The time which he denied to increase of business, he generally spent at his house at Hampstead, and devoted to experimental philosophy. He made some optical glasses on a new construction, which have been deemed improvements; formed a machine for transposing the keys in music; and gave many useful hints in the dyeing of cottons and other stuffs. These he called his dissipations;[3] and with some truth, as the frequent neglect of his professional employments certainly obstructed his advancement, while his unintermitting application to study, seriously impaired his health. His conduct, with respect to his philosophical experiments and mechanical inventions, evinced the generosity of his disposition; the first of them he freely communicated to men of similar pursuits; and the latter, when completed, he as liberally gave away to poor artists or dealers in those articles.

He was not, however, without less intellectual recreations. We have heard from a gentleman, acquainted with the habits of this singular man, that when he could quit the metropolis, his

[1] Reported in 1 Bl. Rep. 640. [2] See 1 Mer. 308.
[3] January 21, 1784, ætat 45, worn out, it is said, in mind and body.

favourite resort was the sea-coast, where he amused himself with his boat, and frequently remained till the calls of business became pressing. He would then at once shake off his indolence, vigorously apply himself to his papers, and despatch them with astonishing rapidity.

Dialectics appear to have been his favourite study, and after he became engaged in business, he delighted to apply his refined logic to legal topics. This is evinced by his arguments in the very singular cause of *the representatives of General Stanwix and his daughter;* in which a father and his daughter were cast away in the same vessel, and not a person on board was saved, and the question was, which should be presumed to have died first. This case, which seemed to mock every principle of judicial decision, was brought before the Court of Chancery, in the year 1772,[1] and met with a singular discussion. In the arguments which Mr. Shadwell published in Mr. Fearne's posthumous works, it was (that gentleman tells us) our author's intention to try what could be advanced on it with some appearance of reason. But he was not actuated by a parade of logical ingenuity. The compositions adverted to were never shown by the author but to a few select friends. They were merely a work of amusement.[2]

Mr. Fearne's general indifference to pecuniary emolument, the absorption of his time by scientific pursuits, and (we believe) the failure of some mechanical speculation which his philosphical discoveries had induced him to form, clouded the evening of his days. Like Lord Bacon, and from a similar cause (in part,) he died poor.[3] The profession, however, were gainers by that event, as but for it they would probably have never been presented with his valuable *posthuma*, which were published by Mr. Shadwell for the benefit of Mrs. Fearne.

The professional character of Mr. Fearne stands almost without a rival. His essay on the most abstruse doctrine of the law of real property, "Contingent Remainders and Executory Devises," is generally considered as a most beautiful combination of logical accuracy and profound legal learning. And these are not its only merits. The style of it, which is peculiar, not to say original, has not merely perspicuity and exactness, but much vivacity and elegance; and the complete success it met with, is a striking proof how effectively subservient literature and science may be to the illustration of the most abstruse departments of our law. The last edition of this work, by Mr. Butler, is not, in our opinion, altogether worthy of his great abilities. The repetition of the propositions of the text at the bottom of the page, almost

[1] Chalmer's B. D. xiv. 160. [2] Ibid. [3] Chalm. *ubi sup.*

totidem verbis, answers no useful purpose; and there are, we think, some glaring inaccuracies in his numerical analysis.

One of the most singular misapplications of Mr. Fearne's reasoning powers, was in his reading on the statute of enrolments. His object there was to prove that a grant of a remainder or reversion, for a pecuniary consideration, is at the present day a bargain and sale, and consequently void without enrolment. The sophistry of his arguments is now universally acknowledged. The grant of a remainder or reversion before the abolition of attornments was precisely analogous to a feoffment with livery of seisin. The pecuniary consideration *then* did not alter the operation of the deed, and make enrolment requisite; and the statute of 4 Ann. c. 16. s. 9. simply made a grant *without*, exactly what it was before *with*, attornment. See the very late case of Doe v. Cole, 1 Manning & Ryland, 33.

Mr. Fearne's fault, as a legal writer, was, we conceive, a want of that patient spirit of analysis and research, which can alone be depended on for laying well-founded premises; though we by no means intend to say that he was wholly deficient in this spirit, or did not occasionally, and, as it were, by fits and starts, possess it in an eminent degree. But he was certainly far from being what Lord Thurlow once styled him,[1] one of the most accurate of writers. His excellence consisted in accurate discrimination, in subtle ratiocination, in melting down the huge and shapeless masses of seemingly indigested and incongruous doctrines, and casting them into regular forms—in detecting anomalies, and crushing them, when pernicious, with the combined and irresistible force of sarcasm, reason and authority. Lord Mansfield had almost as much cause to dread Mr. Fearne on the legal, as his invisible enemy, Junius on the political arena.[2] The celebrated case of Perrin v. Blake[3] illustrates this. His lordship (then chief justice) thought fit to deny with some indignation his having given as counsel an opinion which Mr. Fearne had ascribed to him on the subject of the devise in that case, and which was at direct variance with his lordship's judicial determination. This circumstance properly induced Mr. Fearne to publish the opinion,[4] and to demonstrate its authenticity by shewing the source from which he got it; and the strain of irony in which he lamented that he should have been so fatally imposed on by appearances, would have done credit to

[1] In Pering v. Phelips, 1 Ves. J. 256.

[2] Lord Mansfield, however, did not (as Dr. Parr and many others supposed) persecute Mr. Fearne. See Butler's Reminiscences, vol. ii.

[3] 4 Burr. 2579. 1 Bl. Rep. 672.

[4] This appeared about 1780, and is said to have afforded Lord Mansfield some uneasiness, who, however, took no notice of it. Chalmers, vol. xiv. 162.

the pen of Swift. This letter, with the opinions of Mr. Murray, and other eminent counsel, on the litigated will of W. Williams, was published with the fourth edition of the Essay on Contingent Remainders, but has been omitted from the subsequent editions.

Mr. Fearne, however, in his ironical attack on Lord Mansfield's decision in Perrin v. Blake, was not exactly consistent with himself. His ground of complaint was the desire of that great judge to break through those strict rules of law, by which, whatever might be the intention of testators, limitations in wills assuming a certain form, produced a certain effect.[1] And this complaint was just, as without a doubt it is more desirable that property should be secured by firm and settled rules, than that the intention of testators should be effectuated. But if Lord Mansfield was on this ground culpable for setting his shoulder to the rule in Shelly's case, how much more so was Mr. Fearne himself for endeavouring,[2] on similar principles to those on which Lord Mansfield reasoned, and by argnments deduced from common sense, and abstract fitness, to subvert the maxim of the common law with respect to abeyance, confirmed as it is by a multitude of decisions, and, we believe, unshaken even by a judicial dictum. There is scarcely a remark of his on Lord Mansfield which does not apply with ten-fold force to himself.

LATE JUDIDIAL DECISIONS.

Damages on Bills of Exchange.—At the late term of the Circuit Court in the city of New-York, before *Judge Edwards*, a question of commercial importance came before the Court. The Tombeckbee Bank of Mobile held the drafts on a house in that city, duly accepted, but protested for non-payment, and settled with an indorser, receiving the principal and interest only, and reserving one of the bills as the ground of an action on which to recover the damages on all the bills—amount of damages at ten per cent. $2500. This action was brought to recover these damages The declaration was in usual form on a Bill of Exchange against drawers. In defence, the counsel for the defendants insisted that by receiving payment of the principal and interest of the bills, the holders had lost all right to the damages, and relied on the case of *Johnston* vs. *Branan*, in 5 Johnson's Reports,

[1] See Cont. Rem. 165. [2] Cont. Rem. 361.

where an Indorsee was denied the right of recovering the interest on a note, of which the principal had been paid, and the Court held interest could not be recovered separately after payment of principal. Judge Edwards, in charging the Jury, instructed them that the plaintiffs, by receiving the principal and interest of the Bills of Exchange, had in effect released all right to damages; and damages could not be recovered on a bill after the principal and interest had been received by the holder.—The Jury returned a verdict into court; but the plaintiffs' counsel claiming to be called, and not answering to the call, the verdict, which was for the defendants, was not recorded, and the plaintiffs became nonsuited.—Mr. Daniel Lord, jun. for the plaintiffs, Messrs. G. Sullivan and G. Winter for defendants.

[In the Superior Court of the City of New-York in June last the Chief Justice gave judgment in the following cases:]

Bad Practice.—*Rogris and others*, v. *The Niagara Insurance Company*.—This was an action on a policy of Insurance. The declaration contained several counts, and to them the defendants set up various pleas. To some of those pleas the plaintiff demurred, and on the others issue was joined. The Court overruled the demurrers, but gave the plaintiffs liberty to amend their declaration. Of this privilege they did not avail themselves, but went to trial on the remaining counts. On the trial, the declaration was ruled to be bad, and the plaintiffs' counsel consented to a verdict in favor of the defendants. The present application was for relief, and to allow the plaintiffs to amend their declaration. The Court gave their opinion that the counsel had acted from misapprehension; and such being the case, they were not disposed to hold the parties to the strict rules of conducting business. The misconduct of counsel, if advantage was taken of it, would only entangle justice, and take from the clients those rights to which they are entitled. The verdict must be set aside, and the plaintiffs allowed to amend their pleas and go to trial; but with the costs of the demurrer, and all subsequent costs.

Jurors.—*Shaw* v. *Andrew Blanch*.—In this case it appeared that the sheriff had summoned the defendant in the usual manner to appear as a Juror in the Supreme Court, and that the terms of the summons were not complied with. Another summons was issued against him, calling upon him to show cause why he should not be mulcted in damages for his non-attendance. The Court fined the defendant $25, and in the course of their remarks on imposing the same, stated that every summons calling upon

an absent Juror to show cause for his non-attendance, must be served personally ; otherwise the party disregarding it, would not render himself open to a punishment for contempt.

ASSIGNMENTS.—*Sullivan* v. *Redmond*.—An action was brought at the Circuit by the plaintiff against the defendant, and a verdict given in favor of the plaintiff. During the pendency of the suit the defendant made an assignment of the whole of his property to certain of his Creditors, and according to the writings drawn up he was to receive no farther interest from the same than one dollar a day for his superintending the Hotel. The question submitted to the Court was, whether a party to a suit has a right to make over his property to others during the pendency of the same. It was the opinion of the Court that a debtor had a right to dispose of his property to any creditor that he should prefer, and that should a sale be *bona fide*, the Court would protect the purchaser. In this country there were no bankruptcy laws, and the common law steps in and authorizes the debtor to make whatever transfer he shall choose. He has a right to pay one creditor in preference to another, and even to sell his property if he thinks prudent. The owner retains his power over his estate until a *lien*, either by judgment or execution, is laid upon it. There was nothing but fraud that would vitiate an assignment ; the pendency of a suit could never affect it. Judge Oakley coincided in the same opinion. The law was settled on that subject, but he doubted the wisdom of it.

SHARE-HOLDERS.—*The Harlem Canal Company* vs. *Moses B. Scixas*.—This was a question whether an action of assumpsit can be brought to recover the instalments due on certain shares subscribed for by the defendant in the H. C. Company. The defendant, it appeared, had subscribed for sixteen shares, and had refused to pay when called upon for the instalment. The Court decided that the subscribing for shares is an express contract, and that by so doing the party subscribing agreed and promised to pay. He was therefore liable to be sued, and would be held responsible for the payment in full of the whole of his shares.

The same vs. *Joseph Spear*.—This was a similar case, but with this exception : the defendant had not only subscribed for shares, but actually held the scrip for the same. The Court observed that the remedy of forfeiting the shares by non-payment was erroneous ; the idea was groundless, and the doctrine could never be sustained.

AGENCY.—*Wallace* vs. *Murray*.—This was an action of damages for non-performance of a contract. The case was tried at the Circuit, and a verdict given for the plaintiff to the full amount claimed, viz. 16,000 pounds sterling. The contract was, that goods of the above value should be sold and delivered to the defendant, and that the payment for the same should be part in cash, and the remainder by lands in Pennsylvania. Several questions of no importance to the public came up, but in the course of the judgment the Court decided: That an agency can be proved by other testimony than the agent himself, as he, peradventure, may become unfaithful, interested in its denial, or be absent from the country. The value of lands should be shown, not from a forced sale under a public officer, but from those persons who were acquainted with its actual value. New trial granted.

LIBEL.—*Waistell* vs. *Holman*.—This was an action for libel. The declaration contained two counts. The first stated the libel to be a letter addressed and delivered to the plaintiff. The second was for publishing the same. The Court decided that the first count was bad, but gave an opinion in favor of the other.

NON-INCORPORATED COMPANIES.—*Michael Sullivan* vs. *Duncan P. Campbell*.—This was an action against the defendant as a member of a company not incorporated, but acting under an agreement among themselves, for the erection of a bulk-head, and the excavation of a canal. It was proved that the work was done by order of the defendant and for the use of the company. The defendant endeavored to maintain that the contract was by the committee of the company, and that there was a clause in their laws which stated that no one member should be liable for the debts of the company, and that the plaintiff was apprized of such clause. The Court decided that as the contract was by parol, and there was no proof that the articles binding the company were shown to the plaintiff, he was not required to sue them as an association. The plaintiff ought to have had actual notice of the law. Motion for a new trial set aside.

[In the Court of Appeals of South Carolina, at the late term, JOHNSON J. delivthe opinion of the Court, in the following cases:]

YORK.—*The executors of Sol. Hill* vs. *Andrew Hill; motion granted.*—W. H. bequeathed certain negroes to his son S. H. and made him and R. C. his executors. In an action brought by the executors of S. H. he having died in possession of the negroes, against the defendant, who converted them to his own use, R. C. the co-executor of plaintiffs testator, is a competent wit-

ness for the plaintiffs. When a subscribing witness to a lost deed is alive and within the jurisdiction of the court, proof of its contents by a witness who had seen the deed and judged of its genuineness from his knowledge of the hand-writing of the party and the witnesses, is not sufficient; the subscribing witness must be produced.

FAIRFIELD.—*Ann Guphill* vs. *Henry Isbell; motion granted.*—If one possess himself of the funds of an infant, and invest them in the purchase of a negro, it creates a resulting trust, and when of full age, the infant may elect whether she will take the negro or claim the fund; until an election is made and the trust surrendered, the trustee may maintain trover against the cestui que trust for the conversion of the negro.

UNION.—*Charles O'Neal* vs. *John Lark; motion granted.*—If a defendant pay money to the sheriff on an execution lodged in his office, and he goes out of the office without entering satisfaction, the defendant is discharged and plaintiff must resort to the sheriff.

LAURENS.—*Snow & Todd* ads. *Prather; motion granted.*—If, in the execution of a warrant of distress, the bailiff take the goods of a stranger, and the landlord receive and sell them, he is liable to a joint action against them for the value of the goods and the injury incident to the loss of them; but he is not answerable for any insult offered to the person of the owner and other matters of aggravation attending the manner of taking. An excessive verdict founded on such evidence was set aside.

[The following common law cases are selected from the English Quarterly Digest of April last, which contains the cases in the last No. of Barnewall and Cresswell—the two last Nos. of Bingham, and the last No. of Bligh.]

Action.—The defendants had engaged to pay C. and S. a certain sum on a building contract. C. and S. gave the plaintiff an order on the defendants for the last instalment of that sum, which instalment was payable on the completion of the contract. After giving that order C. and S. applied to the defendants for an advance, which they refused on the ground of the order having been lodged with them, for which they alleged they were responsible. Held that, notwithstanding such allegation, it was incumbent on the plaintiff to shew that at the time of the supposed promise the sum mentioned in the order was really due from the defendants to C. and S.; and that, as when the above reply to the application for an advance was made by the defendants, the

buildings on the completion of which the last instalment was to be paid were not completed, the plaintiff was not entitled to recover the amount of the order *Fairlie* v. *Denton*, 8 B. & C. 395.

Agreement.—Held, that an agreement in writing to the effect following: "I hereby agree to remain with Mrs. L. for two years for the purpose of learning the business of a dress-maker," was not binding, for want of mutuality. A variance was also objected. *Lees* v. *Whitcomb*, 5 Bing. 34.

Alluvion.—Land gradually and imperceptibly added by alluvion to the demesne lands of a manor does not belong to the crown, but to the owner of the demesne lands. (House of Lords) *Sir R. Gifford Appt. and Lord Yavborough Respt.* 5 Bing. 163.

Assumpsit.—The plaintiff kept a day school, but the defendant's child had been placed with him as a boarder and the accounts always paid quarterly. Four days after the commencement of a quarter the child was taken ill and sent home, and never returned. Held that the plaintiff was entitled to the full quarter's schooling although there was no stipulation for a quarter's notice or pay. *Collins* v. *Price*, 5 Bing. 132.

Bill of Exchange.—1. The indorsee of a bill employed an attorney to give notice of the dishonour to the defendant (an indorser.) The attorney, though using the utmost diligence, was not informed of the defendant's residence for several weeks after the bill was dishonoured, and then took a day to consult his client (i. e. he was informed of the defendant's residence on the 16th, and on the 18th sent a letter with notice.) Held, that the notice was valid. Held also, that the common averment that the defendant had notice was sufficient, and that it was not necessary for the special circumstances to appear on the record. *Firth* v. *Thrush*, 8 B. & C. 387. 2. The defendant was the acceptor of a bill drawn by A., and by him indorsed to his bankers (the plaintiffs.) It was dishonoured, and shortly after the defendant paid A. the amount; but the bill, instead of being delivered up, was still left with the bankers, who three years after brought the action. It was proved that A. had at one time paid in upon his banking account a sufficient sum to cover all the items placed to his debit up to that date, including the amount of the bill, although the balance was subsequently against him. No demand was ever made on the defendant by the plaintiffs up to the commencement of the action. Held, that the defendant was not liable. *Field* v. *Carr* 5 Bing. 13.

LITERARY INTELLIGENCE.

A Practical Treatise on the Commercial and Mercantile Law of England, by Humphrey W. Woolrych, of Lincoln's Inn, Barrister at Law, has lately been received in this country. This Treatise consists of four parts—1. The Law of Shipping. 2. Commercial Contracts. 3. Bills of Exchange. 4. Bankruptcy and Insolvency.

A second edition has been recently published in London of the work, entitled "A Treatise on Universal Jurisprudence." The author is John Penford Thomas, Esq. of Queen's College, Cambridge. The object of this work is to condense the whole science of law into a small volume, and in a popular form.

Law of Insurance.—A work has recently been published in London, and has since been received in this country, entitled "A Treatise on the law relating to Insurance—in three parts, viz. 1. Of Marine Insurance. 2. Of Insurance on Lives. 3. Of Insurance against Fire. By David Hughes, Esq. of the Middle Temple." In his Preface the author says—"Considerable advantage has accrued to the author from the period at which his work has been undertaken. For he has been enabled to avail himself of much new and valuable discussion. The various forms assumed by commerce and the changes which daily take place in the habits and dealings of mankind, have given rise to new laws and fresh topics of legal investigation. At the same time, he has been enabled, by reason of the law having become settled, to divest his pages of much elaborate argument, justly considered necessary at an earlier period; the introduction of which into a treatise of this nature, cannot, it is presumed, be deemed essential, with regard to points which are now laid up among the elements of our jurisprudence, and regarded as too well established to be shaken. In addition, also, to the alterations thus suggested, in the plan of the present work, it may be proper to observe that some recent decisions of considerable importance have occurred, which now appear for the first time."

LAW INTELLIGENCER.

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PRIORITY OF PAYMENT.

Given to the United States in cases of Bankruptcy, Insolvency, &c.

No. II.

THE former part of the investigation upon this subject, which was inserted in our August number, terminated with an extract from the late case of *Conrad* v. *Atlantic Insurance Company* (1 Peter's Sup. Co. Rep. 439) introduced for the purpose of shewing that the priority was not in the nature of a *lien*, but was a mere right of prior payment out of the general funds of the debtor, in the hands of his assignees. We shall now proceed to conclude the investigation, according to the plan upon which it was commenced—that is, to give as perfect and clear a view of the law upon the subject as possible, without adding any thing original by way of comment. The only opinion we have ventured to intimate, was, that the right of priority did not seem to be in derogation of private rights, as it was one of the inherent prerogatives of government.

In the case just mentioned, it was admitted that where any absolute conveyance is made, the property passes so as to defeat the priority, yet it was contended, that a *lien* had no such effect, and that therefore a *mortgage*, which, in the eye of a Court of Equity was but a *lien*, for a debt, would not defeat the priority;—and the case of *Thelusson* v. *Smith*, was relied on in 2 Whea. 396, which, it seems, has been greatly misunderstood. If the proposition, said Mr. J. Story, that "a mortgage is a conveyance

of property, and passes it conditionally to the mortgagee," required any authority to support it, it was clearly maintained in *United States* v. *Hooe* (3 Cranch, 73.)[1] It had never yet been decided, by that Court, he said, *that the priority of the United States will divest a specific lien attached to a thing, whether it be accompanied by possession or not.* Cases of lien, accompanied by possession are, among others—the lien of a ship's owner to detain goods for freight, the lien of a factor on the goods of his principal for balances due him—the lien of an artizan for work and services upon the specific thing. Cases of lien where the right is perfect, independent of possession, are the lien of a seaman for wages, and the lien of a bottomry holder on the ship for the sum loaned. In *none* of these cases, the learned Judge held, had it ever been decided, "that in a conflict of satisfaction out of the thing itself, the priority of the United States cut out the lien of the particular creditor." And he added, "before such decision is made it will deserve very grave deliberation, and a marked attention to what fell from the court, in *Nathan* v. *Giles* (5 Taunt. 558, 574.") The case of *Thelusson* v. *Smith*, he did not understand to justify any such conclusion.

The case of *Thelusson* v. *Smith*, it seems, has been very inaccurately reported, and is calculated to mislead the profession. It is no authority for the point which appears to have been decided by it, viz: the precedence of the debt of the United States, as to *a previous judgment*, in the case of a general assignment. Mr. J. *Johnson* held it to be incontrovertible, that the question of priority in that case, could not have been adjudicated upon, on the verdict as set out in the record, and he wished to have it understood that he concurred in the judgment, on no other ground than the want of priority between the parties. (1 Peters' Sup. Co. Rep. 451.) That this case may be fully understood, and that the true extent of the lien of judgment creditors, as it relates to the preference given to the United States may not be mistaken, we subjoin the following statement of the case as given by Mr. J. *Story*,

[1] Held in Wilcocks v. Waln—if mortgage bears date before general assignment, the U. States have no claim. Sergt. & Rawle.

in 1 Peters' Sup. Co. Rep. 442, together with his accompanying remarks.

"A judgment, *nisi*, was obtained against Crammond, on the 20th of May, 1805, in favour of Thelluson and others. On the 22d of the same month he executed a general assignment of all his estate to trustees for the payment of his debts. At that time he was indebted to the United States, on several duty bonds, which became due at subsequent periods. Suits were instituted on these bonds, as they severally became due, and judgments were obtained and execution issued against Crammond, under which a landed estate called Sedgely, was levied upon and sold by the marshal; and the action was brought by Thelluson and others, against the marshal, to recover the proceeds of this sale in his hands. No execution had ever issued upon the judgment of Thelluson and others against Crammond, and of course there had been no levy under that judgment on the Sedgely estate, before or after the levy in favour of the United States. It was admitted, that in Pennsylvania a judgment constitutes a lien on the real estate of the judgment debtor; and it was assumed by this Court, in the argument of the cause, that the judgment of Thelluson and others, bound the estate from the 20th of May, when it was entered, *nisi*, although in fact it was not finally entered, until nearly a year afterwards. The posture of the case then was, that of a judgment creditor seeking to recover the proceeds of a sale of land sold under an adverse execution, out of the hands of the marshal; upon the ground of his having a mere general lien, by his judgment, on all the lands of his debtor; that judgment never having been consummated, by any levy on the land itself. The Court decided that the action was not maintainable. The reasons for that opinion are not, owing to accidental circumstances, as fully given as they are usually given in this court But the arguments of the counsel, point out grounds upon which it may have proceeded, without touching the general question of lien. The plaintiffs were entitled to recover only, upon the ground that they could establish in themselves a rightful title to the proceeds. Whether the land itself was rightfully sold under the execution of the United States, or any title to it passed by the sale, as against the assignees of Crammond, was not matter of inquiry in that case. However tortious or invalid it might be, still, if the plaintiffs had no title to the proceeds, they must fail in their action. Under the general assignment of the debtor, the priority of the United States attached; and if the assignees were willing to acquiesce in the sale, the right of the United States to hold the proceeds, could not be disturbed by third per-

sons. Now, it is not understood that a general lien by judgment on land, constitutes, *per se*, a property, or right, in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of his judgment, so as to cut out intermediate incumbrances. But, subject to this, the debtor has full power to sell, or otherwise dispose of the land. His title to it is not divested or transferred by the judgment to the judgment creditor. It may be levied upon by any other creditor, who is entitled to hold it against every other person except such judgment creditor: and even against him, unless he consummates his title by a levy on the land, under his judgment.—In that event, the prior levy is, as to him, void; and the creditor loses all right under it. The case stands, in this respect, precisely upon the same ground as any other defective levy, or sale.—The title to the land does not pass under it. In short a judgment creditor has no *jus in re*, but a mere power to make his general lien effectual, by following up the steps of the law, and consummating his judgment by an execution and levy on the land. If the debtor should sell the estate, he has no right to follow the proceeds of the sale, into the hands of vendor or vendee; or to claim the purchase money in the hands of the latter. It is not like the case where the goods of a person have been tortiously taken and sold; and he can trace the proceeds, and, waiving the tort, chooses to claim the latter. The only remedy of the judgment creditor is against the thing itself, by making that a specific title which was before a general lien. He can only claim the proceeds of the sale of the land, when it has been sold on his own execution, and ought to be applied to its satisfaction. To this state of things, the language of the Court in Thelluson v. Smith is to be applied, when it is said, that if the debtor's property is seized under a *fi. fa.* it is divested out of the debtor, and cannot be liable to the United States. Applying these principles to the facts of that case, it is clear that the Sedgely estate had not been divested out of the debtor by any execution on the judgment of Thelluson and others; that it either remained in the debtor, and was liable to the execution of any other of his creditors, who chose to levy upon it, subject, of course, to have his title overruled by their subsequent levy, when perfected; or, that, subject in like manner, it passed by the assignment (if that was *bona fide*) to the assignees; and in their hands, the United States would have a priority of payment out of it as general funds, in their hands. The judgment creditors, as such, had no title to any fund in the hands of the assignees, until the priority of the United States was satisfied

—for that priority does not yield to any class of creditors, however high might be the dignity of their debts.

The fact, that a judgment creditor has a lien, does not place him in a better situation, as a creditor, over the general funds of the debtor in the hands of the assignees. If he possess such a lien he must enforce it in the manner prescribed by law; and if he does, that may so far affect the interest of the assignees actually subjected to such lien. But it gives him no rights to the fund, until he has perfected his lien according to the course of the law. Until that period, he has merely a power over the property, and not an actual interest in it. This ground is alluded to in that part of the opinion of the Court. where speaking of the priority of the United States, it is said, "the law makes no exception in favour of prior judgment creditors, &c. Exceptions there must necessarily be as to the *funds* out of which the United States are to be satisfied; but there can be none in relation to the debts due from a debtor of the United States to individuals. The United States are to be the first satisfied; but then it must be out of the debtor's estate." The real ground of the decision, was, that the judgment creditor had never perfected his title, by any execution and levy on the Sedgely estate; that he had acquired no title to the proceeds as his property, and that if the proceeds were to be deemed general funds of the debtor, the priority of the United States to payment had attached against all other creditors; and that a mere potential lien on land, did not carry a legal title to the proceeds of a sale, made under an adverse execution. This is the manner in which this case has been understood, by the Judges who concurred in the decision; and it is obvious, that it established no such proposition, as that a specific and perfected lien, can be displaced by the mere priority of the United States —since the priority is not of itself equivalent to a lien."

An assignee, it has been held, is not liable under the acts of Congress, until he has received notice of the debt due to the U. States.[1] But it is not necessary that notice should be given by the United States, nor is a judgment or suit against him necessary in order to charge him with notice. If the notice is such as is required in the ordinary cases of trustees, and enough to put a prudent man on inquiry, it is sufficient. Thus it was held sufficient notice, where the debtor, at the time of making the assignment, informed the assignee, that he was surety on a bond to the United States, and that he believed the bond was broken.[2] The

[1] U. States v. Clark, 1 Paine's Cir. Co. Rep. 629. [2] Ibid.

bond on which the debtor was surety in this case was a *paymaster's* bond, conditioned that the latter should well and truly account for, and pay over, all monies received by him, as such paymaster. The debt of the paymaster to the United States was created, it was held, by the advances made to him, and not at the time of striking a balance against him on the Treasury books;—and the surety became a debtor as soon as the paymaster refused to account according to law.

In relation to the provision in favour of sureties as to their remedy for money advanced for their principal, it has been held, that a surety in custom house bonds who has paid the same after commission of bankruptcy had issued against his principal, is entitled to a preference over the general creditors, and is to be first paid out of the effects of the bankrupt.[1] In a case where P., as surety for S. in a bond for duties, paid the amount of the bond to the United States, and S. having become insolvent, assigned his effects to B. in trust, first to pay his custom house bonds, then to indemnify his sureties, and the residue for his general creditors; and B. received from the estate of S. $4000, which he mixed with his own monies, and became bankrupt, and R. and others were appointed his assignees; but no part of the estate of S. ever came specifically to the hands of the assignees—it was held, that P. was not entitled to be paid by the assignees, in preference to the general creditors of B., but that the United States would so have been entitled had they been the plaintiffs.[2]

In relation to the remedies by which the right of priority is enforced, it has been held that the United States can maintain assumpsit against an assignee for money received under the assignment (*United States* v. *Clark*, 1 Paine's Cir. Co. Rep. 629.)

In the case of the *United States* v. *Howland*, 4 Whea. 108, it was held, that the Circuit Court has jurisdiction on a bill in equity filed by the United States against the debtor of their debtor, they claiming a priority under the before-mentioned act of 1799; notwithstanding the local law of the state where the suit is

[1] Mott v. Maris' Assignees, 2 Wash. Cir. Co. Rep. 196.
[2] Pollock v. Pratt, &c. 2 Wash. Cir. Co. Rep. 490.

brought, allows a creditor to proceed against the debtor of his debtor by a peculiar process at law.

ANTIQUARIAN RESEARCHES—THE YEAR BOOKS.

> ——————"The feet of hoary time
> Through their eternal course have travelled over
> No speechless, lifeless desert"——————

The common law has been very aptly compared by Sir Walter Scott, to a vault in a huge Gothic building, which, though dark and ill arranged, affords, to those acquainted with its recesses, an immense store of commodities. As some of these "recesses" are so very remote, that they are not easily to be visited by every adventurer in law, it may be considered fortunate, that the "commodities" which were there first deposited have been transferred by those who have had greater opportunity to explore them, such as Fitzherbert, &c. to more accessible repositories. The recesses, to which we allude, owe their origin to different periods; but they are all of them to be assigned to the time which intervened between the reign of two distinguished princes—one distinguished as the reformer of jurisprudence, and the other as the reformer of religion. We mean the reigns of Edward the First, and Henry the Eighth. The reader cannot now, we apprehend, be at loss to perceive, that allusion has been made to the *Year Books*. These venerable remains of the early common law are calculated to excite curiosity in more respects than one. In the first place, they are exceedingly ancient; and in the next, they were composed soon after a reform of the law and the settlement of the forms of process and rules of pleading was accomplished by Edward the First; and it may be added, in the third place, that they contain many rules which have since been esteemed so salutary and well founded, that they are regarded at this day as fundamental maxims of municipal law.

As the history of law, like all other histories, is calculated to

gratify curiosity, so is the history of the rare and ancient records by which the principles, nomenclature, &c. of that science have been preserved and transmitted. Such curiosity may by some be esteemed trifling—but we are satisfied, it is not only natural, but commendable. As Dr. Johnson has somewhere observed, antiquity has many votaries who reverence it, not from prejudice, but from reason. It was believed, therefore, that all the facts and circumstances

"As by the choice collections do appear,"

respecting a series of legal judgments to which very few American lawyers have direct access, but which, owing to their connection with the practiques of this country, may be said to have an influence upon its jurisprudence, would not be received with indifference by the readers of our Review. The account we have given is not, to be sure, as perfect, in some respects, as might be wished, while in others, it may be thought minute. It is hoped, however, that the first circumstance will not render it entirely unacceptable, nor the latter have the effect of making it repulsive.

It may be premised, that notwithstanding the great antiquity of the Year Books, it is a mistake to suppose that they were coeval with the custom of recording and transmitting the authorities of judicial determinations in England. Sir John Davys, in the preface to his reports, although he acknowledges that there is no collection of adjudged cases *in print*, prior to the reign of Edward I., except the broken cases in the older abridgments (which are not older than the reign of Henry III.) yet he assures us that there were digested reports "in years and terms as ancient as the time of William the Conqueror." This also appears from the old poet Chaucer, who of the serjeant at law, says—

"In terms had he cases and domys all
That fro' the time of King Welyam was full."

It is indeed beyond doubt, that many reports of cases, besides those extant in the Year Books and in the old abridgments, and the detached cases in the writings of Bracton, Littleton, Coke, Selden, &c. were in the hands of the learned. Thus Lord Hale

has quoted cases in the time of King John,[1] and others are expressly mentioned by Lord Coke, which he had seen, of the reign of Henry III.

Blackstone, in speaking of the reported cases of the English Courts of Justice, states that the reports are extant in a regular series, from the reign of Edward II. inclusive; and that from his time to that of Henry VIII. they were taken by the prothonotaries, or chief scribes of the Court, at the expence of the Crown, and published annually, whence they are known under the denomination of the "*Year Books*," or as they are sometimes called "*Annals*."[2] The first regular appointment of a reporter in England, is however, assigned by Lord Coke to the reign of Edward III., when, as he observes, "the law being in its height, the causes and reasons of judgment, in respect of the multitude of them, are not set down in the records; but then the great casuists and reporters of cases (certain grave and sad men) *published* the cases, and the reasons and causes of the judgments and resolutions, which, from the beginning of Edward III., and since, we have in print."[3]

It is observable, that the cases of a considerable number of years, within the period above mentioned by Blackstone, are wanting to complete the series of the printed collection of the Year Books. Those in the following years are wholly wanting; 11 to 16—19 and 20—31 to 37, in the reign of Edward III.; all the years of the reign of Richard II.; the 3, 4 and 6 years of the reign of Henry V.; the 5, 6, 13, 15, 16, 17, 23 to 26 and 29 of the reign of Henry VI.; the 17, 18 and 19 of Henry VII., and 1 to 12, 15, 16, 17, 20 to 25, 28, &c. of Henry VIII. The cases of some of the omitted years, it appears, however, were preserved in manuscript, and are extant among the Harleian M. S. S.[4] They are also, in a great part extant in the older abridgment of Statham, Fitzherbert and Brooke. It is certainly to be lamented, that when the re-publication of the Year Books was

[1] Hist. Com. Law. ch. 7. [2] 1 Bla. Com. 71. [3] 4 Inst. 4.
[4] Vid. Brooke's Bibliotheca Legum Angliae, part II. p. 200.

unanimously recommended by the twelve Judges as an essential part of the law-student's library, a more complete and regular compilation of them had not been ordered.

The first part of the Year Books contains divers memoranda of the exchequer of the reign of Edward I., though none of the Reports of that reign, in any regular series are extant in print, notwithstanding they are said to have been very good.[1] Of the cases of the reign of Edward II., it is said there are many entire copies of them excellently reported, and which exhibit a fair specimen of the learning of the Judges and pleaders of the time. Selden (in his *Dissert. ad. Flet.* c. 8. s. 3) mentions *Richard de Winchendon* as a compiler of the law annuals of this period, of which he quotes several cases from an ancient MS. in the Library of the Inner Temple, presented to that Society by Sir Robert Barker, Chancellor of the Exchequer, in the reign of Philip and Mary. This MS. it is observable, is a different collection from that published by Mr. Serjeant Maynard, on the recommendation it is said, of Lord Chief Justice Hale.[2] It appears by Cro. Eliz. p. 218, that a case was determined on the authority of a case of the twelfth year of Edward II., which was admitted by the court, from a *written* book. On the authority of that determination Lord Hale, in the case of Sacheverel and Frogate (1 Vent. 162) directed search to be made in the MS. annuals of the same reign, in Lincoln's Inn Library (from whence Maynard's collection was printed;) but the case being not there found, the court were inclined to think the reference was erroneous in point of time, and that the case meant to be relied on, was one of 12 Edward III., which was however very different. From these circumstances, it is probable, that the book produced in the case in Cro. Eliz. was a more complete compilation of the annuals of Edward II. than the printed one. It is further observable (says the *Bibliotheca Legum Angliæ*, part II. p. 80) "that the collection of Richard de Winchendon does not appear to have been searched in the case of Sacheverel and Frogate; whence it seems probable, that

[1] Vid. Brooke's Bibliotheca Legum Angliae, part II. p. 201. [2] Ibid.
[3] Ibid p. 79.

the written book produced in 33 Eliz. was that of Richard de Winchendon." The author of the Bibliotheca, &c. laments that this ancient collection of Winchendon is not now to be found in the library in which it was extant in Mr. Selden's time, and that it is not now known what has become of it.

We have already mentioned that, according to Lord Coke, the first regular appointment of a reporter, was made in the reign of Edward III. The Reports of this reign consist of four volumes, the two first of which contain, with the exception of a few years, as before noticed, the cases from the first to the thirty ninth; the third, entitled "*Quadragessima*," from the fortieth to the fiftieth; and the other volume is the *Liber Assisarum*, comprehending a series of cases determined in the Assizes, throughout the whole reign. In point of reputation, the two latter have stood higher with posterity, than the two former. This is partially accounted for by Reeves, from the circumstance that the former contain determinations on points of learning, which had become more obscure, than those in the subsequent collections, and consequently not so frequently brought forward as authorities by Fitzherbert and Brooke, whose abridgments, it is said, in after times, became the clue, and in a great measure substitute for the Year Books. It is further observed by Reeves, that the Qudragessima and Book of Assizes are certainly entitled to the preference, for, besides that questions are there discussed with more precision and clearness, they contain more of those points of law that have survived to the present time. And in regard to precision and clearness, all the Reports of this reign excel those of the preceding. It has already been noticed that the cases of the *nineteenth* year of Edward III. are wanting in the Year Books. Plowden has however cited a case of that year in his *argument concerning nuisance*, and also a case of the *seventh* year, accompanied with a recitation of two *latin verses*, from *Horewood's Report*.

Although the Reports of the succeeding reign of Richard II. are not extant in any regular series, Lord Hale says he once saw a manuscript of the entire years and terms thereof, and remarks,

[1] Reeve's Hist. Eng. Law, vol. 3. p. 148.

there was a visible decline, during the feeble government of this reign, in the dignity of the law, and in the learning and depth of the lawyers.[1] Many of the cases of this reign were abridged, however, by Fitzherbert, from which abridgment they have been collected in a separate volume by Bellewe, as a substitute for the Year Book.

The Reports of the reign of Henry IV. are more calculated to engage the attention of the modern reader then any of the preceding. Their form is said to be less irksome, and the subject more intelligible; and they are more narrative as regards the circumstances of the case, and what was said about it. But while the Reports of this reign have these advantages, they, as well as those of Henry V. do not indicate as much judicial learning and ability as those of the last twelve years of the reign of Edward III.[2]

Concerning the Reports of Henry VI. and Edward IV., Edward V. and Richard III. it may be said, that the matter and style of them approach nearer to the matter and style of modern Reports than any of the former, and are more worthy of notice than those of preceding reigns. They are more particular as to what took place on trial, contain more fully the points that were debated, and give more at large the opinion of the court. The second part of Henry VI. and the whole *long quinto* (as it is called) are replete with valuable learning, though the first part is said to be more barren, spending itself in much learning which is obsolete and of little importance.[3]

The determinations of the Judges, before the time of Henry VII. were mostly the result of argument and discussion, and were seldom made upon the authority of precedent. But in this reign the counsel and court are found *quoting cases*, and Bracton is once or twice referred to.

As has been before noticed, the Year Book of Henry VIII. contains the cases only of a few years. Between these cases and the cases of the former reigns, it is remarked by Lord Coke,

[1] Hale's Hist. Com. Law, ch. 8.

[2] Reeve's Hist. Eng. Law, vol. 3. p. 254. [3] Ibid p. 112.

that no small difference is observable. He supposes the appointment of reporters to have ceased with the reign of Henry VII., or about that time. And it is conjectured by Reeves, that since a taste for general learning had begun to prevail, it was thought more advisable to trust to the inclination discovered in private persons to take notes, who, probably from a competition, would do more to render the business of reporting perfect and useful, than the temptation of a fixed salary. But whatever was the reason, the stipend was no longer continued, and the office of reporter dropped.[1]

It has been considered somewhat remarkable that Reeves' minute perusal of the Year Books did not enable him to furnish more information respecting the authors of those ancient annuals; and the particulars of their original compilation.[2] It appears that at the end of Mich. 21. Edward III. 50, there is this record—*Icy se finissent du* Mons. Horewoode, and afterwards, *Icy s'ensuivent certains cases pris de hors un autre report qui n'ont ete dans les reports du* Mons. Horewood, *par ci devant imprimes.*—And it is said that 1 and 2 Edward IV. appear to have been collected by one Townshend.[3]

The reasons assigned for the discontinuance of the appointment of reporters is supported by the publication of the *voluntary* reporters, who were engaged in the course of the reigns of Henry VII. and Henry VIII., viz: Keilway—Moore (Sir F.) Benloe —Dalison and Dyer. The authority of the determinations reported by those lawyers, were received with equal respect as those of their predecessors. And the conciseness, perspicuity and accuracy of Dyer, have rendered his reports a treasure to the profession. The value of Dyer's reports was considerably augmented by the marginal notes and references afterwards made by Lord Chief Justice *Treby*.

[1] Reeve's Hist. Eng. Law, vol. 4. p. 414.

[2] Bibliotheca Legum Angliae, part II. p. 204.

[3] Herbert's Edition of Ames, 302.

HOFFMAN'S LEGAL OUTLINES.

Legal Outlines, being the substance of a Course of Lectures now delivering in the University of Maryland, by David Hoffman, in three vols. vol. 1. Edward J. Coale. Baltimore.

THE jurisprudence of our country, it must be acknowledged, has received essential and lasting services from Professor Hoffman; and as regards his qualifications we know of no individual who is better fitted to afford assistance to those who, whether with a view to future practice or not, are engaged in the search after a knowledge of that science. With the advantage of acuteness of intellect, he seems to have derived from nature an appetite for juridical knowledge that has predominated over every other. But what is more especially to be admired in that gentleman as an author, is the comprehensive view he takes of the vast science to which he is devoted—the untiring patience he displays in the work of research—and the methodical, and at the same time agreeable manner, in which he conducts the legal noviciate to an acquaintance with its numerous labyrinths. That he greatly excels in these respects, has been made perceiveable, by his "Course of Legal Study," though it is more fully exemplified in the work before us. The latter indeed bears striking testimony of the tendency of his mind, to view the law philosophically, and of his determination not only to trace it from its source, but to consider and explain the principles which constitute the source. A distinguished writer has compared the law to the river Nile, and says, "when we enter upon the municipal law of any country, in its present state, we resemble a traveller who, crossing the Delta, loses his way among the numberless branches of the Egyptian river. But when we begin at the source and follow the current of the law, it is in that course not less easy than agreeable, and all its relations and dependencies are traced with no greater difficulty than are the many streams into which that magnificent river is divided before it is lost in the sea."[1] Of

[1] Kaim's Hist. Law Tracts, Pref. p. 9.

Mr. H. it can with truth be said, that he begins "at the source' and "follows the current."

This preliminary volume is to be succeeded by two others, all of which are designed to contain the substance of an extensive course of lectures which the author is delivering in the University of Maryland. The portion of the work now given to the public "embraces," says Mr. H. "only the initiatory title of the course, of which the entire scheme was stated in a syllabus published in the year 1821, which contains eleven titles," (Pref. p. 1.) The following extract from the preface, will not only explain the object and plan of the work, but shews that distinguishing trait in the author's character as a writer, to which we have alluded.

"The work will contain, it is believed, the only analytical outline which has yet appeared of the entire body of jurisprudence proper to be studied in this country, and may thus prove advantageous in rendering the student's transition to the 'Commentaries' less abrupt than usual. Though there are many excellent elementary works on the Laws of England, none of them have aimed at presenting a *coup d'œil* of the entire science of jurisprudence. The object of these 'Outlines' is to furnish the law-student with a concise and orderly view of every branch of that vast system, the details of which are to occupy him through life. His future studies may perhaps be facilitated by a survey, as it were, of the geography of a vast region; with its numerous boundaries, divisions and sub-divisions; its minute and devious paths, in which it may be consoling to know that if he wanders long, it is not without method and aim.

"In this preliminary volume the student will find the elements of NATURAL, POLITICAL and FEUDAL JURISPRUDENCE. These may serve as a basis to his future researches, not only into the laws and institutions of England and of this country, but in that great code which regulates the communion of nations; as well as that vast body of 'written reason,' the Roman Civil Law, together with the various systems of continental jurisprudence erected, part in, on its foundations. The topics have been treated in a method not so strictly concise and analytical as will be necessary in discussing those which are embraced in the remaining volumes. This difference in the mode of treating the two great divisions of the work, has been preferred because the important and extensive learning of ethical, political and feudal law is too apt to be neglected by the student, who scarcely thinks he has commenced his legal studies till he begins the perusal of his

Blackstone and Coke, his Hargrave and Preston; authors, indeed, eminently distinguished in the peculiar municipal jurisprudence of England, but who, with many others on like subjects, are by no means sufficient to make a 'ripe scholar' in the law. These subjects have been treated by a large class of writers, many of them entitled, not merely to his passing respect, but to his serious study. The student, if he finds no more in these volumes, will at least find pointed out to him the purest sources of information, in every department of his science."

The work when completed, says Mr. H. will contain thirteen titles. The preliminary volume is occupied with the first title, which is subdivided into ten lectures in which is treated the following subjects:—1. The origin and nature of man, his physical and moral constitution.—2. Of man in a state of nature.—3. Of the rights of nature.—4. Of the origin of primary society, and of civil government.—5. Of the right of civil government.—6. Of the effects of society and jurisdiction on the natural rights of man.—7. Of law and its general properties.—8. Of the laws of nature applied to man individually, either in a state of nature or of primary society and civil government.—9. Of political as distinguished from civil law, and of the various forms of government.—10. Of the feudal law.

The two forthcoming volumes will contain, the outlines of

I. The Law of *Landed Property*, technically called the law of REAL RIGHTS AND REAL REMEDIES.

II. The Law of *Persons* and of *Personal Property*, technically called the law of PERSONAL RIGHTS AND PERSONAL REMEDIES.

III. The Law of EQUITY, as it is distinguished from strict Law on the one hand, and mere Ethics on the other.

IV. The Law of *Mercantile Transactions*, technically called the LEX MERCATORIA.

V. The law of CRIMES AND PUNISHMENTS.

VI. The ROMAN CIVIL LAW, by eminence called *The Civil Law*.

VII. The LAW OF NATIONS, sometimes called *International Law*.

VIII. The MARITIME AND ADMIRALTY LAW.
IX. The CONSTITUTION AND LAWS OF THE UNITED STATES.
X. LEGAL BIBLIOGRAPHY AND BIOGRAPHY.
XI. FORENSIC ELOQUENCE AND ORATORY.
XII. PROFESSIONAL DEPORTMENT.

We regret that the plan and limits of our publication will not allow an indulgence of the disposition we have to give a more particular analysis of the work before us. We have an inclination to consider its merits more circumstantially, because its excellencies appear so greatly to preponderate over its defects. The more critically it is examined the more plainly is perceiveable utility in design and ability in execution. It is with the law as with every science and every art—the minute details can never be advantageously studied without a prior attention to the "outlines." The assistance afforded to the painter by the knowledge of first principles derived from a comprehensive view of nature is obvious to every one. It is likewise obvious, that in the attainment of geographical knowledge the student should commence with a careful view of a map of the world. The same rule will hold in relation to jurisprudence, a general map of which is of inconceivable advantage in the outset of its study. Such a map has been produced by Professor Hoffman, and, according to our judgment, it is one which is both accurately and elegantly drawn.

LAW OF PARTNERSHIP —No. 4

Power of a Partner to bind the firm by Simple Contract.

[Concluded.]

[In the article on Partnership, published in our last number, we considered the power of a partner to bind his firm by simple contracts, of various kinds, and propose now to conclude this branch of our subject.

Where there is no collusion, a firm will be liable for money received by one partner in the course of its business, though the partner gave his separate receipt for the amount, and applied the money to his own use.[1] And where one of two attorneys in partnership received money on behalf of the firm due to their client, of whom the client demands the money, this is a receipt by, and a demand of both, who are liable to the client jointly, without any demand upon or notice to the other.[2] A receipt for monies given by a partner in relation to partnership business is binding upon the firm.[3] If one partner borrows money in the name of the firm to pay his expenses in travelling on partnership business, it will be a charge upon all the co-partners.[4] But a note given by a partner in the name of his firm for his ordinary board, was, in the hands of the original payee, held not binding on the other partners.[5]

So a partner may bind his firm by drawing,[6] accepting,[7] or in-

[1] Willett v. Chambers, Cowp. 814. Holt. 434.

[2] M'Farland v. Crary, 8 Cowen's Rep. 253.

[3] Brown v. Lawrence, 5 Conn. Rep. 397.

[4] Rothwell v. Humphreys, 1 Esp. N. P. C. 406.

[5] Wheelock v. Hall, 3 New-Hamp. Rep. 310.

[6] Smith v. Bailey, 11 Mod. 401. Lane v. Williams, 2 Vern. 277. S. C. 16 Vin. Abr. 243. Mills v. Barbour, 4 Day's Rep. 430. Douglas v. Cowles et al. 5 Day, 511.

[7] Anon. Styles, 370. Anon. Holt, 67. Pinkney v. Hall, 1 Salk. 126. S. C. Lord Raym. 175.

dorsing[1] a bill of exchange, or by making,[2] or indorsing[3] a promissory note in its name, or on its behalf. The usual mode of binding a firm by bill or note is to draw, &c. the same in the name of the firm: but in either of these cases the bill or note may be enforced against all the co-partners, though drawn, &c. by one of them in his individual name, if by the words "on behalf of the firm of, &c." or any other, in the instrument itself, it appears that a joint operation was intended to be given to it. Thus where a partner signed a promissory note with his own name, for himself and partners, the firm was held liable[4] Where a promissory note beginning " I promise to pay," was signed *by a member of the firm in his own name, for himself and partners*, it was held that the partner signing was also severally liable to be sued upon the note.[5] Upon a note beginning in the same way, *and signed by a partner with the partnership name*, the firm was held liable.[6] So where such a note was signed by *a partner in his own name for his co-partners*, they were held liable.[7] In order however to render a firm liable on a bill or note, it must appear *from the security itself* that such an operation was intended; and when signed by a partner in his own name without more proof that the note was received under an expectation that the firm was bound by it, and that the money obtained on it was applied to partnership uses, will not be sufficient to give it such an effect.[8]

[1] Wells v. Masterman, 2 Esp. N. P. C. 731. Swan v. Steele, 7 East. 210. Ridley v. Taylor, 13 East. 175. Manhattan Co. v. Ledyard et al. 1 Caines Rep. 192. Kane et al v. Schofield, 2 Caines Rep. 368.

[2] Storer v. Hinckley et al. Kirby's Rep. 170. Champion v. Mumford, et al. 4 Johns. Rep. 266. Drake v. Elwyn, 1 Caine's Rep. 184.

[3] Sup. on Bills. Per Lord Kenyon. Harrison v. Jackson, 7 T. Rep. 207.

[4] Galway v. Matthew. 1 Campb. 403. Emly v. Lye, 15 East. 11, 12. Doty v. Bates et al. 11 Johns. Rep. 544. Ripley v. Kingsbury, 1 Day's Rep. 150.

[5] Hall v. Smith, 1 Barn. & Cresw. Rep. 407.

[6] Doty v. Bates, et al. 11 Johns. Rep. 544.

[7] Galway v. Matthew, 1 Campb. 403.

[8] Siffken v. Walker, 2 Campb. 308. Emly v. Lye, 15 East. 10, 11. Ripley v. Kingsbury, 1 Day's Rep. 150.

But if a bill of exchange is drawn upon a firm, and one of the co-partners accepts it in his own name without more, this acceptance binds the co-partnership. "For this purpose, (says Lord Ellenborough,) it would have been enough if the word "accepted" only had been written on the bill, and the effect cannot be altered by adding the name of the partner."[1] And though the bill be not accepted, yet if drawn by one of several partners in his own name upon the firm with the privity of the others, in favor of persons who advance him the amount which he applies to the use of the partnership, although the partners are not jointly liable on the bill, they may be jointly sued by the payees for money lent; the previous transactions of the parties showing an authority in the partner from the firm, to raise money in this way upon its credit.[2] In such case it has been held that the act of drawing amounted in judgment of law to an acceptance of the bill by the drawer in behalf of the firm, so that the firm was bound by it as an accepted bill[3] In a similar case, Mr. Justice Story doubted whether the firm was not bound as by an acceptance, and at any rate sitting in equity decreed payment of a bill thus drawn from all the co-partners.[4]

And in general a partner may bind the firm by acts or contracts necessary or incidental to carrying on the business of the firm, and pledging its credit, provided the individual dealing with him is not guilty of any fraud or negligence, and reasonably supposes that he is transacting business with the whole firm through one of its members.[5] It should be recollected, however, that a partner has implied authority to bind the firm only *in partnership transactions*, and although there are many cases in which the firm has been held liable even where their credit was pledged by a single partner *really* for his individual benefit, yet these were

[1] Wells v. Masterman, 2 Esp. N. P. C. 731 Mason v. Rumsey et al. 1 Campb. 384. Douglas v. Cowles et al. 5 Day's Rep. 511.

[2] Denton v. Rodie, 1 Campb. 384. Ex parte Bolitho, 1 Buck. 100.

[3] Dougal v. Cowles, 5 Day's Rep. 511.

[4] Van Reimsdyk v. Kane, 1 Gal. Rep. 630.

[5] Baker et al. v. Charlton, Peake, 80—1.

cases in which the credit of the firm was pledged *apparently* for the benefit of all the co-partners, the transactions, as being in the ordinary course of business, and other facts in the knowledge of him who dealt with the partner, indicating nothing to the contrary. These decisions were governed bp the equitable principle, that if one of two innocent persons must suffer by the fraud of a third, it must be he who by confidence and credit enabled him to commit it. Nor does it in the least effect the liability of the firm, that he who has given credit to one of its members, or value for a bill drawn by him in its name, *afterwards* discovers the misappropriation of the goods or money; his conduct being justly considered only in reference to his knowledge, *at the time of the transaction.*[1] Where, however, the person dealing with a single partner, knows in any manner, or without gross negligence may know, that the responsibility of the firm is pledged to him for the private purposes of the partner himself, the other partners are not bound by the contract. Thus, all the members of a firm are liable on a bill or note drawn by one of them in the partnership name, to one who takes it in the ordinary course of commercial transactions, as upon discount; and that too though the money raised on it be applied to the private purposes of the partner merely, provided the discounter did not know of the intended application.[2] Yet where the discounter promised at the time he advanced the money to keep the whole business secret from the other partners, it was held that he could not recover of them; this fact indicating knowledge on his part that the money was raised for the use of the contracting partner merely, and not on joint account.[3] So, too, it is well settled, that if a creditor of one of the partners collude with him to take payment or security out of the partnership funds, knowing at the time that it was without the consent of the other partners, it is fraudulent and void.[4]

[1] Swan v. Steel, 7 East. 210. per Spencer J. 4 Johns.Rep. 269.

[2] Arden v. Sharp, 2 Esp. N. P. C. 524- Ex parte Bonbons, 8 Ves. 540. Bank of Kentucky v. Brooking et al. 2 Littel's Rep. 45, 46.

[3] Arden v. Sharp, 2 Esp. N. P. C. 524.

[4] Per Lord Ellenborough, Swan v. Steele, 7 East. 210. S. C. 3 Smith, 199.

And if a partner without the knowledge of his co-partners draws and accepts a bill in the name of the firm, partly for a demand which the payee has against the firm, and partly for an individual debt, the payee can recover from the firm only that portion of the sum specified in the bill, in which the firm is indebted.[1] Upon the same principle, if the members of an old firm pledge jointly with their own the name of a newly admitted member in discharge of a debt contracted by them prior to his admission, as by accepting a bill in the name of the new partnership, the security will not be available against the new partner in the hands of the creditor.[2]

Where goods purchased by a partner in the name and with the funds of the firm, were applied by him to the payment of an individual debt, his creditor knowing the property was partnership property, it was held, that the firm might recover from the creditor the value of the same in assumpsit for goods sold and delivered.[3] Where one takes from a partner the security of the firm in payment of a private debt, *knowing that the security is given without the assent of the other partners*, all the authorities agree that it will not in his hands be available against the firm, since the transaction is a fraud upon it. But inasmuch as the credit of all the co-partners might be injured by a loss of credit on the part of one of them, it is by no means improbable that to avert such an evil, they might authorise a partner to pledge their security, to relieve him from the press of his individual engagements. When an assent of this kind can be expressly proved, or implied from the circumstances of the case, as by the passive privity of the co-partners, there is no question but that the firm is bound.[4] And proof

Wells v. Masterman et al. 2 Esp. N. P. C. 731. Green v. Deakin, 2 Starkie N. P. C. 347. Henderson v. Wild, 2 Campb. 561. Brown v. Ducanson & Ray, 4 Har. & McHen. Rep. 350. Baird v. Cochran et al. 4 Sergt. & Rawle, 397. Ex parte Bonbonus, 8 Ves. 540.

[1] Barber v. Backhouse, Peake N. P. C. 61.

[2] Shireff et al. v. Wilks, 1 East. 48.

[3] Dob. v. Halsey, 16 Johns. Rep. 34.

[4] Ex parte Peele, 6 Ves. 600. Ex parte Bonbonus, 8 Ves. 580.

of subsequent approbation by all the partners raises a presumption of previous authority on the part of one, to bind his firm for an individual debt.[1] It would seem clear upon principle, that as a partner has implied authority to bind his firm only in partnership transactions, if he pledged its responsibility for his private debt, the proof of this fact, without more, on the part of the firm, would be sufficient to throw the burthen of proving the concurrence of the co-partners on the private creditor, to enable him to recover of the firm. In such case the creditor knows that his debtor is exceeding the ordinary power of a partner, and it is his duty to enquire of the other members of the firm, if they have vested one of their number with the extraordinary authority of binding them in his private concerns. In the cases of Barber v. Backhouse[2] and Shireff et al v. Wilks,[3] such appears to have been the opinion of Lord Kenyon; and in the latter case, he expressly notices the fact, 'that no assent of Robson, (one of the co-partners, sought to be charged,) was found, and nothing stated to shew he had any knowledge of the transaction," which under such circumstances he afterwards declares, "was fraudulent upon the face of it." In ex parte Bonbonus.[4] Lord Eldon cited Shireff et al. v. Wilks, with approbation, and observed, "I agree that if it is manifest to persons advancing money to a single partner that it is on separate account, and so that it is against good faith that he should pledge the partnership, *then they should show* that he had power to bind the partnership." In Green v. Deakin, where a partner drew a bill in the joint name to the order of his separate creditor, it was held, that the latter could not recover of the firm in an action on the bill, notwithstanding he had no notice of the non-concurrence of the co-partners,—the burthen of proving the concurrence resting on the creditor.[5] In the case, however, of Ridley and Knaggs v. Taylor,[6] which was an action brought by the payees against the the acceptor of a bill of exchange drawn and indorsed by a part-

[1] Ex parte Bonbonus, 8 Ves. 540. Van Reimsdyk v. Kane, 1 Gal. Rep. 630.
[2] Peake's N. P. C. 61. [3] 1 East. 48. [4] 8 Ves. 540.
[5] Green v. Deakin, 2 Starkie's N. P. C. 347. [6] 13 East. 175.

ner in the name of the firm for his individual debt, Lord Ellenborough seems to have required of the defendant, proof of the non-concurrence of the co-partners; intimating that upon the facts stated, it was not necessary for the plaintiffs to enquire if the partner with whom they dealt was authorised to dispose of the partnership security as his own.

It is true that he distinguished this case from Shireff et al. v. Wilks inasmuch as in this, the other co-partners not being parties to the suit, might have been called by the defendant to prove that they did not concur in the drawing and indorsing of the bill; but upon principle we cannot discover how the not producing all the evidence of which a fact is susceptible, can at all alter the effect of that which is produced. The defendant, by showing that the security of the firm had been given by a member for his private debt, had surely shewn that he had exceeded the ordinary power of a partner, and that too within the knowledge of the plaintiffs. It then became incumbent on *them* to show, that a special authority had been delegated in this instance, by proving the express or implied concurrence of the other partners in the transaction: and it was certainly as easy for the plaintiffs to call the co-partners for this purpose, as for the defendant to prove by them, their non-concurrence.

In Henderson and Smith v. Wild,[1] which was an action brought by two partners for goods sold and delivered, the defendant produced receipts which it appeared had been given by by one of the partners upon a set-off of his private debt against the debt due the firm upon which the action was brought, and these, Lord Ellenborough held, would constitute a bar to the action. The cause went for the plaintiffs on another ground. If, as appears from the short report of this case in Campbell, these were all the facts, the opinion of his Lordship in this as in the former case, seems indefensible on principle, and opposed by the weight of English authority. In this country the rule laid down by Lords Kenyon and Eldon seems to have prevailed,

[1] 2 Campb. 561.

and in New-York, the case of Ridley & Knaggs v. Taylor, has been specifically rejected.[1] The courts here hold, that *prima facie*, a note made by one partner in the name of the firm has been made in the course of the partnership dealings; and if given for the private debt of one of the partners, this is matter of defence which must be proved by the party taking advantage of it.[2] Where, however, one carried on a joint business with others *in his own name*, and a separate business *in his own name*, it was held by the Supreme Court of Massachusetts, that a note signed by him, did not prima facie bind the firm, since it was doubtful upon the face of it, whether he intended to pledge his firm or himself alone; and that in such case it was the duty of a discounter to ascertain whether the signature was intended for the signature of the firm.[3] Where, however, it is proved that the consideration of a partnership security is the private debt of the partner who gave it, the separate creditor must in order to a recovery, show the assent of the whole firm to be bound; the transaction itself being *prima facie* a fraud upon the firm by the separate creditor, and the partner for whose debt the security has been given.[4] But if a partnership security, given by a partner for his individual debt, gets into the hands of a bona fide holder who has no knowledge of its origin, and under circumstances which do not affect him with notice of it, it is good in his favor against the firm.[5] And in such case the

[1] Per Spencer J. Dob v. Halsey, 16 Johns. Rep. 38, 39.

[2] Doty v. Bates and Handy, 11 Johns. Rep. 544.

[3] 5 Pick. Rep. 11.

[4] Dob v. Halsey, 16 John. Rep. 34. Livingston v. Hastie, 2 Caine's Rep. 246. Per Kent C. J. Lansing v. Gaines et al. 2 Johns. Rep. 300. Livingston v. Roosevelt and Dubois v. Roosevelt, 4 Johns. Rep. 251. 262 n. Laverty v. Burr, 1 Wendell's Rep. 529. Blair Miller v. Doug. 14 Fac. Coll. 154. 2 Bell's Comm. 616. n. 2. See Poindexter v. Waddy, 6 Munf. 418. Munroe v. Cooper, 5 Pick. Rep. 412. Wheelock v. Hall, 3 N. Hamp. Rep. 210. N. Y. Firemen Ins. Co. v. Bennett, et al. 5 Conn. Rep. 575.

[5] Per Lord Kenyon, Wells v. Masterman, 2 Esp. N. P. C. 731. Per Kent J. Livingston v. Roosevelt, 4 Johns. Rep. 279. Per Livingston J. Livingston v. Hastie, 2 Caine's Rep. 250. Manufacturers & Mechanics Bank v. Gore et al. 15 Mass. Rep. 75.

indorsee may recover of the firm even though the drawing or accepting by one partner in fraud of the rest was contrary to an express clause in the articles of co-partnership, provided the indorsee was ignorant of both the fraud, and the clause ; " but then, says Lord Ellenborough, he must show he gave value for the bill."[1]

Inasmuch as the fraud of a separate creditor's taking a partnership security for his debt, depends in part upon his knowing that the security is the *property of the firm*, when he does not know this fact, and the security does not from its nature apprise him of it, the security in his hands is good against the partnership. Thus though a member of a banking house gave the notes of his firm in payment of his individual debt, his partners would nevertheless be bound to redeem them ; for the creditor having no knowledge on the subject might reasonably conclude, that the notes had been previously sent into circulation, and returned to his debtor as his individual property.[2]

It has been held, that one of two partners may give authority to a clerk in the house, who may in consequence thereof, bind the firm by accepting bills, and drawing and indorsing bills, and notes, in the name of the company.[3] And a bill which has been drawn in blank by one partner, and delivered by him to a clerk to be filled up in the ordinary course of business, will, if misapplied by the clerk, be nevertheless binding upon the firm, in the hands of a party whose title cannot be impeached. Thus, where in such a case, the drawer having died, and the surviving members assumed a new firm, the clerk afterwards filled up the bill inserting a date prior to the death of the drawer, and sent it into circulation, it was held that the surviving partners were liable to a bona fide indorsee, though no part of the value came

[1] Grant v. Hawkes et al. Guildhall, 4 June, 1817. Chitty on Bills, 42. n. 5th edition.

[2] Ridley & Knaggs v. Taylor, 13 East. 175.

[3] McKean C. J. Tiller v. Whitehead, 1 Dallas, 269.

to their hands.[1] Where one traded with others in a certain name and style, and his co-partners carried on separate concerns in the same name and style, it was held that he was liable to the indorsees of a bill of exchange drawn by one of his partners in the partnership name, although he offered to prove that the bill was not drawn on account of his firm, but one of the others.[2] The rule seems to be, that in such case the holder may have a right to elect against which of the partnerships he will enforce his claim, but he cannot hold them all liable.[3] Where, however, one carried on a joint business with others *in his own name*, and a separate business in his own name, it was held by the Supreme Court of Massachusetts, that when a note drawn by him on his own account was discounted upon the supposition that it was drawn on account of his co-partners, the discounter having received however at the time of discount no intimation to that effect, it did not *prima facie* bind the firm but that the discounter was under the circumstances bound to ascertain, that the signature was intended for the signature of the firm.[4] And indeed, it cannot be questioned, that if at the time of taking the bills the holder knew either from the nature of the transaction or in any other way, that it was drawn on account of one of the firms, that one alone is liable. Again, one partner may bind the firm by a guaranty made in its name, and in the course of transacting the partnership business. Thus, where one employed a firm consisting of two partners, to lay out money in the purchase of an annuity, of which, and of the fact of the money's being laid out both were cognizant, but one of the partners, who had in fact carried on the whole transaction, unknown to the other guaranteed the punctual payment of the annuity in the name of the firm, it was held, that both were bound by the guaranty, and this, though the whole trans-

[1] Usher v. Dauncey, 4 Campb. 97. See Russell v. Langstaffe, Doug. 514. Snaith v. Mingay, 1 Mau. & Selw. 87.

[2] Baker et al. v. Charlton, Peake's N. P. C. 79.

M'Nair v. Flemming, Montague on Part. 32. n. Gow on Part.

[4] Manufacturers, &c. Bank v. Winship, 5 Pick. Rep. 11.

action was out of their ordinary course of business, as the navy agents of their employer, and they received but their ordinary compensation.[1] *A fortiori*, the firm would be bound by a guaranty in its name of a debt due from a third person, made by a partner in a partnership transaction, where both the transaction and the making of the guaranty was in the ordinary course of the business of the firm. This is, indeed, the common case of a commission house, guaranteeing for an extra commission the price of goods sold by them for their employers, where, although the guaranty was made but by a single partner, it would unquestionably be binding on the firm. A partner has no power to bind the firm by a guaranty, unless it be made in a partnership transaction. Thus, where one guaranteed in the name of his firm his individual debt, without the privity or consent of his co-partners, Lord Mansfield held the guaranty covinous and void as to the rest of the firm.[2] So where one guaranteed in the co-partnership name, the due payment of a bill, merely to give the acceptor credit with a house from whom he purchased goods, Lord Ellenborough held such an engagement "not incidental to the general power of a partner," but required proof of prior course of dealing, or command, or subsequent recognition.[3] It seems to have been quoted as the opinion of Lord Mansfield, expressed in *Hope* v. *Cust*,[4] that a partner has power to bind his firm by guaranty or letter of credit in general, without reference to the guaranty's being made in the course of a partnership transaction; and his authority is opposed by Gow, to that of Lord Ellenborough, in the case of *Duncan* v. *Lowndes & Bateman*.[5] It will, however, be found on a careful comparison of these cases, that they are by no means at variance; and so far as we can judge from the reports, these learned judges ap-

[1] Sandilands v. Marsh, 2 Barn. & Ald. 673.

[2] Hope v. Cust, cited in Shireff v. Wilks, 1 East. 53.

[3] Duncan v. Lowndes & Bateman, 3 Campb. 479. See also Foot v. Sabin, 19 Johns. Rep. 154. Sutton & M'Nickle v. Irvine et al. 12 Serg. & Rawle, 13.

[4] Cited Shireff v. Wilks, 1 East. 53.

[5] Gow on Partn. 81.

pear to have held the same doctrine. In *Hope* v. *Cust*, the partner gave the general guaranty of his firm for money due from him in his separate capacity, and Lord Mansfield left it to the jury to determine whether this transaction was not a fraud on the other partners. In summing up, he said, "There is no doubt but that the act of every single partner, *in a transaction relating to the partnership*, binds all the others. *If one give a letter of credit, or guaranty in the name of all the partners, it binds all.*" Taking this last sentence to be limited in its meaning by the one which preceded it, as we must upon ordinary rules of construction, the general doctrine of the case will not be found opposed by that of *Duncan* v. *Lowndes & Bateman*. In short, whether we consider cases, or principles, we conceive the power of a partner to bind the firm by guaranty to rest upon the same grounds, and to be subject to the same restrictions, as his power to bind it by pledging an ordinary negociable security. Thus, the indorsement of a note by one of several partners, in the partnership name, as surety for a third person, without the consent or knowledge of the other partners, will not bind the firm; and the burden of proving the authority of a partner thus to use the partnership names lies on the creditor or holder of the note.[1] In ex parte Gardom,[2] the opinion of Lord Eldon does indeed seem opposed to that of Lord Ellenborough. In that case, reference being made to a firm for the credit of one who manufactured goods for them, one of the partners, without the privity of the rest, guaranteed payment for whatever goods the persons referred might sell the manufacturer. The counsel, Sir Samuel Romilly, gave up the objection that the guaranty was not within the power of the partner, and Lord Eldon in his opinion observed, that "it was properly given up." Notwithstanding, however, the high authority of Lord Eldon, this opinion may well be questioned, since it is opposed to the weight of precedent, and to the general principle, that a partner can bind

[1] The N. Y. Firemen Ins. Co. v. Bennett et al. 5 Conn. Rep. 575.
[2] 15 Ves. 286.

his firm, only in what is, or at least appears to be a partnership transaction.[1]

It is a sound rule of law, that a joint contract can never be defeated by the mere private contract of an individual of the concern, to whom the other parties have confided no authority for that purpose.[2]

The power of a partner to bind the firm being implied from the partnership, ceases immediately on its dissolution.[3] And though the notice of dissolution empowers one partner to receive, and pay all debts due to and from the partnership, no authority is thereby given to such partner to bind the firm by bill of exchange or promissory note.[4] And in such case, even if the bill be drawn on a debtor of the house and discounted, and the proceeds applied to the liquidation of partnership debts, yet the bill cannot be enforced against the firm by the discounter and indorsee of the separate partner, since all the partners ought to have concurred in negociating it: nor can an action be maintained against the partners, for money paid to the use of the partnership.[5] And though the bill or note existed previous to the dissolution, yet if sent into the world afterwards, to be binding upon the firm, all the partners must concur in its negociation.[6] Lord Kenyon has even doubted whether if an indorsement were actually made on a bill or note before disso-

[1] See Sutton & McNickle v. Irvine et al. 12 Sergt. & Rawle, 13.

[2] Per Story J. Young v. Black, 7 Cranch, 568.

[3] Wrightson v. Pullan, 1 Starkie N. P. C. 375. Hackley v. Patrick, 3 Johns. Rep. 538. Lansing v. Gaines et al. 2 Johns. Rep. 300. Sandford, v. Mickles, 4 Johns. Rep. 224. Jone's case, Overton's Rep. 455. Foltz v. Pourie et al. 2 Dessaus Cha. Rep. 40. Fisher's exrs, v. Tucker, 1 McCord Chan. Rep. 169.

[4] Kilgour v. Finlayson, 1 H. Blacks. 155. Martin v. Walton et al. 1 M'Cord's Rep. 16. Sandford v. Mickles et al. 4 Johns. Rep. 224. Foltx v. Pourie et al. 2 Desaus Cha. Rep. 40.

[5] Kilgour v. Finlayson, sup.

[6] Abel v. Sutton, 3 Esp. N. P. C. 108. See Ramsbottom v. Lewis, 1 Camp. 279. Sandford v. Mickles et al. 4 Johns. Rep. 228. Lansing v. Gaines et al. 2 Johns. 300.

lution, but the bill or note never circulated until after it, the indorsement would charge the partners who were not privy to the negociation.[1] X.

LATE JUDICIAL DECISIONS.

It is proposed to make up the list of late judicial decisions for this work at the present time and in future, chiefly from the Quarterly Digest of English Decisions at Law and in Equity. This course has been adopted on account of the great respect paid in the United States to the decisions of English Judges; and because the greater part of them have a direct application in this country. The time required for the republication of these decisions in this country is very considerable, and when they are republished, there are comparatively speaking, but few lawyers who supply their libraries with them. For these reasons, and we may add, at the particular request of several of our patrons, we shall endeavor to lay before our readers an abstract of the important English cases, in a few months after they have been decided. At the same time it is not intended to exclude late American cases which are considered to be of great and general importance.

The common Law Quarterly Digest contains the cases in Barnwall and Creswell, Bingham, and Bligh. The following are from the Digest of April last.

Carriers. "We have established these points—that a carrier is an insurer of the goods which he carries; that he is obliged for a reasonable reward to carry any goods to the place to which he professes to carry goods that are offered him, if his carriage will hold them, and he is informed of their quality and value; that he is not obliged to take a package, the owner of which will not inform him what are its contents, and of what value they are;

[1] Abel v. Sutton, sup.

that if he does not ask for this information, or if, when he asks and is not answered, he takes the goods, he is answerable for their amount whatever that may be; that he may limit his responsibility as an insurer by notice, but that a notice will not protect him against the consequences of a loss by gross negligence." Per Best, C. J. giving judgment in the undernamed cases of Ni. Pr. The first was against three coach proprietors, the name of one being Weeks; and the notice relied on was one suspended in an office kept by a person of the name of Weeks to the effect —"Take notice the *the proprietor of this office* will not be accountable, &c." It not appearing that the proprietor of the office was Weeks (the defendant), held, that the responsibility of the defendant was not limited thereby. In the second case the notice was, that the proprietors of certain coaches *which set out from* that office would not be responsible, &c. The goods in question were lost on a journey from K. *to* the office, and Best, C. J. held at the trial that the notice only applied to journies *from* the office to K., though at the time of the loss returning *to* it. A new trial was granted, on the ground that though the notice merely specified coaches which set out from the office, it might also be applied to their journey home, if the plaintiff knew that the coach came from the office, which should have been left to the Jury to say.—*Macklin* v. *Waterhouse*, 5 Bing. 212. *Riley* v. *Horne*, 5 Bing. 217.

Company. 1. The plaintiff was a shareholder and managing director of a company of which the defendant was a shareholder and agent. The defendant sold goods belonging to C.—drew upon him for the amount, and indorsed the bills to the plaintiff. C. became insolvent, but the defendant received 10*s*. in the pound on account of the bills. Held, that (the parties being both shareholders and joint contractors in respect of the transaction,) the plaintiff could not recover.—*Teague* v. *Hubbard*, 8 B. & C. 345.

2. A company empowered to make reasonable bye laws, made a bye law (duly confirmed by the Lord Chancellor and the Chief Justices of K. B. and C. P.) to the effect that the steward (with a certain allowance from the company) should provide at his own expence a dinner on Lord Mayor's day under a certain penalty, unless he made oath before a justice that he was not worth 300*l*. The bye law was held bad, and it was also held that the declaration, not averring a tender of the allowance, was insufficient.—*Carter* v. *Saunderson*, 5 Bing. 79.

Consideration. A conveyance of an advowson in 1762 was expressed to be in consideration of "twenty shillings faithful ser-

vice, and other considerations." The Court would not presume it voluntary.—*Gulley* v. *Bishop of Exeter and Dowling*, 5 Bing. 171.

Covenant. Lessee covenanted, that he, his executors or administrators should not assign without licence. He assigned without licence, and the assignee assigned over. An action being brought against the immediate assignee of the lessee on the covenant for non-payment of rent, Held, that his obligation arose only from his filling the particular character of assignee and ceased with it.—*Paul* v. *Nurse*, 8 B. & C. 486.

Custom. 1. The plaintiff sought to establish a claim under a custom, to the second best fish out of every boat load landed in S. cove. It was proved, that the plaintiff and his ancestors had maintained a capstern and rope for the use of the fishermen, without which, in tempestuons weather, boats could not be drawn up. The land on which the capstern stood belonged to the plaintiff, but all the rest of the cove to a third person, across whose land the boats were drawn by means of the capstern. Held, a good consideration for the exaction of a toll from all boats landing their fish in the cove, whether using the capstern or no. Held, that a fisherman using the cove was not admissible as a witness for the defendant.—*Lord Falmouth* v. *George*, 5 Bing. 286.

2. A custom regulating the rights of the owners of all lands bordering on the sea need not be pleaded.—*The King* v. *Lord Yarborough*, 2 Bligh; 147.

Demurrage. The charterer of a ship requested the owner (the plaintiff) "not to show himself," for fear of getting down the price of the goods with which the ship was laden. The plaintiff consequently delayed procuring from the custom house the papers authorising the unloading of the vessel. Held, that the omission did not preclude him from recovering for demurrage accruing during the delay, the delay being at the charterer's request.—*Turnell* v. *Thomas*, 5 Bing. 188.

Devise.—1. Devise to A. for life, remainder to trustees to preserve, &c. remainder to A.'s *second*, third, fourth, fifth, *and all and every other the son and sons of A.* severally, successively, and in remainder one after another, as they and every of them should be in *seniority of age and priority of birth* and their heirs male; remainder to the first, second, third, fourth, fifth, and all and every other daughter and daughters of the said A. with (after several other dispositions) a power to A. to raise portions in case there should be any child or children of his body *other than*

and besides an eldest or only son. The case having been sent from the Court of Chancery for the opinion of the C. P. all the judges joined in certifying that the eldest son of A. took an estate in tail male, expectant on the death of A.—*Langston* v. *Pole*, 5 Bing. 228.

2. A. (the devisor's trustee) was directed by will to convey the premises to B. to enter upon and possess the same after the decease of A., and (after other directions) it was ordered by the devisor that in case B. should die and leave no child of his own body, that the property should be sold and distributed, as in the will mentioned. The Court certified that B. took an estate tail expectant on the death of A. —*Ragget* v. *Beaty*, 5 Bing. 243.

Estate Pur Autre Vie. A tenant of lands granted to him and his heirs for three lives, devised them to his daughter, without other words. Held, that only an estate for her life passed to her, and that so much of the estate as remained at her death devolved on the heir of the devisor as special occupant.—*Doe dem. Jeff.* v. *Robinson*, 8 B. & C. 296.

Evidence.—1. The declaration was entitled generally of Hilary term, and the cause did not accrue till Feb. 1. Held, that the real time of commencing the action might be proved by the plaintiff's attorney, and that it was not necessary to produce the writ.—*Lester* v. *Jenkins*, 8 B. & C. 339.

2. An allegation in an indictment that a bill of indictment was preferred and found against A. B. at a quarter sessions, must be proved by a record with a caption regularly drawn up. The minute book of the clerk of the peace is not admissible to prove the finding of the bill, though no record had been drawn up and it appeared not to be the practice of the court of sessions to draw up records in form.—*The King* v. *Smith*, 3 B. & C. 341.

3. On an indictment against a county, the question being whether the county or a parish were liable to repair a bridge, the Court refused to compel the parish to allow an inspection of their books relating to the bridge.—*The King* v. *Justices of Bucks*, 8 B. & C. 375.

4. Agents abroad informed defendants by letter of their having received money for defendants, and defendants in reply gave directions as to the disposal of the money. Held, that the letter of the agents coupled with the letter of the defendants, was admissible as evidence of the receipt of the money by the defendants, in an action by third parties.—*Coates* v. *Bainbridge*, 5 Bing. 58.

5. In an action by assignees of a bankrupt to recover money paid under a fraudulent preference, the ledger of the bankers

with whom the bankrupt kept cash was admitted to prove that the bankers had no cash of the bankrupt in their hands at the time of the bankruptcy.—*Furness* v. *Cope*, 5 Bing. 114.

6. In an action for an injury to a reversion, a witness stated that he occupied under the plaintiffs as his landlords; but it subsequently appeared that he held under an agreement in writing. The Court was divided as to whether the occupancy was proveable by oral testimony. Best C. J. and Burrough J. being of opinion that the production of the written agreement was necessary, and Park and Gaselee Js. that it was not. The verdict was taken for one shilling only, and it seems to have been admitted, that if the plaintiffs had gone for damages commensurate with the value of their interest, it would have been necessary to produce the agreement for the purpose of proving the value by the amount of the rent.—*Strother* v. *Barr*, 5 Bing. 136.

7. An answer in Chancery touching an advowson, filed by one who had been seized of the advowson twenty years before, was held not admissible against a party claiming through him.—*Gully* v. *Dowling*, 5 Bing. 171.

Executor. Debt lies against an executor on an award made in pursuance of a submission by him, after the death of the testator; and plene administravit is no bar to the action; for the executor, by submitting to a reference without protesting that he had no assets, must be taken to have admitted them.—*Riddell* v. *Sutton*, 5 Bing. 200.

Feme Covert. The defendant, a married woman, being sued as a *feme sole*, suffered judgment by default, and was taken in execution. The Court refused to discharge her on the ground, that having suffered the plaintiff to incur the expense of a writ of inquiry, she should be left to her writ of error.—*Moses* v. *Richardson*, 8 B. & C. 421.

Foreign Court. The discharge of an insolvent by a Scotch court is no defence to an action brought in this country by an English subject for a debt contracted in England, although the plaintiff had opposed the discharge in the Scotch court. The Court intimated that the decision might have been different if the plaintiff had applied to have the benefit of the Scotch law, and to receive a distributive portion of the insolvent's property. —*Phillips* v. *Allan*, 8 B. & C. 477.

LITERARY INTELLIGENCE.

American Jurist. The third number of the American Jurist for July last, was published in the course of that month. The contents are as follows:—Art. 1. Sheriff Sumner's Discourse.—Art. 2. The Law of Water Privileges.—Art. 3. The Civil Law.—Art. 4. Real Actions, remarks on the Review of Jackson on Real Actions in the 2d No. of the American Jurist.—Art. 5. Damages on Bills of Exchange.—Art. 6. Manufacturing Corporations.—Art. 7. Derelict Property.—Digest of recent Decisions—Legislation—Intelligence, &c.

The following American Law Publications have lately appeared:—

A view of the Constitution of the United States of America, by William Rawle, LL. D. Second edition.

Chancery Cases, argued and determined in the Court of Appeals of South Carolina, from January to May, 1827—by D. J. M'Cord, State Reporter—Vol. 2.

A Treatise on the Limitation of Actions at Law and Suits in Equity, by Joseph K. Angell.

Reports of Cases argued and determined in the Supreme Court, and in the Court for the trial of Impeachments and the Correction of Errors, of the State of New-York—By Esek Cowen—Vol. 8.

The following works are among the latest law works advertised in London:

The Office and Duty of Executors; or a Treatise of Wills and Executors, by T. Wentworth, of Lincoln's Inn. New Edition.

A Practical Treatise on the Analogy between Legal and Equitable Estates and modes of Alienation, by H. Jickling, Esq.

The laws relating to Inns, Hotels, Alehouses and Places of Public Entertainment, by J. Wilcock, Esq.

☞ ERRATA. Several Peccadilloes will be observed in the printing of this No.; but as they were owing chiefly to an unexpected change in the workmen employed, it is hoped they will be passed over without further explanation.

Law Books.

HILLIARD, GRAY & CO. *Boston*, have on hand a large assortment of American and English Law Books, comprising an assortment of *Elementary Books* and *Reports*, which they will sell on liberal terms.—They have lately published,

Vols. 9 and 10 of Massachusetts Reports, with Notes by B. Rand, Esq.

Nos. 1 and 2 of the 6th Vol. of Pickering's Reports.

Hobert's Reports, with Notes by Judge Williams.

A Treatise on the Limitation of Actions at Law and Suits in Equity, by Joseph K. Angell. The following are the contents of this work:

1. Of the meaning and history of the Limitation of Actions, with considerations upon its justice and policy, and upon its operation as regards the constitutional provision in favour of Contracts.

2. Limitation of Actions in relation to Real Property.

3. Limitation of Right of Entry, when an actual entry is necessary, and how it is taken away by Possession.

4. What constitutes a Possession which will operate as a bar.

5. Of Possession as between Co-Tenants, and between Landlord and Tenant.

6. Possession as between parties to a Mortgage and between Trustee and Cestui que trust.

7. Possession in relation to persons under disability.

8. The Limitation of Personal Actions in relation to Contracts.

9. At what time the right of Action on a Contract accrues, and whether Fraud may be pleaded.

10. Exceptions concerning Merchants' Accounts, and persons under disability; and of the meaning of the term "beyond seas."

11. Of the acknowledgment of debts barred by the statute.

12. Of conditional acknowledgments—acknowledgments by partial payment, and where the promise is to be performed at a certain time—acknowledgment by decree for payment of debts, &c.; and by and to whom the acknowledgment may be made.

13. Of Special Acts of Limitation in relation to Executors and Administrators, for the benefit of the representatives of deceased persons.

14. Limitation of Actions upon Torts and Penal Statutes.

15. Limitation of Actions how interrupted by judicial process.

16. Of Pleading the Statute.

17. Limitation of Actions in Equity.

18. Limitation of Actions in Admiralty.

19. Limitation of Actions as regards the Government.

20. Authority of Courts to make exceptions in consequence of impediments to sue.

The *Appendix* contains an abstract of the Statutes of Limitation of the several States, and Brookes' *Reading* upon the Statute 32d Hen. VIII.

They have also for sale the remainder of the Editions of the following works:

Bayley on Bills.
Bigelow's Digest of Mass. Reports.
Mass. Reports, 17 vols. or any volume that may be wanted.
Pickering's Reports, 5 vols. or any volume that may be wanted.
Phillips on Insurance.
Dane's Digest of American Law.
Oliver's American Precedents.

They are also Agents to receive Subscriptions for the UNITED STATES LAW INTELLIGENCER AND REVIEW, a *Monthly Periodical*, commenced in January, 1829. The contents of the different Nos. of this work which have been published are as follow:

No. 1.—JANUARY.

Address to the Public.

Restrictions upon State Power in relation to Private Property, No. 1.

Mathews on the doctrine of Presumptive Evidence.

Petersdorf's Abridgment.

Effect of Prejudice against Lawyers.

Doctrine of Acknowledgment of Debts.

Late Judicial Decisions.

Judiciary Intelligence.

No. 2.—FEBRUARY.

Restrictions upon State Power in relation to Private Property, No. 2.

Damages on foreign Bills of Exchange.

The Doctrine of Unity of Possession.

Validity of Wagers on the event of an Election.

Aceeptance of Bills of Exchange to pay at a particular place.

Parliamentary Act in relation to Acknowledgment of Debts.

Notices of New Works.

Judiciary Intelligence.

Late Judicial Decisions.

No. 3.—MARCH.

Restrictions upon State Power in relation to Private Property, No. 3.

Law of Copyright.

Mercantile Law—Law of Merchants' Ships and Shipping—Late edition of Abbott on Shipping.

Mr. Barbour's Judiciary Bill.

Judiciary Intelligence.

Late Judicial Decisions.

No. 4.—APRIL.

Restrictions upon State Power in relation to Private Property No. 4.

Registration of Deeds and Presumption of Grants.

Digests of Equity Cases

No. 5.—MAY.

No. 6.—JUNE.

No. 7.—JULY.

No. 8.—AUGUST.

LAW INTELLIGENCER.

Vol. I. OCTOBER. No. 10.

LAW OF ASSIGNMENT.

The Case of Andrews v. Ludlow.

[We have been indebted for the following examination of the late case of Andrews v. Ludlow, (5 Pick. 28.) to the kindness of a Correspondent.]

No books come from the press, in which the people have a deeper interest than in Reports of adjudged cases. They embody the evidence of the law, by which the rights of property may be known and must be governed, by which the reputation of the citizen is protected and his liberty and life secured. They afford a knowledge of the remedies by which private wrongs may be redressed and public crimes punished. They contain the reasonings and arguments of learned lawyers, the opinions and decisions of profound judges.

The judgments of a Court, when reported, after having exacted obedience from those who are the subjects of them, stand as land-marks, to point out a secure path to those who are willing to be guided, and to admonish those, who trespass upon the rights of others, of the pains and penalties to which they expose themselves; finally, they go down to posterity, not only to mark the character of those by whom they were rendered, but to give evidence of that of the age and country to which they belong. We consider reported cases proper subjects of criticism, not indeed, to be tried by the same standard as the popular books of the day, but by well established principles, by other adjudged cases, the authority of which has never been denied or questioned, by the settled law of the land. It is the duty of the

profession, especially, not to yield too readily to a doubtful decision of any Court, lest by their acquiescence they should seem to sanction its authority.

The first settlers of New-England, were not men, who wished to live without laws, and happily they did not come from a country destitute of laws. They brought with them the Common Law of England. But when they adopted new constitutions of government, established civil and religious institutions of their own, differing from those of the parent country, the common law itself was to be made to conform to this change of circumstances, and this new state of things. When, therefore, a case was cited at the bar, from an English book, which seemed to be in point, it often became the duty of the court to consider whether it was decided upon general principles of law, derived from the nature of man and founded in justice, or whether it had its origin in some political maxim not in accordance with the spirit and form of our own institutions. We did not want for judges, technical lawyers, so much as men of enlarged views, of nice discrimination and sound judgment. Perhaps no State in the union has had more cause to be proud of its judges, than Massachusetts. Yet, it would be strange if even in that Commonwealth the Court had not sometimes been governed by old cases, when a new state of things required a different decision, and perhaps quite as strange, if it had not sometimes supposed, what we think has oftener happened, that a slight alteration in some statute or change in the state of society, rendered inapplicable the adjudged cases of England, when it would have been safer to have followed them. They must then pertinaciously adhere to what they have once decided, right or wrong, or else review and occasionally overrule their own decisions. No one can doubt which course they should adopt, nor that it is the right and duty of the bar, as *Amici Curiæ*, to suggest their own doubts, in relation to any decision, when reported, especially, if it be upon an important subject, and does, or is supposed, to establish a new principle of law or a new rule of practice.

With these views, we took up the fifth volume of Mr. Picker-

ing's Reports, with the intention of examining a single case, there reported, and now placed at the head of this article, or perhaps we should say, a single question in that case; namely, whether a certain assignment disclosed by the supposed trustees, is or is not, upon the face of it, in the judgment of the law, fraudulent. The Court were of opinion that it was not, and rendered judgment accordingly. The opinion was drawn up by Mr. Justice Wilde, and it is mentioned in a note that Chief Justice Parker did not sit in the case. The material facts as to the only point, which we shall consider, and those upon which, the opinion of the Court was founded, were as follows :

An Indenture of Assignment, of three parts, was made on the 18th June, 1822. *Ludlow*, the principal defendant, was party of the first part; the supposed trustees, who were themselves creditors of *Ludlow*, were parties of the second part; and other creditors of *Ludlow*, who should execute the indenture, were parties of the third part. By this instrument, Ludlow assigned to the trustees certain real estate, chattels, and credits, upon trust to sell the lands and chattels, and collect the sums due to Ludlow, and after deducting their expenses and $1000 for their services, in executing the trust, in the first place to apply the proceeds, to the payment in full of debts due from Ludlow to the United States, amounting to about $3000. Secondly, to apply the residue in payment, *pro rata*, of the debts due to the trustees and the creditors of the third part: but upon condition, that those creditors only should be entitled to a dividend, who should execute the indenture, within two months from its date. And by a subsequent agreement of September 6, within thirty days from that time; and thirdly, to pay to the order of Ludlow the surplus, if any, and any dividend, which would have become payable to any creditor, if he had not neglected to execute the indenture. The creditors, who became parties to the Indenture thereby released t eir demands. The plaintiff was a creditor, bu did not become party to the assignment; he brought his action against Ludlow, and summoned the assignees, as his trustees. His writ was served on the third of July of the same

year The clause in the instrument relied on, as indicating fraud, as is said by the Court, is as follows: "To pay the surplus, (if any after paying certain creditors,) to the said Ludlow, and in like manner to pay over any dividend which would have become payable to any creditor, if he had not neglected to become a party within two months after the making of said assignment." Out of this clause the Court made two points, though the counsel for the plaintiff appear to have made but one. We shall copy the opinion of the Court, as to this clause, entire; it is as follows:

"As to the agreement to pay over the surplus, it is clear that it could have no effect, because the debts greatly exceeded the value of the property. It was probably introduced as a matter of form, by the person who drew the assignment, and passed without notice; for it seems impossible there could have been an expectation that a surplus would remain after payment of the debts. As to the stipulation to pay over to Ludlow the dividends of creditors who should neglect to become parties to the assignment, the presumption is, that it was inserted for the purpose of hastening the creditors, so as to bring the settlement of the concern to a speedy conclusion. This case therefore is not like the case of *Harris & al.* v. *Sumner*, before referred to, in which a large provision was secured to the debtor unconditionally. The Court held that such a provision was conclusive evidence of fraud. In the case under consideration we cannot infer that it was the intention of the parties to make provision for the benefit of the debtor, for it could not be presumed that the creditors would refuse to accede to an arrangement evidently made for their benefit, and there could have been no expectation of a surplus. It appears also, that after the expiration of the time first allowed for the creditors to become parties, the time was further extended; which confirms the presumption that the clause in question was not introduced for the purpose of making any provision for the debtor.

We are therefore of opinion that the assignment to the trustees was valid, and binding on the parties who had signed it previously to the service of the plaintiff's writ and as creditors had then signed, whose demands exceeded the value of the property conveyed to the trustees, the assignment cannot be impeached by the other creditors of Ludlow, who neglected to become parties." (5 Pick. Rep. 32.)

We certainly agree with the Court, that that part of the clause

which relates to the passing back to the assignor the surplus, if any, after the whole debts of those who are parties to the assignment are paid, does not vitiate it, the effect of the instrument would be the same, by operation of law, merely, without any express stipulation of this kind. The value of the property transferred, or what will be the amount of the proceeds thereof, cannot be known, at the time of making the instrument, nor can it be known, how many of the creditors will accede to its terms, and become parties to it; or what will be the amount of the claims of those who do. In this particular case, the extraordinary provisions supplied in part, at least, the place of the ordinary one, because unless the proceeds of the property assigned amounted to a sum larger than that of all the claims of the creditors, the stipulation, that the debtor, should have the dividends of those who did not become parties to the assignment, which if they had executed it, would have been payable to them; would give him the whole balance, though it had not been executed by any one besides the assignee. We may then dismiss that part of the clause above cited, by which the debtor, after all the claims of those who become parties to the assignment is to receive the surplus, if any, and also so much of the opinion of the Court, as relates thereto, especially, as Mr. Justice Wilde says, "it was probably introduced as matter of form by the person, who drew the assignment and passed without notice."

The simple question then is, whether an assignment, which purports to convey the property of an insolvent debtor to a trustee, for the benefit of such of his creditors as shall execute it, within a limited period, containing a general release of their whole demands and containing a stipulation that the dividend of such as shall not become parties to it, shall revert to the debtor, be fraudulent or not. The Supreme Court of Massachesetts have decided in the case of *Andrews* v. *Ludlow*, that such an assignment is valid, and available for the benefit of the parties, who had signed it previously to the service of the writ upon the alleged trustees, and that it could not be impeached by the other creditors. We doubt the correctness of this decision. It can-

not be maintained. No case has been cited in support of it, and we can find none by which it is sustained. We admit that an insolvent debtor may prefer one or more of his creditors who accede to the terms proposed in his assignment, but we contend that a clause, containing a stipulation that any part of it, shall revert to the debtor conditionally or unconditionally before all the demands of those who are parties to it, are paid, renders it wholly void as against creditors. And we believe the practice generally to have proceeded upon such an opinion. The first difficulty which occurs to the mind of the debtor, who contemplates assigning his property, is that, if only a part of his creditors accede to his terms he shall be left without any means, by which he can ever hope to obtain a release from the others. For this, if *Andrews* v. *Ludlow* be law, the Court have discovered a complete remedy. The debtor is himself to represent, and receive the dividends of so many of his creditors as do not, for any reason, choose to assent to his assignment, upon the condition annexed. In the mean time his property is to remain as secure from an attachment as was the body of a felon, in olden times, who had found his way into an asylum. He would grow wise by experience, and instead of holding property liable to attachments, he would receive *his dividends* in money and take care to invest it, in property, which his creditors could not reach, by any process known to the law. Would not this enable the debtor to lock up his property; to delay, hinder, and defraud his creditors of their honest claims ?

The Court say " the presumption is, that this clause was inserted for the purpose of hastening the creditors, so as to bring the settlement of the concern to a speedy conclusion." If this was a good reason and the clause in itself unobjectionable, the reason would have applied in other cases, and this clause have made a part of the common forms. But what tendency has it to bring the settlement of the concern to a speedy conclusion ? In an assignment, made in the usual form, the debtor transfers his effects to a trustee for the benefit of those of his creditors who become parties to it, within the time fixed upon for that purpose.

Would the creditor be more likely to execute the assignment speedily, when he knew, if he omitted to do so, all the property of his debter would go to increase the dividends of those who did, and the debtor left wholly destitute, or when he knew the share, which he might have received, in discharge of his debt, would be returned to his debtor against whom he would retain his demand ? Nor do we readily apprehend how the alteration in the assignment, giving an extension of time, for the creditors to come in, which took place, on the 6th of September, or any other, which could then have taken place, should render the assignment valid or how it could be made use of, as an argument against the validity of this attachment, which was made on the third of July preceding. No one can doubt, as to what was the object of the debtor, in this case. He wished to obtain a release, from all his creditors, and for this purpose, was willing to give up the property transferred for their benefit, but he apprehended that they might not all be willing to execute the release, and if not, he did not intend to divest himself of the dividends, which would otherwise have been payable to such as neglected or refused to take them, in discharge of their whole demands. How large these dividends were ever likely to be, does not appear. How then could the Court say, " it could not be presumed that the creditors would refuse to accede to an arrangement evidently made for their benefit." How could the Court know, that it would evidently be for the benefit of a creditor, to release his whole demand, for such dividend as he might happen to get, perhaps, not five cents on the dollar. This was a matter of discretion, to be exercised upon a knowledge of certain facts; for instance, the probable amount of the dividend, the age of the debtor, his ability for business, the amount of claims outstanding against him, his expectations as to property,—at least, these as well as other inquiries, are generally made by merchants before they are ready to decide upon the expediency of such a measure, and after all, who can judge, so well as the creditor himself, whether on the whole, it will be for his benefit to assent to such an arrangement. We consider this a general question, and

one which should be decided upon inspection of the deed itself, as it was, at the time of the service of the plaintiff's writ, without looking abroad to learn the motives of the grantor; that it was a legal fraud, not necessarily attended with moral guilt. Suppose, instead of extending the time, on the sixth of September, those who were parties to the agreement, at the time of the attachment had immediately thereupon, caused the effects to be disposed of, as, if the assignment was valid, they had a right to do, and the proceeds thereof, to be divided, according to its terms, the question whether the deed was fraudulent or not, as to the creditor, who had attached, would have been the same then as now, in principle, and would have required the same decision.

In these remarks reference has been had to the laws of Massachusetts, as it was with reference to them that *Andrews* v. *Ludlow* was decided; and not that the law of debtor and creditor is in Massachusetts any more than in the other states, what we should wish it to be. Though in favor of a national bankrupt law, we are not in favor of allowing every insolvent debtor to make a bankrupt law for himself. We think there is truth in the remark of Chancellor Kent, in *Riggs* v. *Murray*. "If an insolvent debtor may make sweeping dispositions of his property to select and favorite creditors, yet loaded with such durable and beneficial provisions, for himself, and incumbered with such onerous and arbitrary conditions and penalties, it would be impossible, for Courts of justice to uphold credit or to exact the punctual performance of contracts." We shall now cite some authorities and make some extracts from the books which appear to us to render the decision of *Andrews* v. *Ludlow* very questionable. Some of the cases which we shall examine, and those which we think most in point, were decided in New-York; in which state it will be recollected, they have an insolvent law—allow no advantage to the first attaching creditor, by reason of the priority of his attachment, and they also have a Court of Chancery, to compel disclosures, detect frauds, and enforce the execution of trusts. In Massachusetts they have no insolvent law. Property is liable to be attached, for the sole benefit of

the attaching creditor, and they have no Court of Chancery. Under these circumstances, should the Supreme Court of Massachusetts have been the first, to have established a precedent, like that of *Andrews* v. *Ludlow*? Of the cases cited by the counsel for the trustees, the only one which is mentioned in the report, as having reference to the point under consideration, is that of *Hastings* v. *Baldwin*, 17 Mass. Rep. 552. In the report of this case it is not suggested that the assignment contained a clause, like the one objected to in *Andrews* v. *Ludlow;* of course, the question we have discussed, could not have arisen in *Hastings* v. *Baldwin*. And, we apprehend, that case was referred to by the counsel for the purpose of showing that though the assignment was fraudulent, there might be a lien in favor of the trustee to the amount of his own demand.

The counsel for the plaintiff cited, *Riggs* v. *Murray*, 2 Johns. Ch. Rep. 565; *Hyslop* v. *Clark*, 14 Johns. Rep. 458; *Burd* v. *Smith*, 4 Dallas, 76; *Austin* v. *Bell*, 20 Johns. Rep. 442; *Harris* v. *Sumner*, 2 Pick. 129; *Widgery* v. *Haskell*, 5 Mass. Rep. 144. In our examination, we shall confine ourselves to these cases, because we have not found any other of higher authority, or more directly in point. The only one of these cases, of which the Court take any notice, in their opinion, is that of *Harris* v. *Sumner*. They say the case of *Andrews* v. *Ludlow* is not like that of *Harris* v. *Sumner*, in which, a large provision was reserved to the debtor unconditionally. We admit the cases are not precisely alike. Still we think the case of *Harris* v. *Sumner* is an authority so far as it goes, and that it goes very far to prove the assignment, in question, fraudulent. The facts in that case, so far as they concern us, are very concisely given by Mr. Justice Putnam, who delivered the opinion of the Court: "The deed, he says, purports to convey the property to the plaintiffs, in trust, that they should sell the same, and from the proceeds of the sale, should pay themselves $407 35, the amount of their demand against Coltman, (the assignor,) then should pay to Coltman $1000, provided the residue of the proceeds of the sale should pay to the creditors who should execute the instruments,

70 per cent, and, if not, then, should pay to Coltman such proportion of $1000, as the creditors should receive, of 70 per cent.

In *Harris* v. *Sumner*, to use the words of Mr. Justice Putnam, "the avowed intent was to lock up the debtors property, unless his creditors would permit him to take nearly one third of it, for himself, and receive the residue in full discharge of their demands." In *Andrews* v. *Ludlow*, the avowed intent was to lock up the debtor's property, unless his creditors would permit him to receive the shares of such as did not come in to the measure. It might have been more than one third of the whole amount, or it might, by possibility, not have been any thing; but in that event, he would have had what he evidently preferred, a release, in full, from all his creditors; whereas, in *Harris* v. *Sumner*, though the debtor was sure of his $1000, if the dividends amounted to 70 per cent, yet he might have been in debt three or four times that sum.

In the case of *Harris* v. *Sumner*, Mr. Justice Putnam says, "the question is, whether an insolvent debtor may transfer his whole property, in such manner, as to make a provision for himself, and to lock it up from his creditors, who do not feel satisfied to accept of their proportion of the residuum." The Court held he could not. In the case of *Andrews* v. *Ludlow*, the question was, whether a debtor might make a reservation, in favor of himself, until it was made certain that all his creditors would accede to his proposition, which was, in effect, that he should be wholly free from debt, within two months; or that he should then, have a part of his funds under his own controul. If all the creditors consented to receive the property transferred, in discharge of their demands, no such stipulation, in favor of the debtor, was necessary; if they did not all come into the measure, it was a reservation of a sum of money, to be held in trust, for him. The provision therefore was inoperative, or it secured to him a beneficial interest, in the property assigned, though the parties to the deed had not received the full amount of their respective claims.

We will next examine *Widgery* v. *Haskell*, 5 Mass. R. 144. This has always been considered a leading case upon this sub-

ject, in Massachusetts. It was decided in 1809, and was fully recognized in *Harris* v. *Sumner*, in 1824. We shall merely make an extract from the opinion of the Court in this case, which was delivered by Ch. Justice Parsons:

"By our law a debtor's property is liable to attachment by any creditor: and on the other hand, a debtor may prefer any one creditor to another, by paying his debt, either in cash, or by conveying so much of his estate as will be adequate to the payment. But the creditor must be a party or assenting to this payment or conveyance. If he be not, nothing passes to him, and nothing passes from the debtor, and his estate intended to be conveyed remains liable to attachment by any other creditor.

"But it has been argued that a creditor, to whom the conveyance is made, must be presumed to assent, or he may afterwards assent. We cannot always presume that he will assent, and especially on the condition of releasing the whole debt on receiving a part: and the present case proves that one creditor did not assent. A creditor may afterwards assent, and then he may be bound by his assent: but until his assent the property remains the debtor's, so far as to be liable to the attachment of another creditor: and if the property does not pass by the conveyance when executed, it can never after pass by virtue of such conveyance, so as to defeat an intervening attachment by another creditor."

Does the law presume the creditor will assent, to an assignment, containing a release of his whole debt, on receiving a part? Chief Justice Parsons says it does not; and to us this opinion seems to be correct, beyond the possibility of a doubt. But Mr. Justice Wilde says, it could not be presumed that he would refuse. Does this mean that the law does presume that he will assent? If so, then it is directly opposed to the authority of *Widgery* v. *Haskell*. But, if "not to refuse," in *Andrews* v. *Ludlow*, means any thing less than "assent," in *Widgery* v. *Haskell*, it will not answer the purposes of the argument. For the law is called upon by the debtor to presume an assent for his benefit, and not by the creditor to presume a refusal for his protection.

We will pass now to the case of *Hyslop* v. *Clark*, 14 Johns. Rep. 458. We think this case more directly in point, than any of those we have heretofore examined. We shall give the facts

as stated by Mr. Justice Van Ness, who delivered the opinion of the Court; we shall also copy so much of the opinion, as is applicable to the matter under consideration.

"The question in this case is," says Mr. Justice Van Ness, "whether the assignment, to Cambell and Hyslop is valid in law, or not. This must, in a great measure, be determined upon the face of the instrument itself, as a question of law. The assignment is made in trust; first, to satisfy a debt due to Hyslop & Co.; second, to pay all the other creditors, proportionally, on condition of their executing releases of their respective demands; and in case the creditors, or any of them, shall refuse to give such releases, then it is declared that the last mentioned trust shall cease and determine, and the trustees are required and directed not to execute it; third, in case of such refusal of the creditors, or any of them, to give such discharge, then in trust, after paying the debt to Hyslop & Co. to pay the whole of the avails of the property assigned to such of the creditors, as Barnett and Henry, the assignors, shall appoint, as soon as such refusal shall be known; fourth, to pay the overplus, in any event, to Barnett and Henry.

"On the part of the plaintiffs, it is argued, that a debtor has a right to prefer one set of creditors to another, and that this assignment is a bona fide exercise of such right. If that were true, there would be no difficulty in the decision of this case. It has frequently been determined, both in this court and in England, also, before the introduction of the bankrupt system, that it is lawful to give a preference to particular creditors; and if this assignment was calculated purely to effect that object, it would be valid. But we think it goes greatly beyond such a purpose, and contains provisions, which render the whole, in judgment of law, fraudulent and void. It does not actually give a preference, but is, in effect, an attempt, on the part of the debtors, to place their property out of the reach of their creditors, and to retain the power to give such preference at some future period. One object evidently was, to coerce the creditors to acquiesce in the terms offered to them. The language held to them is this "if

you will release your debts, you may participate in the benefits that may result from this assignment ; but if you refuse, we will lock up our property indefinitely, in such a way, that whether you ever get any part of it shall depend upon our will and pleasure; those of you who have shown a disposition to submit to the terms we have prescribed, may expect some favors from us ; but you who have presumed to murmur or hesitate, and you particularly, who have refused to comply with what we have determined to be just and reasonable between us, shall have nothing."

The case of *Hyslop* v. *Clark*, is discussed by Ch. Justice Spencer, in *Austin* v. *Bell*, 20 Johns. 442, which is directly in point, and to our minds conclusive. It is the last case with which we shall trouble our readers, taking it for granted, their patience will then be wholly exhausted, or that they will be fully satisfied.

In *Austin* v. *Bell*, the question discussed, and upon which the case turned, was precisely the same as that in *Andrews* v. *Ludlow*. The clause in the assignment out of which it arose, was as follows, namely: "And upon the further trust, that in case any of the creditors named in the several classes, should not within the time limited, become parties to the assignment, then the grantees should pay to the grantors the proportion of such of the creditors who neglected or refused to execute these presents." The deed, as in the case of *Andrews* v. *Ludlow*, contained a general release of all demands. It also contained some other provisions to which objections were made by counsel, but none of which in the opinion of that Court, vitiated the assignment, and which of course it is not necessary for us to notice. Spencer, Chief Justice, delivered the opinion of the Court.

"In the case of *Murray* v. *Riggs* and others, there was a provision in the assignment of the 31st of May, 1800, that the assignees should hold the balance of trust property subject to the further order of the assignors, and that the creditors who should not, in one year, accept of the conditions, or who should knowingly embarrass the objects of the assignment, should be forever excluded from any share under the assignment. The only remainining question is, whether the stipulation reserving to the assignors the proportions of such of the creditors as neglected or refused to execute the assignment by the first day of November,

1819, renders it fraudulent and void. In this case, *Lambert* sued out his executions, and levied on the property assigned, a few days before the first day of November, 1819. The difference between the provision in the deed of the 31st of May, 1800, in the case of *Murray* v. *Riggs*, and the provisions of this deed, is this; in the former case, the creditors who refused, for one year, to accept of the conditions, or who should embarrass the objects of the assignment, were forever excluded from any share, but it was not provided that the shares to which they would have been entitled, by accepting the conditions, should revert or result back to the assignors ; but, in this case, instead of throwing the distributive shares of such as refused to execute the assignment, into the general mass, for the benefit of all the creditors, it is expressly reserved to the assignors themselves. In the case of *Murray* v. *Riggs*, Chief Justice *Thompson*, observed, " for any thing that appears, all the creditors of *Robert Murray & Co.* (the grantors,) were satisfied with the assignment, and the provision there made for the payment of their debts." He went on to say, " this is an important feature, in which this case is distinguishable from that of *Clark* and *Hyslop*." In the case of *Hyslop* v. *Clark and others*, (14 Johns. Rep. 458.) the assignment contained a provision, that if any of the creditors should refuse to give the assignors a discharge from their entire debts, then the trust, providing for the payment of the scheduled creditors rateably, should cease and become void, and the trustees were directed not to execute it; and, in that event, the deed further provided, that the trustees should hold the property assigned in trust, in the first place, to pay the debt due to *Robert Hyslop & Co.* and then to pay the avails of the assigned property to such of the creditors as the assignors should appoint; and upon the further trust, in any event, that the overplus should be paid to the assignors. The case of *Hyslop* v. *Clark* was decided in October term, 1817, and the case of *Murray* v. *Riggs*, in February, 1818. Chief Justice *Thompson* assented to the decision in *Hyslop* v. *Clark*, and it cannot be admitted, that he intended to overrule that case, by any thing he said in the case of *Murray* v. *Riggs*. The contrary, in truth, appears, from his distinguishing between the two cases, as has already been mentioned. Mr. Justice *Van Ness*, who delivered the opinion of the Court, in *Hyslop* v. *Clark*, considered that part of the deed which declared the trust void, on the refusal of the creditors to give releases, and which, in that event, directed the avails of the property to be paid to such of the creditors as the assignors should appoint, as an attempt on the part of the debtors to place their property out of the reach of their creditors, and to retain the power to give preference to creditors, at some future period. That it was, also, one object

to coerce the creditors to acquiesce in the terms offered them, and that, therefore, that part of the assignment was void under the statute of frauds; and that being void in part, as against the provisions of a statute, it was void *in toto;* and in this opinion the Court unanimously concurred. Now, I cannot perceive any material distinction between the case of *Hyslop* v. *Clark*, and the one before us, unless, indeed, it be that this is a stronger case of legal fraud. In this case, on a refusal by any of the creditors to execute the assignment, their shares in the division of the property assigned were to revert to the assignors. In other words, it was to be at their absolute disposal, to apply to their own use, or to pay to their creditors as they pleased. This is not only an attempt to coerce creditors, and to place the property beyond their reach on execution, but it is the reservation of property which ought to have been devoted to the payment of their debts, to their own private benefit and use. Without, in the least, impugning the doctrine, that a man in debt, has a right to give a preference to creditors, I am bound to say, that a deed which does not fairly devote the property of a person, overwhelmed with debt, to the payment of his creditors, but reserves a portion of it to himself, unless the creditors assent to such terms as he shall prescribe, is, in law, fraudulent and void, as against the statute of frauds, being made with intent to delay, hinder, or defraud creditors of their just and legal actions."

Upon this case we shall make no comment—it speaks for itself. But in the 2d volume of Kent's Commentaries, 422, published since the decision of *Andrews* v. *Ludlow* was made, we have his opinion upon this subject. He seems to consider the question well settled and not open for debate. He says, "the debtor may deprive the creditor, who refuses to accede to his terms of his preference and postpone him to all other creditors, but then he will be entitled to be paid out of the residue of the property if there should be any, after all the other creditors, who released and complied with the conditions of the assignment, are satisfied. If the condition of the assignment, be that the share which would otherwise belong to the creditor who should come in and accede to the terms and release, shall on his refusal or default he paid back to the debtor or placed at his disposal by the trustees, it is deemed to be oppressive and fraudulent and destroys the validity of the whole assignment." He cites *Burd* v. *Smith*, 4 Dallas, 76. *Hyslop* v. *Clark*, 14 Johns. Rep. 45.

Seaving v. *Brinckerhoff*, 5 Johns. Rep. 329. *Austin* v. *Bell*, 20 Johns. Rep. 442.

For ourselves, we confess we cannot distinguish the case of *Andrews* v. *Ludlow*, from several of those which have been examined, and especially that of *Austin* v. *Bell*. We regret that Mr. Justice Wilde did not make the attempt, or that he had not shown that one or the other of them, was decided upon local law; or joined issue, with Chief Justice Spencer, and by the introduction of such arguments and authorities as he thought pertinent, have given the profession an opportunity to judge of their weight, and upon which of the two cases they could rely with the greatest safety. As the matter now stands, we must consider, that the same question, upon a subject of great importance, touching the law of debtor and creditor, has been differently decided, by the two highest Courts, of the two commercial States of New-York and Massachusetts.

We will not say it was due to the Counsel in the case of *Andrews* v. *Ludlow* to notice the authorities which they cited, however directly in point, we may think them; and though the world is apt enough to judge of lawyers by the manner in which their arguments are treated by the Court; perhaps we ought not to say, that the Court came to a wrong conclusion in relation to the matter under consideration. Yet, as they differed from the Supreme Court in New-York, and, from what we apprehend is the received opinion of the profession, even in Massachusetts, upon this point; and considering the amount of property which frequently depends upon the validity of an assignment, we cannot but regret that the grounds of their opinion were not given more fully.

An examination of the authorities cited at the bar, and which the Court overruled without noticing them, would have rendered the decision more satisfactory to the profession. Such an examination was due to the commercial community, which is deeply interested in the question; it was due to the character of the judges whose decisions were overruled; it was due to the reputation of the Supreme Court of Massachusetts.

[That a deed of trust containing a clause, that no creditor shall be entitled to

receive a dividend of the proceeds, who shall not within a limited time, discharge the assignor from the claim against him, is fraudulent, was decided, also, on great deliberation, in the case of *Ingraham* v. *Wheeler*, in Connecticut, by the Supreme Court of Errors of that State. This case is reported in the 6th vol. of Conn. Rep. p. 277. *Brainard*, J. who gave the opinion, observed, "No insolvent debtor has a right to prescribe terms to his creditor, and to say to these, *take up with the crumbs on my own terms or have nothing*. Besides, if those creditors do not see fit to comply with those terms, where is the residue? The answer must be, in the hands of the trustees, of the bankrupt's own creation; a trust necessarily *resulting*. I therefore lay this instrument totally out of the question, as being void; and that upon the face of it."—ED.]

INTEREST UPON BANK DISCOUNTS.

IT must have been perceived by every lawyer, and indeed by every man of business, that the subject of *interest* is one which is extremely likely to create misunderstanding and promote litigation. For this reason, a collection of the authorities appertaining to all the varied questions naturally growing out of this fertile source of difference is a very great disideratum. Indeed, if we were asked to propose for investigation a legal topic which would be likely to excite the most general attention, we should say a *Practical Treatise on the law of Interest*. The Hon. Creed Taylor, Chancellor of the Richmond and Lynchburg Districts in Virginia, has already considered the proper mode of calculating interest and stating accounts in his "Instructions for Commissioners in Chancery;" and we can also refer for much useful information on the subject of interest generally—of usury, and of interest payable by executors, administrators and trustees to those parts of "*The Digest of the Laws of Virginia illustrated by Judicial Decisions*," which relate to *executors*, *administrators*, and *interest*. Besides these, Mr. Hening, of Virginia, has collected the decisions of the American Courts on the subject generally, an abstract of which is published in the Appendix to that gentleman's edition of "Francis' Maxims." The way is there-

fore, already, tolerably well prepared by these and other works which might be mentioned, for what we trust will soon be produced, viz.: a *complete* collection and *systematic* arrangement of principles and cases.

The *usury laws* of most of the States are still in force, though it has been pretty fairly demonstrated by experience that their effect has been to counteract the object for which they were framed. The time will come, and there is much reason to expect that it is not far distant, when these laws will be blotted from our Statute Books. While they remain, however, there will occasionally arise difficulties in distinguishing between the interest which is allowed, and the usury which is prohibited and punished. A difficulty of this kind has lately arisen in Connecticut which required the interposition of the Supreme Court of that State. The facts of the case referred to and the decision therein we propose to lay before our readers, which we do with more pleasure, as they have been communicated from one in whose accuracy we have entire confidence.

LITCHFIELD, CONN. AUG. 22, 1829.

On the 18th inst. came on for trial, in the Superior Court in this county, before the Hon. Judge Daggett, the case of the *Phenix Bank* v. *Oliver Wolcott* and *Frederick Wolcott*. But *Frederick Wolcott* declining to make any defence, was defaulted; and the trial proceeded between the *Bank* and *Oliver Wolcott* only.

The action was on a promissory note for $40,000, made by the defendants, payable to the Phœnix Bank, or order. The material facts in the case were as follows: The defendants were in 1821, indebted to the Phœnix Bank to the amount of about $20,000, on six prior notes, indorsed to the Bank, and payable, (including grace,) in ninety-eight days from their respective dates; which notes had long lain over. They were also indebted in about the same sum, on two other notes, one of which was due to the Branch Bank of the United States, and the other to the Eagle Bank; both of which had also been lying over. And as the defendants had not funds at command, for the payment of any of these claims; they, in the fall of 1821, proposed that the plaintiffs, (the Phœnix Bank,) should *postpone*, for five years, the payment of the six notes first mentioned, and should also *assume* the payment of the two other notes. This, as the

defendants proposed, was to be effected, by *consolidating* all the different sums, due on all the eight notes, in a new one for $40,000, to be given by them to the plaintiffs, to be secured by a mortgage of real property. And that the consolidated debt, or loan, of $40,000, thus created, should be continued, or renewed, at the end of every ninety-eight days, for the term of five years, unless the defendants should elect to pay it within that period. To carry which latter stipulation into effect, the plaintiffs were to bind themselves, (as they eventually did,) by a covenant to bring no suit upon the note, within the above period of five years, if the loan should be continued throughout that period. It was also to be a part of the agreement, that the defendants should pay the interest, or discount, on the debt of $40,000, in advance, for the first ninety-eight days, (that period being the *ordinary usance*, on discounts, made by the bank,) and should also in the same manner pay in advance, the same interest or discount, for every succeeding term of ninety-eight days, so long as the loan should be continued. To this proposal, the plaintiffs, after a long negociation, assented. But, to save the defendants the trouble of *formally renewing* the $40,000 note, by giving a new one, at the expiration of every ninety-eight days, it was further proposed by the defendants, and acceded to by the plaintiffs, that the note for $40,000, should be in the form of a note payable on *demand;* but that the interest, or discount, should, nevertheless, be paid in advance for every ninety-eight days, as above stated; in order that the Bank might ultimately receive the same rate of interest, as had been paid by every other person, for whom it had ever discounted a note. There was no *agreement* as to the *mode of computing* the interest; but the cashier, in computing it, took thirty days for a month, and 360 for a year: A mode of taking and reserving interest, which was proved to have been immemorially, and universally in use, among banks and merchants, throughout the United States. There were various minor circumstances in the case, on which the defendant founded objections: But the points in the defence which are material to the main question, to wit, *the legal mode of computing interest*, upon Bank discounts, were—

I. That taking interest in *advance* upon such discounts, is, in law, usurious.

II. That in the computation of interest or discount, the taking of thirty days for a month, or 360 days for a year, makes the reservation usurious.

III. That a promissory note *given directly to* a Bank, instead of being indorsed over to it by a third person, is not a proper subject of discount; and therefore, that the taking of interest in advance, or the reservation of it, at the rate above mentioned, is usury.

The Judge overruled these several objections, and instructed the jury, that on neither of the grounds, taken by the defendant O. W. was the contract, *per se*, usurious ; and that unless they found, that there was a *corrupt agreement*, in which it was the *intention* of the parties to reserve more than legal interest, (of which intention he saw no evidence,) the contract was lawful, and they must find for the plaintiffs ; and they found accordingly. Damages, $46,653 33.

THE REPORTS

Of Sir Edward Coke, Knt. in verse, wherein the name of each Case and the principal points are contained in two lines. To which are added, references in the margin, table of cases, &c. Third Edition. London.

THOUGH our readers may recollect that we, some time since, gave a number of striking examples of the disposition of legal gentlemen to indulge in figurative language, when engaged in the discussion of abstruse points of law ;[1] yet most of them, it is presumed, will learn for the first time that a complete digest of a series of adjudged cases has been, for a considerable period of time, in existence, *in poetry*. Such, they may be assured, is the fact; and we have no doubt in being able to convince them by the extracts we shall offer, that we have now before us a work to which the above title page is strictly appropriate—a work in which are compressed within about eighty pages of a small duodecimo, the Reports of the venerable Coke, where they stand arranged in the drapery of verse. All the information we are enabled to give as to the ingenious author of this bibliothecal anomaly—this rythmical *multum in parvo*, is, that derived from the publisher's preface, and which is, that it is a copy of an ancient manuscript which by accident fell into his hands.

The first extract we shall offer is the digest of *Calvin's* case. This celebrated case which comprises about twenty folio pages

[1] Vid. Art. *Poetry of the Law*, in last July No.

in the original report, and which is so remarkable for elaborate research and reasoning, is thus ingeniously put into a nut-shell :

" CALVIN—Scotch *ante nati* aliens were,
But *post nati*, in England, subjects are."

The celebrated rule in Shelley's case is thus put down :

" SHELLEY—Where ancesters a freehold take,
The words " his heirs" a limitation make."

We also select the following important cases as additional specimens :

" ARCHER—If he for life enfeoff in fee,
It bars remainders in contingency."

" FOSTER—Justice of peaee may warrant send,
And bring before himself such as offend."

" BOULSTON—If neighbor coney boroughs make,
The conies I, in my own ground, may take."

" LUTTRELL—The owners change a fulling mill
To one for corn, prescription lasteth still."

" CHUDLEIGH—Feoffees holding for life, they may
To heir (ere use contingent takes) convey."

" GODDARD—Th' effect the deed doth take shall be
Not from the date, but the delivery."

" BALDWIN—A lease, to one and to his heirs,
For years with seisin, yet but lease for years."

" BODDINGTON—Gen'ral grant is void, if where
The land doth lie, the place mistaken were."

" TWINE—General gift with hanging secrecy,
Trust giver still possest, covin imply."

The following are selected from the *Actions for Slander* contained in Part IV of the Reports:

" STANHOPE—Forsworne is but a hasty word,
Unless he add ("before judge of record.")

" HEXT—Action lies where'er the words are such
As they his life on whom they're spoke may touch."

" CUTLER—For scandalous articles to tie
To good behaviour, action will not lie."

" BYRCHLEY—That he's corrupt, will action bear,
Discoursing of the place of officer."

" SNAG—If a person says he kill'd my wife,
No action lies, if she yet be alive."

" DAVIS—For slander action will not lie,
Unless some temp'ral loss incur thereby."

The following are selected from the *Appeals* and *Indictments* in Part IV:

" YOUNG—An assistant or the officer,
To kill is murder, though no malice were."

" WALKER—Indictment shall not harmed be
By surplusage, if no repugnancy."

" HUME—In murder must the indictment lie
Exactly at the place where he did die."

" HILL—Its no policy, if you indict,
To recite Statutes, lest you misrecite."

We shall close our extracts with *Wade's* case, which was a case of tender:

" WADE—Coin IN BAGS at any time of day
Tendered, to save condition, safely may."

The above extracts will convey a correct idea of the curious production before us. If the poetry is not the best, the work is certainly a curiosity both as respects its antiquity and its conciseness. We think also it may be recommended for its utility, inasmuch as it has a tendency to refresh the memory as to the copious body of law which is supported by the authority of one so highly gifted and so greatly revered as Sir Edward Coke.

SKETCH

Of the present Chief Justice of the Court of King's Bench.

[SELECTED.]

SOME one of the sages of our law, we believe Lord Kenyon, himself without the advantage of patrimony at least to any great extent, remarked that there was one indispensable requisite to

success in the profession of the Bar,—that was to be born without a shilling. The justness of this remark as a general proposition we certainly take leave to deny, though, no doubt, there are particular and splendid instances in which success has been achieved by those on whom fortune had in earlier life most inauspiciously frowned. Among the number of these latter at present living, the Chancellor (Lord Lydhurst,) the Ex-Chancellor Eldon, the Lords Stowell and Plunkett, and Sir John Leach, as well as the subject of this sketch, may be enumerated.

The origin of Charles Abbott, now Lord Tenterden, is indeed more humble than that of most of his predecessors. He is the son of an honest and respectable barber of Canterbury, (as we have been credibly informed,) in which town he was born about the year 1760. The occupation of the father of Lord Tenterden brought him, as may be supposed, into frequent contact with the resident prebends and canons of the cathedral; and the honest conduct and respectable appearance of the old man, joined to his respectable demeanour, contributed to render him and his family general favorites of the domestic circle. However, the present Lord Tenterden came more under the notice of the clergy; and they looked on him thus early with a favouring and friendly eye.

At a very early age, the future Chief Justice of all England, became a scholar at the free school of Canterbury, which is open, as a matter of right, to the sons of all the burgesses. At this school, young Abbott acquired the reputation of being studious and well behaved; and, after a short period, his progress in learning was such that he was appointed tutor to a young gentleman of the name of Thurlow, an illegitimate son of the Chancellor Thurlow's. When Thurlow went home for the holidays, Mr Abbott always accompanied him; and the father of the young scholar had thus an opportunity afforded him of becoming more intimately acquainted with the character of his son's tutor. The result of this knowledge, on the part of his Lordship, was highly favorable to Mr. Abbott, who acquired and deserved the esteem and friendship of his powerful patron. As a consequence of his good opinion, and through the instrumentality and assistance of Lord Thurlow, Mr. Abbott was entered at Corpus Christi College, Oxford, in the year 1781. About six years previously, Lord Eldon and his brother Lord Stowell, had become members of University College ; and when Mr. Abbott was entered of Corpus Christi, the present Lord Stowell was tutor of that College. Thus at the same period, there were three men at the University, one a scholar holding an exhibition not exceeding £16 per annum, and the others Fellows with an income not exceeding £120 annually, who were destined to become the heads of the legal profession in England—the one as Chancellor, the

other as Chief Justice, and the third as Judge of the Admiralty and Prerogative Courts. The tradition of the University has recorded that there were not at that or any other period within its walls, three more simple and unassuming characters.

In the University of Oxford, there were, at this time, two prizes of twenty pounds each, given annually, for the best compositions in Latin verse and English prose; there has since been adden a third, by Lord Grenville, for Latin prose. The first of these prizes, for the best composition in Latin verse, upon a subject chosen by the University, is confined to those members who are not of more than four years standing.

In the year 1784, the subject chosen was *Globus Ærostaticus.* This prize was gained by Mr. Abbott. In the year 1786, the thesis for composition in English prose, was 'The Use and Abuse of Satire,' and this prize was likewise gained by him. Mr. Abbott thus established his character at the University for diligence and scholarship, and at once justified the liberal patronage of his friends, and gained a reputation which was eventually of the greatest service to him in future life. When, after an interval of thirty years, Lord Eldon, as Chancellor, had to select a proper man to fill a judicial vacancy, he remembered Mr. Abbott and the reputation he had acquired at Oxford. Perhaps the Chancellor valued this kind of fame so much more highly, as he himself had been a successful combatant in the same lists. In the year 1771, fifteen years before Mr. Abbott gained his prize for the best composition in Latin verse, Mr. Scott, afterwards Lord Eldon, obtained the prize for his English Essay on the 'Uses and Abuses of Foreign Travel.' In the usual time, Mr. Abbott like Lord Stowell, became a tutor of his college—a situation of more emolument than a mere fellowship. Whilst in this situation, one of the sons of Mr. Justice Buller became his pupil, and the learned Judge was so pleased with the progress of his son, and so convinced of the talents of his instructor, that he recommended Mr. Abbott to quit the University and take his chance at the bar. With this recommendation Mr. Abbott, fortunately for himself, complied. Resigning, therefore, his tutorship, but retaining the place of fellow, he journied up to London, entered himself as a law student, and commenced the study of special pleading.

Of this science—if science it can be called, all confused and chaotic as it is—Mr. Abbott, like his patron Buller, soon became a master, and having obtained the reputation of a safe and diligent draughtsman, and thereby procured a character and connexion, he was, after a short interval, called to the bar.

Whilst at the bar, Mr. Abbott published his celebrated work upon shipping, which he dedicated to Lord Eldon, at that time

Lord Chancellor. The work is very strongly marked with that sense and diligent reading which have always characterised the author. The method is original, and the distribution and style are singularly plain and unaffected. Upon the whole, it is the best law book of Mr. Abbott's time, and very deservedly procured him the patronage both of the Chancellor and Lord Ellenborough. Lord Ellenborough endeavored, but in vain, to push him into greater business; but Mr. Abbott was better estimated by the bar than by the attorneys, and never attained any considerable degree of practice. Lord Eldon resolved to assist him more effectually, and probably bore his name in mind, that he might promote him as occasion served.

This opportunity at length arose. In the year 1816, Mr Justice Heath died, and a vacancy occurred in the Common Pleas. It was immediately filled up with the name of Mr. Abbott. Upon taking his place, he was almost unknown in the Court, and his elevation excited a very general surprise. It was thought that the bar of the Common Pleas might have afforded a lawyer more adequate to the situation, and that the profession in that Court was not well treated in having a man who had not practised as a Serjeant thrust over their heads; but the murmurings of professional jealousy and discontent were soon stilled by the correct legal learning and superior scholastic attainments of Mr. Abbott.

In his performance of the duties of the office of a Justice in the Common Pleas, Mr. Abbott displayed that degree of useful knowledge for which the Lord Chancellor had given him credit. He certainly gave so much satisfaction to this head of the law, that, when the death of Sir Simon Le Blanc followed that of Mr. Justice Heath, and opened a place in the Court of King's Bench, the Chancellor again advanced him. This advancement was attended with two advantages to Mr. Abbott: it was not only a promotion from an inferior to a higher Court, but a removal to a tribunal more congenial with his habits and manners. The rough and boisterous tone of the leading Serjeants in the Common Pleas was but ill suited to the grave and decorous deportment of the Chief Justice.

In the Court of King's Bench, Sir Charles Abbott had a still better opportunity for displaying his talents for business, his competency, his prudence, and his aversion to all innovation upon the received practice of the Court and its officers. The frequent indisposition of Lord Ellenborough afforded him these occasions, and his conduct gave the fullest satisfaction to the Chancellor. Accordingly, the death of Lord Ellenborough no sooner afforded a third opportunity for his further advancement, than he was made Chief Justice of the King's Bench. Thus, in a space of

time not much exceeding four years, a man of good habits of business and diligent reading, but in no respect of a capacity more than ordinary, ascended from the most moderate practice at the bar to the eminent office and dignity of Chief Justice of England, and thus occupied a seat, which, from the beginning of the last century to the present, had been successively filled by some of the ablest men in the English annals.

As a Judge, the genius of Mr. Abbott is rather technical than general or comprehensive. He has not the boldness to originate or the dexterity to amend; but he administers the laws as they exist with singular precision and dispatch. Grasp of mind he appears to have none; but in familiarly talking out a cause with Sir James Scarlett, he appears to be a great master of detail, and to be sufficiently imbued with a logical and generalising spirit.

Moreover, no Judge of the present, nor indeed of past times, has contrived to get through the enormous business of his Court with more celerity and effect. This disposition on the part of the first authority in the Court, while it has tended to repress any thing approaching to eloquence or discursiveness, has, nevertheless, contributed to the introduction of a more business-like system, by which, perhaps, the great mass of the suitors have been more materially benefitted.

LATE JUDICIAL DECISIONS.

INSURANCE CASES.

Superior Court, N. Y.—Among the interesting causes of this term, one has occurred in which the following points of moment to Insurance Companies, and the insured, have been determined,

1. That the survey made on a vessel insured, in order to bring her case within the rotten clause of the Policy, must declare the vessel to be incapable of proceeding on her voyage by reason of her being unsound or rotten, and not for any other cause. If the survey includes any other cause of inability to proceed, the case is not within the rotten clause.

2. Although the survey include no other cause, but substantially declares the vessel incapable of proceeding on the voyage, by reason of rottenness, it is conclusive against the assured under the rotten clause: yet the survey is not of itself any evidence of rottenness on the question of seaworthiness, unless supported by the oaths of the surveyors or other persons.

3. Seaworthiness being a question of fact for the determination of the jury, they will take into consideration all the circumstances of the vessel, prior to the voyage insured; and, if they find her rotten to any extent short of unseaworthiness, they may take into consideration the expense of repairing that rottenness, so far as the repair of it has become necessary in consequence of sea-damage, and

include that expense in the computation of other expenses of repairs, to make the amount exceed the half of her value,

As to the first point it may be said, few merchants or ship owners are aware of the legal effect of this condition in the Policies, though now generally used in New-York, but not in other cities except Philadelphia. Under this clause, commonly called the rotten clause, the seaworthiness of the vessel cannot be put in question. If the ship owner could prove, by the most satisfactory evidence, that his vessel was most certainly sea-worthy, nevertheless his right to recover on the policy would be utterly lost, if the survey should declare the vessel unseaworthy by rottenness, or incapable of proceeding on her voyage by reason of her being unsound or rotten. These surveys are made often without much consideration, because the surveyors do not know their conclusiveness on the assured.

As to the second and third points, they indicate to the assured, claiming for losses, the great importance of prompt collection of evidence as to the actual state of vessels insured at the time of the survey, from others as well as the surveyors, and also, previous to the voyage insured.

In this cause Joseph D. Beers, Esq. recovered against the Niagara Insurance Company, $3500, as for a total loss of vessel and freight—the company not being able to establish either the unseaworthiness of the vessel, or to bring the case within the rotten clause by the terms of the survey.—Com. Adv.

Circuit Court of the U. S.—For the District of Maryland.—The very interesting cause of Buck and Hedrick, (use of Fitch and Medina,) v. The Chesapeake Insurance Company, was decided yesterday morning for the Plaintiffs. It was argued with equal confidence (as usual in such cases) on both sides, and involved the question whether policies "for whom it may concern," cover belligerent property, in the absence of a warranty or clear representation of neutrality; and also the question whether a certain letter written to Fitch, amounted in law to a representation that there was no Spanish property. These points having been decided by the Supreme Court in favor of the Plaintiffs, a new and substantive representation was set up, and much discussion of law and fact arose as to the nature of representations; whether any allegation can amount to a representation, where it is accompanied by the statement of such *inferential reasons* as manifest strong *belief* on the part of the applicant for insurance, but not positive knowledge. The fact whether the alleged representation took place on the execution of the first or second policy, was strongly contested, the first being for Spanish, and the second for American account; and the representation, if made on the 6th May, the date of the first policy, would (if material) annul the first and larger policy. The plaintiffs' counsel contended, with much zeal, that the alleged representation *must* have occurred on the 24th May, when the second policy was effected, and that the representation itself (whenever it occurred) was wholly immaterial, if the Jury should believe from the strong evidence in the cause, that the *premium* of insurance would have been the same or less, had it been expressly declared to be on Spanish account, but documented as American, and on board of an American vessel. There was much evidence on this point, which, however, was confined to *orders* accepted, or policies executed by the defendants—though the Court's permission was more ample, and allowed the practice of other offices to be enquired into, with a view of showing the absolute immateriality of the risk, and that the relation subsisting in 1822, and up to this period, between the Spanish colonies and the mother country, was not such a one as the offices, and the office of the defendant in particular, regarded as creative of a belligerent risk.

The Jury retired on Tuesday evening at about six o'clock, and rendered their verdict yesterday morning at the opening of the Court, being in their room upwards of 41 hours, that is, two nights, and part of three days. We are pleased to state that the barbarous relic of ancient days was not so tenaciously adhered to, as to deny the Jury necessary food, &c. and thus to starve them into unanim-

ity. Still their hours must have hung on somewhat heavily. The duty of Jurymen, solemn and important, was zealously sustained on the present occasion, and a verdict was rendered for the full amount of the plaintiffs' claim $11,200

Plaintiffs' Counsel—Messrs. Hoffman and Mayer. *Defendant's Counsel*—Messrs. Wirt, Purviance and Meredith.—BALT. AM.

The following is the continuation of the Digest of late English Cases, in the Courts of Common Law.

Goods Sold.—Action for goods sold, work and labour, &c. Certain machines were ordered for the defendant, and completed and packed up in boxes by the directions of his agent. The maker wrote to the defendant to inform him that the machines were ready, and begged to know how they were to be sent; but the machines remaided on the maker's premises, and the defendant subsequently refused to receive them. Held, that the property not being changed, the action was not maintainable; but upon payment of costs, the plaintiff was allowed to set aside the nonsuit, add new counts (for not acccpting) to the declaration, and have a new trial.—*Atkinson* v. *Bell*, 8 B. & C. 277.

Insolvent—A promise to a creditor made in consideration of his withdrawing his opposition to the discharge of an insolvent debtor, is contrary to the policy of the insolvent act and void.—*Murray* v. *Reeve*, 8 B. & C. 421.

Joint Stock Company.—Debt on bond conditioned for paying the plaintiff a certain sum on his forming a company and procuring a certain number of shareholders, such company to carry on a distillery according to certain patents granted to the defendants and to be assigned to the company. Plea, that the patents contained provisos rendering them void if assigned to more than five, and that it was intended that the company should consist of more than five, and that the agreement was therefore illegal and fraudulent. The plea on demurrer was held to bar the action. —*Duvergier* v. *Fellowes*, 5 Bing. 248.

Juror.—Indictment for a conspiracy, on which the defendants were convicted, A new trial was moved for, on the ground that a special juror who served on the trial was an alien. The Court refused the application, alleging that a new trial was never granted on the ground that a juror was liable to be challenged if the party had an opportunity of making his challenge, and that 7 Geo. 4- c. 60. s. 27, had taken away even the right of challenge in the case of a special juror.—*The King* v. *Sutton*, 8 B. & C. 417.

Lease.—Lessee for a term expiring on the 11th Nov. let the

premises from 11th Sept. to the 11th Nov. (being the residue of the term,) for a certain rent. Held to be a lease, good by parol, and not an assignment within the statute of frauds; but as nothing was left in the original lessee, he had no power to distrain, though it seems he might have recovered the rent in assumpsit. —*Preece* v. *Corrie*, 5 Bing. 24.

Lien.—A party loses his lien on goods, by causing them to be taken in execution at his own suit.—*Jacobs* v. *Latour*, 5 Bing. 130.

N. B. In this case a question was raised, whether a trainer of race horses has a lien on the horses for his services. The Court gave no opinion as to this.

Money had and received.—B. hired a ship by deed to convey a cargo to Hayti, and contracted to furnish a homeward cargo. On arriving there, B. assigned the cargo as a security, which cargo was subsequently attached by the owners (the defendants) to satisfy their claim for hire, and B. having refused to furnish a homeward cargo, the captain procured one and received freight for it. B. subsequently became bankrupt, and his assignees brought an action for the proceeds of the cargo seized, and the freight of the homeward cargo received by defendants. Held, that they were not entitled to recover either.—*Kymer* v. *Larkin*, 5 Bing. 71.

Parties.—A. being indebted to B. and C. (partners,) gave B. alone a warrant of attorney for the debt; under which, after an act of bankruptcy by A. and after the dissolution of B. & C., B. levied the sum in question on A.'s goods. Held, that B. and C. were jointly liable to the assignees of A. for the money received by B; notwithstanding the dissolution, and that the action at B.'s death survived against C. An action of trover had also been brought by and against the same parties for goods deposited with the partners after A.'s bankruptcy, and converted by B. alone subsequently to the dissolution, and it was held that both partners were jointly liable.—*Biggs* v. *Fellows*; 8 B. & C. 402.

Partners.—A., B. and C. carried on business in copartnership as factors and commission-merchants in England and America —in England, under the firm of A., C. & Co., in America, in the name of C. alone. When C. went to America, he had written instructions from his partners, one of which was, "It is understood that our names are not to appear on either bills or notes for the accommodation of others, and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here." A., B. & C., in order to ob-

tain consignments from America, made advances or granted drafts or bills of exchange or indorsements to their principals on the security of the goods consigned. In order to obtain a consignment from W., C. in his own name indorsed bills for him, which were to be provided for by others drawn by W. on A., C. & Co. in England, which were to be provided for by the proceeds of the consignment. Before the latter bills were presented for acceptance, A. & B. had become bankrupts. Held, that the indorsement of the bills by C. must be considered as an indorsement by the firm, and that they were liable upon those bills.—*South Carolina Bank* v. *Case*, 8 B. & C. 427.

Payment of Money into Court.—Payment of money into Court on a common indebitatus count, admits nothing beyond the amount of the sum paid in. Thus, in an action against the husband for goods furnished to the wife, he having paid money into Court generally. Held, that he was not thereby precluded from contending that the goods were not necessary for the wife of a person in his degree. The judge who tried the cause having decided differently, a new trial was granted, when the jury found a verdict for 10*s*. Upon which the defendant moved to set aside the verdict, or that the jndge should certity; and per Best, C. J. (who tried the cause,) "I shall certify; and it will be mercy to the plaintiff to do so, for the Court would grant repeated new trials, rather than allow a verdict to prevail which is contrary to law and justice."—*Seaton* v. *Benedict*, 5 Bing. 28 & 187.

Pleading.—1. The plaintiff in *quare impedit* traced his title through a period of two centuries, but the merits rested on the validity of a deed of 1762, which the defendants sought to invalidate by setting up a subsequent deed. The Court would not allow more pleas to be pleaded than were necessary to contest the deed of 1762.—*Gully* v. *Bishop of Exeter and another*, 5 Bing. 42.

2. In an action on a bail bond, the declaration need not aver that the process was issued on an affidavit of debt.—*Sharpe* v. *Abbey*, 5 Bing. 193.

Statute of Limitations.—Declaration in trover by an administrator averred the grant of letters of administration and a subsequent conversion. Plea of not guilty within six years was held bad on demurrer; for the cause of action might have accrued to the administrator within that period though the plea were true. Leave to amend was granted on payment of costs.—*Pratt* v. *Swaine*, 8 B. & C. 285.

Tenants in Common.—Common user of a wall by the owners of adjoining premises, is sufficient, in the absence of other evidence as to the property in the wall, to ground a presumption that it belongs to the respective owners as tenants in common; and one having pulled down the wall and erected another it its stead, Held, that this was not such a destruction of the common property as would render him liable in trespass to the co-tenant. —*Cubitt* v. *Porter*, 8 B. & C 257. And *Wiltshire* v. *Sidford*, 8 B. & C. 259, note (b.)

Trespass.—The plaintiff conveyed a chapel to *A.* (under whom defendant justified) by a deed the validity of which was disputable. A however took possession, and gave the key to the servant, who, with A.'s permission, lent the chapel to the plaintiff to preach in. The plaintiff locked the chapel and retained the key, upon which the defendant ordered the chapel to be broken open. Held, that the plaintiff had not such a possession as would entitle him to sue in trespass.—*Revett* v. *Brown*, 4 Bing. 7.

Trover.—A. and B. as brokers for C. sold goods to D., but still retained the possession of them. The goods were paid for by bill, the acceptors of which subsequently became bankrupt, whereupon A. and B. applied to D. for further security, and obtained from him a letter authorising them to sell the goods and pay C. the amount of the bill out of the proceeds. D. subsequently became bankrupt, upon which C. demanded and received the goods from A. and B. who however afterwards received them back, and held them at the time of the trial. Trover being brought by the assignees of D., Held, that it was not maintainable; the possession of the goods having been parted with by the power of sale given by D. to A. and B. though it did not appear that C. had expressly assented to the arrangement.—*Bailey* v. *Culverwell*, 8 B. & C. 453.

Use and Occupation.—A tenant for a year (rent payable quarterly) having quarrelled with her landlord, after the commencement of the second quarter declared her intention to quit immediately. The landlord said he should be glad to get rid of her and he afterwards accepted the keys. Held, that the original contract was thereby at an end; and that, as a contract cannot be implied where one is expressed, the landlord was not even entitled to recover for that part of the second quarter, during which the tenant actually occupied the premises.—*Grimman* v. *Legge*, 8 B. & C. 324.

LITERARY INTELLIGENCE.

The character of the late Hon. *Theodore Gaillard*, one of the Judges of the Court of Common Pleas, and formerly Chancellor of South Carolina, has been sketched in an interesting and able manner, in an Eulogium lately published, which was delivered by William Lance, Esq. on the 19th May, 1829, at Charleston, in that State.

The Discourse pronounced by Judge Story, at his Inauguration as Dane Professor, in Harvard University, on the 25th of August last, has recently been published.

The 2d volume of the work entitled, "Notes on Practice, exhibiting a view of the Proceedings in Civil Actions in the Supreme Court of Pennsylvania and in the District Court and Court of Common Pleas for the city and county of Philadelphia, by Francis J. Troubat and William W. Haly," is advertised.

Messrs. G. & C. & H. Carvill, New-York, have announced that a Treatise on the Practice of the Supreme Court of the State of New-York, according to the new revised Laws, will be published in the course of November next. The authors are Elijah Paine and William Duer, Esqrs. The former gentleman is the reporter of the cases tried and argued in the United States Circuit Court. The work will comprehend all points of Practice and all the changes which the operation of the new Revised Laws will introduce, and which alone render such a treatise necessary. The work will be issued under the sanction of the Revisers themselves.

☞The subject of the *Law of Partnership*, will be resumed either in the November or December number.

LAW INTELLIGENCER.

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JUDGE STORY'S INAUGURAL DISCOURSE.

A Discourse pronounced upon the Inauguration of the Author as Dane Professor of Law in Harvard University, on the twenty-ninth day of August, 1829. By JOSEPH STORY. *Boston: Hilliard, Gray, Little & Wilkins.*

The public have been for some time apprised of the very liberal donation made by the author of the "Abridgement of American Law," (Hon. Nathan Dane,) of the whole proceeds of the sale of that work to the establishment of a Professorship of Law in Harvard University; and also of the fact that Judge Story had been appointed to discharge its duties. These duties are in the first instance to deliver lectures upon the Law of Nature, the Law of Nations, Maritime and Commercial Law, Equity Law, and, lastly, the Constitutional Law of the United States. It has been customary in that ancient University, for professors, upon their induction into office, to deliver a public discourse upon some topics suitable to the occasion, and it was a respect for this custom which led to the oral delivery of what, under the above title, is now made permanent, by the operations of the press.

The place at which this discourse was delivered—the occasion which demanded it—and the reputation of the individual who is the author—all had a tendency to excite an eagerness to peruse it. It was delivered within the walls of the most ancient and celebrated literary institution of our own country—the occasion was the establishment of a professorship for the purpose of conveying theoretical and elementary instruction in the principal branches of the department of jurisprudence, and of unfolding the principles of our

own free constitution; and, finally, the individual who delivered it is one of the Judges of our highest judicial tribunal, and has long been distinguished for his accomplishments both as a jurisconsult and a scholar. High as our expectations were naturally raised as to a literary production which is so peculiarly calculated to engage professional attention, they have been fully and completely realized. No one, we think, who has perused it, will be disposed to question its merits either in point of style, or of sentiment, or will be able to escape the impression of profound respect which it tends so strongly to create for the enlarged views—extensive erudition and vigorous intellect which are therein eloquently displayed.

The above-mentioned discourse should be read not merely by lawyers. It has peculiar claims upon the attention of every literary man, and every man who participates, or who thinks of participating in the great and all-important business of legislation. Indeed there can be no hesitation in asserting, that it should receive the attention of every American citizen—for it treats of subjects in which every citizen is deeply interested, and upon which he should be in some degree instructed. A portion of the topics it embraces renders it of as great and as general importance as any discourse which can ever be delivered relating to the exigences and temporal interests of society. It treats of the utility and dignity of jurisprudence, and explains the connection between that science and the happiness of the great human family. It demonstrates the truth of the remark of Dr. Johnson, "that law is the science in which the greatest powers of the understanding are applied to the greatest number of facts;" and of the remark of Mr. Burke, that "it does more to quicken and invigorate the understanding, than all other kinds of learning put together." But what is of still more consequence, it discusses the political duties which are to be performed by all American citizens—describes the responsibility of those who sit in legislative councils, either as silent voters, or leaders in debate—and excites an enthusiasm in all for the constitution of their country.

The general plan which has been adopted in this Dis-

course somewhat resembles the plan of Sir William Blackstone in the Introduction to his "Commentaries:" that is, some considerations are first offered touching the general utility of the study of the law, and addressed more pointedly, to those who purpose to make it the business of their lives. The nature and the studies of the professorship are next unfolded—"that the design of the founder may be amply vindicated, and receive, as it deserves, the public approbation."

The view which Judge Story takes in his Discourse of the science of jurisprudence is not less comprehensive than that of Justinian, viz: *Jurisprudentia est divinarum atque, humanarum rerum notitia, justi atque injusti scientia.* "In its widest extent" says the former, "it may be said to compass every human action. If we contemplate it in the highest order of subjects which it embraces, it can scarcely be surpassed in dignity. It searches into and expounds the elements of morals and ethics, and the eternal law of nature, illustrated and supported by the eternal law of revelation." Although the *Common Law* is to be contemplated in a narrower view, yet he thinks it is sufficiently grand in its design and sufficiently difficult in its execution, to have strong claims upon the gratitude and admiration of mankind. It is of common law, in its largest extent, that is, as distinguished from statute law, or the positive enactments of the legislature, he tells us, that the Law Institution in Harvard University "proposes to expound the doctrines and diversities; and thus to furnish the means of a better juridical education to those who are destined for the profession, as well as to those, who, as scholars and gentlemen, desire to learn its general principles."

In recommending the study of the law to the scholar and gentleman he observes,

"Whoever will take the trouble to reflect upon the vast variety of subjects, with which it is conversant, and the almost infinite diversity of human transactions, to which it applies; whoever will consider, how much astuteness and ingenuity are required to unravel or guard against the contrivances of fraud, and the indiscretions of folly, the caprices of the wise, and the errors of the rash, the mistakes of pride, the confidence of ignorance, and the

sallies of enterprise, will be at no loss to understand, that there will be ample employment for the highest faculties. If he will but add to the account, that law is a science, which must be gradually formed by the successive efforts of many minds in many ages; that its rudiments sink deep into remote antiquity, and branch wider and wider with every new generation; that it seeks to measure the future by approximations to certainty derived solely from the experience of the past; that it must forever be in a state of progress, or change, to adapt itself to the exigences and changes of society; that even when the old foundations remain firm, the shifting channels of business must often leave their wonted beds deserted, and require new and broader substructions to accommodate and support new interests.* If, I say, he will but add these things to the account, it will soon become matter of surprise, that even the mightiest efforts of genius can keep pace with such incessant demands; and that the powers of reasoning, tasked and subtilized, as they must be, to an immeasurable extent, should not be absolutely overwhelmed in the attempt to administer justice.

"From its nature and objects the common law, above all others, employs a most severe and scrutinizing logic. In some of its branches it is compelled to deal with metaphysical subtilties and abstractions, belonging to the depths of intellectual philosophy. From this cause it has sometimes been in danger of being enslaved by scholastic refinements, by the jargon of the old dialectics, and the sophisms of over-curious minds. It narrowly escaped shipwreck in the hands of the schoolmen of the middle ages; and for a while was almost swallowed up in the quicksands of the feudal system. If it had not been, that it necessarily dealt with substances instead of shadows, with men's business, and rights, and inheritances, and not with entities and notions, it would have shared the fate, or justified the satire, upon metaphysical inquiries, that those, who attempted to sound its depths,

'In that unfathomable gulph were drown'd.'"

After shewing that common sense has at all times powerfully counteracted the tendency to undue speculation in the common law, he proceeds to recommend the study of the law to American citizens generally, upon considerations of a "broader cast." He here touches upon the peculiarities of our government—a government which however superior it may be to all others, has nevertheless, like every other work of human agency, its imperfections.

*See Lord Hale's noble Discourse on the Amendment of the Law, ch. 3.

Judge Story is not one of those who shut their eyes against these imperfections, or refrain from commenting upon them; if he were, he might justly be censured for a want of wisdom and of patriotism. The more the imperfections of any government are exposed and seen, the more general will be the endeavour and the more successful the precaution to avoid their effects. Our government, it is true, has so far enabled us to live free and happy. But it should not from thence be too hastily inferred that our freedom and our happiness are entirely beyond danger. The barque, when it first puts out from shore, may, for a while proceed with ease and safety; but when it reaches the wide sea, unless those on board are possessed of nautical science—unless they can see danger when at a distance—and unless they are honest, vigilant and united, it may be suddenly lost. Monarchical and aristocratical governments, it is obvious to every person of observation, are not the only governments that can exercise tyranny. It may be exercised wherever there is power—whatever may be the source from whence the power is derived—whatever the rules that are designed to regulate it, and however limited the period at the end of which it is to cease. A republican and representative government, like that of the United States, is especially intended for the freedom of the citizen and the protection of his property. Its peculiar value, moreover, consists in ensuring a substantial enjoyment of those privileges, and not in disguising a violation of them. That this great end of our government may not be perverted, it is essential that every abuse of power should be perceived; and in order that every such abuse should be perceived and punished, a knowledge of the fundamental maxims of public and private law should be extensively diffused. But we hasten to give the remarks of Judge Story upon this important subject.

"From the structure of our institutions, there is much to provoke the vigilance, and invite the leisure of all, and especially of educated men. Our government is emphatically a government of the people in all its departments. It purports to be a government of laws, and not of men—and yet beyond all others it is subject to the control and influence of public opinion. Its whole

security and efficiency depend upon the intelligence, virtue, independence, and moderation of the people. It can be preserved no longer than a reverence for settled, uniform laws constitutes the habit, I had almost said the passion of the community. There can be no freedom where there is no safety to property, or personal rights. Whenever legislation renders the possession or enjoyment of property precarious; whenever it cuts down the obligation and security of contracts; whenever it breaks in upon personal liberty, or compels a surrender of personal privileges, upon any pretext, plausible or otherwise, it matters little, whether it be the act of the many, or the few, of the solitary despot, or the assembled multitude; it is still in its essence tyranny. It matters still less what are the causes of the change; whether urged on by a spirit of innovation, or popular delusion, or state necessity, (as it is falsely called,) it is still power, irresponsible power, against right; and the more to be dreaded, when it has the sanction of numbers, because it is then less capable of being resisted or evaded. Unfortunately, at such times the majority prevail by mere numbers, and not by force of judgment; *numerantur, non ponderantur.* I do not, therefore, overestimate its value, when I say, that a knowledge of the law and a devotion to its principles are vital to a republic, and lie at the very foundation of its strength.

"An American citizen has many political duties to perform, and his activity is constantly demanded for the preservation of the public interests. He must watch the exercise of power in every department of government, and ascertain, whether it is within the prescribed limits of the constitution. He is to study deeply and thoroughly the elements, which compose that constitution; elements, which were the slow results of genius, and patriotism, acting upon the largest views of human experience.—The reasons, on which every part of this beautiful system is built (may it be as durable, as it is beautiful) are to be examined and weighed. Slight inconveniences are not to overturn them; slight objections are not to undermine them. Whatever is human is necessarily imperfect; whatever is practical necessarily deviates from theory; whatever works by human agency works with some inequality of movement and result. It is easier to point out defects, than to devise remedies; to touch blemishes, than to extract them; to demolish an edifice, than to erect a convenient substitute. We may not say of forms of government, that "that which is best administered is best." But we may say, that that, which generally works well, should rarely be hazarded upon the chances of a better. It has been observed by a profound statesman, that the abstract perfection of a government with reference

to natural rights may be its practical defect. By having a right to do every thing, men may want every thing.[1] Great vigilance and great jealousy are therefore necessary in republics to guard against the captivations of theory, as well as the approaches of less insiduous foes. Governments are not always overthrown by direct and open assaults. They are not always battered down by the arms of conquerors, or the successful daring of usurpers.—There is often concealed the dry rot, which eats into the vitals, when all is fair and stately on the outside. And to republics this has been the more common and fatal disease. The continual drippings of corruption may wear away the solid rock, when the tempest has failed to overturn it. In a monarchy, the subjects may be content to trust to the hereditary sovereign and the hereditary nobility the general superintendence of legislation and property. But in a republic, every citizen is himself in some measure entrusted with the public safety, and acts an important part for its weal or woe."

It has been required of us, on a former occasion, to allude to the importance of the trust reposed in those to whom has been delegated the authority of making laws, and to the evils resulting from the acts of unenlightened lawgivers. On that occasion we cited the authority of Cicero, who maintained that a senator should be thoroughly acquainted with *the constitution.*[2] We are now happy in offering the views and admonitions of Judge Story to the same effect—

"Few men, comparatively speaking, may not indulge the hope, if they covet the distinction, at some time to have a seat in the public councils, and assist in the public legislation. What can be more important or useful in such a station, than a knowledge of those laws, which the legislator is called upon to modify, amend, or repeal? How much doubt may a single injudicious amendment introduce. One would hardly trust to an unskilful artisan the repairs of any delicate machine. There would be an universal exclamation against the indiscretion of such an attempt. But yet it would seem, that we are apt to think that men are born legislators; that no qualifications beyond plain sense and com-

[1] Burke on the French Revolution. The whole passage is worthy of commendation. It begins thus: "Government is not made in virtue of natural rights, which may and do exist in total independence of it, and exist in much greater clearness and in a much greater degree of abstract perfection. But their abstract perfection is their practical defect."

[2] Vide No. 1 of this Review, p. 4 & 5.

mon honesty, are necessary for the management of the intricate machine of government; and above all that most delicate and interesting of all machines, a republican government. To adjust its various parts requires the skill of the wisest, and often baffles the judgment of the best. The least perturbation at the centre may transmit itself through every line of its movements; as the dip of a pebble on the calm surface of a lake sends its circling vibrations to the distant shore.

"It is a fact well known to professional gentlemen, that more doubts arise in the administration of justice from the imperfections of positive legislation, than from any other source. The mistakes in the language of a deed, or a will, rarely extend far beyond the immediate parties to the contract or bounty. And yet innumerable questions of interpretation have arisen from these comparatively private sources of litigation, to perplex the minds, and exhaust the diligence of the ablest judges. But what is this to the sweeping result of an act of the legislature, which declares a new rule for a whole State, which may vary the rights, or touch the interests, or control the operations of thousands of its citizens? If the legislation is designedly universal in its terms, infinite caution is necessary to prevent its working greater mischiefs than it purports to cure. If, on the other hand, it aims only at a single class of mischiefs, to amend an existing defect, or provide for a new interest, there is still great danger, that its provisions may reach beyond the intent, and embrace what would have been most sedulously excluded, if it had been foreseen or suspected. An anecdote told of Lord Coke may serve as an appropriate illustration. A statesman told him, that he meant to consult him on a point of law. "If it be common law," said Lord Coke, "I should be ashamed if I could not give you a ready answer; but if it be statute law, I should be equally ashamed, if I answered you immediately."[1] What an admonition is this! And how forcibly does it teach us the utility of a knowledge of the general principles of law to persons, who are called upon to perform the functions of legislation."

To those who indulge the ambition of being leaders in debate, and framers of laws, the above considerations he very justly says, will apply with tenfold force.

"I would speak," he says, "to the consciences of honorable men, and ask, how they can venture, without any knowledge of existing laws, to recommend changes, which may cut deep into the quick of remedial justice, or bring into peril all that is valuable

[1] Teignmouth's Life of Sir W. Jones, 268.

in jurisprudence by its certainty, its policy, or its antiquity.—Surely they need not be told, how slowly every good system of laws must be in consolidating; and how easily the rashness of an hour may destroy, what ages have scarcely cemented in a solid form. The oak, which requires centuries to rear its trunk, and stretch its branches, and strengthen its fibres, and fix its roots, may yet be levelled in an hour. It may breast the tempest of a hundred years, and survive the scathing of the lightning. It may even acquire vigor from its struggles with the elements, and strike its roots deeper and wider, as it rises in its majesty; and yet a child, in the very wantonness of folly, may in an instant destroy it by removing a girdle of its bark."

But the principal object of this "Discourse" is to address those who *intend to make law the profession of life.* This part of the address cannot, we think, be too often read and reflected upon by those for whom it is more especially intended. To shew that the law is to them a science of transcendent dignity, if they have a just reverence for its precepts, he shews that there never was a period in which the Common Law did not recognise Christianity as lying at its foundations—

"For many ages it was almost exclusively administered by those, who held its ecclesiastical dignities. It now repudiates every act done in violation of its duties of perfect obligation. It pronounces illegal every contract offensive to its morals. It recognises with profound humility its holidays and festivals, and obeys them, as *dies non juridici.* It still attaches to persons believing in its divine authority the highest degree of competency as witnesses; and until a comparatively recent period, infidels and pagans were banished from the halls of justice, as unworthy of credit. The error of the common law was, in reality, of a very different character. It tolerated nothing but Christianity, as taught by its own established church, either Protestant or Catholic; and with unrelenting severity consigned the conscientious heretic to the stake, regarding his very scruples as proofs of incorrigible wickedness. Thus, justice was debased, and religion itself made the minister of crimes by calling in the aid of the secular power to enforce that conformity of belief, whose rewards and punishments belong exclusively to God."

He then speaks of the law as to its character for purity of morals—

"And notwithstanding the sneers of ignorance, and the gibes of wit, no men are so constantly called upon in their practice to

exemplify the duties of good faith, incorruptible virtue, and chivalric honor, as lawyers. To them is often entrusted the peace and repose, as well as the property, of whole families; and the slightest departure from professional secrecy, or professional integrity, might involve their clients in ruin. The law itself imposes upon them the severest injunctions never to do injustice, and never to violate confidence. It not only protects them from disclosing the secrets of their clients, but it punishes the offenders, by disqualifying them from practice. The rebuke of public opinion, also, follows close upon every offence; and the frown of the profession consigns to infamy the traitor, and his moral treason. Memorable instances of this sort have occurred in other ages, as well as in our own. Even the lips of eloquence breathe nothing but an empty voice in the halls of justice, if the ear listens with distrust or suspicion. The very hypocrite is there compelled to wear the livery of virtue, and pay her homage. If he secretly cherishes a grovelling vice, he must there speak the language, and assume the port of innocence. He must feign, if he does not feel, the spirit and inspiration of the place."

He then exhorts the student to acquire, at the outset, a just conception of the dignity and importance of his vocation, and not to consider it merely as an affair of traffic; not to imagine that it is sufficient to be the thing described by Cicero, "a sharp and cunning pettifogger—a retailer of law-suits—a canter about forms," &c. On this subject his remarks are as eloquent as they are just; and as they are so extremely well calculated to have a beneficial effect we cannot forbear quoting them at length.

"God forbid, that any man, standing in the temple, and in the presence of the law, should imagine that her ministers were called to such unworthy offices. No. The profession has far higher aims and nobler purposes.[1] In the ordinary course of business, it is true, that sound learning, industry, and fidelity are the principal requisites, and may reap a fair reward, as they may in any other employment of life. But there are some, and in the lives of most lawyers, many occasions, which demand qualities of a higher, nay of the highest order. Upon the actual administration of justice in all governments, and especially in free governments, must depend the welfare of the whole community. The sacred rights of property are to be guarded at every point. I call

[1] I would commend to students the perusal of Mr. [now Judge] Hopkinson's Address before the Law Academy of Philadelphia, in 1826. It abounds with just remarks, chaste diction, and unpretending eloquence. Its matter and its style are excellent.

them sacred, because, if they are unprotected, all other rights become worthless or visionary. What is personal liberty, if it does not draw after it the right to enjoy the fruits of our own industry? What is political liberty, if it imparts only perpetual poverty to us, and all our posterity? What is the privilege of a vote, if the majority of the hour may sweep away the earnings of our whole lives, to gratify the rapacity of the indolent, the cunning, or the profligate, who are borne into power upon the tide of a temporal popularity? What remains to nourish a spirit of independence, if the very soil, on which we tread, is ours only at the beck of the village tyrant? If the home of our parents, which nursed our infancy and protected our manhood, may be torn from us without recompense or remorse? If the very grave-yards, which contain the memorials of our love and our sorrow, are not secure against the hands of violence? If the church of yesterday may be the barrack of to-day, and become the gaol of to-morrow? If the practical text of civil procedure contains no better gloss than the Border maxim, that the right to plunder is only bounded by the power?

"One of the glorious, and not unfrequently perilous duties of the bar is the protection of property, and not of property only, but of personal rights, and personal character; of domestic peace, and parental authority. The lawyer is placed, as it were, upon the outpost of defence, as a public sentinel, to watch the approach of danger, and to sound the alarm, when oppression is at hand. It is a post, not only full of observation, but of difficulty. It is his duty to resist wrong, let it come in whatever form it may. The attack is rarely commenced in open daylight; but it makes its approaches by dark and insiduous degrees. Some captivating delusion, some crafty pretext, some popular scheme, generally masks the real design. Public opinion has been already won in its favor, or drugged into a stupid indifference to its results, by the arts of intrigue. Nothing, perhaps, remains between the enterprise and victory, but the solitary citadel of public justice. It is then, the time for the highest efforts of the genius, and learning, and eloquence, and moral courage of the bar. The advocate not unfrequently finds himself, at such a moment, putting at hazard the popularity of a life devoted to the public service. It is then that the denunciations of the press may be employed to overawe or intimidate him. It is then, that the shouts of the multitude drown the still, small voice of the unsheltered sufferer. It is then, that the victim is already bound for immolation; and the advocate stands alone to maintain the supremacy of the law against power, and numbers, and public applause, and private wealth. If he shrinks from his duty, he is branded as the betrayer of his trust. If he fails in his labor, he may be cut down by the same blow, which levels his

client. If he succeeds, he may, indeed, achieve a glorious triumph for truth and justice, and the law. But that very triumph may be fatal to his future hopes, and bar up forever the road to political honors. Yet what can be more interesting, than ambition thus nobly directed? that sinks itself, but saves the State? What sacrifice more pure, than in such a cause? What martyrdom more worthy to be canonized in our hearts?

"It may be that his profession calls him to different duties. He may be required to defend against the arm of government a party standing charged with some odious crime, real or imaginary. He is not at liberty to desert even the guilty wretch in his lowest estate; but he is bound to take care, that even here the law shall not be bent or broken to bring him to punishment. He will at such times, from love of the law, as well as from compassion, freely give his talents to the cause, and never surrender the victim, until the judgment of his peers has convicted him upon legal evidence. A duty, not less common, or less interesting, is the vindication of innocence against private injustice. Rank, and wealth, and patronage may be on one side; and poverty and distress on the other. The oppressor may belong to the very circle of society, in which we love to move, and where many seductive influences may be employed to win our silence. The advocate may be called upon to require damages from the seducer for his violation of domestic peace; or to expose to public scorn the subtle contrivances of fraud. The ardor of youth may have been ensnared by cunningly devised counsels to the ruin of his estate. The drivelling of age may have been imposed on to procure a grant or a will, by which nature is outraged, and villainy rewarded. Religion itself may have been treacherously employed at the side of the death-bed to devour the widow's portion, or plunder the orphan. In these, and many other like cases, the attempt to unravel the fraud, and expose the injury, is full of delicacy, and may incur severe displeasure among friends, and yield a triumph to enemies. But it is on such occasions, that the advocate rises to a full sense of the dignity of his profession, and feels the power and the responsibility of its duties. He must then lift himself to thoughts of other days, and other times; to the great moral obligations of his profession; to the eternal precepts of religion; to the dictates of that voice, which speaks within him from beyond the grave, and demands, that the mind given by God shall be devoted to his service, without the fear, and without the frailty of man."

After thus exciting the admiration of the student for the dignity of the law, and inspiring in him an ambition to excel by a representation of the brilliancy of fame and fortune which the pro-

fession holds out to those who strive for eminence, he admonishes as to the labor required and the difficulties to be encountered. These he thinks should be well weighed by the student upon his first entrance into study, that he may guard himself against despondency arising from expectations too sanguinely indulged; and because when the labor has been surveyed without dismay, half of the victory has been achieved. The following are his suggestions:—

"Young men of gay and ardent temperaments are apt to imagine, that little more is necessary than to read a few elementary books with reasonable diligence, and the rewards are already within their grasp. They fondly indulge the belief, that fluency of speech, a kindling imagination, ready wit, graceful action, and steady self-confidence will carry them through every struggle. If they can but address a court or jury without perturbation, and state their points with clearness and order, the rest may fairly be left to the workings of their own minds upon the excitements of the occasion. That because the hour is come and the trial is come, the inspiration for the cause will come also.

"Whoever shall indulge in such visionary views, will find his career end in grievous disappointment, if not in disgrace. I know not, if among human sciences there is any one, which requires such various qualifications and extensive attainments, as the law. While it demands the first order of talents, genius alone never did, and never can, win its highest elevations. There is not only no royal road to smooth the way to the summit; but the passes, like those of Alpine regions, are sometimes dark and narrow; sometimes bold and precipitous; sometimes dazzling from the reflected light of their naked fronts; and sometimes bewildering from the shadows projecting from their dizzy heights. Whoever advances for safety must advance slowly. He must cautiously follow the old guides, and toil on with steady foot-steps; for the old paths, though well beaten, are rugged; and the new paths, though broad, are still perplexed. To drop all metaphor, the law is a science, in which there is no substitute for diligence and labor."

He then comments upon the causes which combine to make the study of the common law, at the present day, a laborious undertaking—which are—that the reasoning and doctrines of remote ages are necessarily embraced by it—that it is built up and perfected by artificial doctrines adapted and moulded to the arti-

cial structure of society—that the old law is of an uncouth and uninviting appearance—and that the common law as a science must be forever in progress, having, in its principles and improvements, no limits. The student has also to attend to the study of philosophy—of rhetoric—of history and of human nature ; to obtain a full possession of the general literature of ancient and modern times. .

We have not room sufficient to quote the greater part of the author's remarks upon the *eloquence of the bar*. The concluding sentences upon that subject, however, are themselves so truly eloquent and so fully indicative of the pride he takes in American excellence that we cannot forbear extracting them—

"I seem, indeed, when the recollection of the wonders wrought by eloquence comes over my thoughts, to live again in scenes long since past. The dead seem again summoned to their places in the halls of justice, and to utter forth voices of an unearthly and celestial harmony. The shades of Ames, and Dexter, and Pinkney, and Emmett pass and repass, not hush as the foot of night, but in all the splendor of their fame, fresh with the flush of recent victory. I may not even allude to the living. Long, long may they enjoy the privilege of being nameless here, whose names are every where else upon the lips of praise."

The different duties assigned to the Dane Professorship we mentioned on the first page of our remarks.[1] We regret we have not space enough to extract a portion of the comments made by the author on the subjects of those duties. If there is one of the subjects more important than the rest, it is the *constitutional law of the United States*. Upon a proper understanding of, and respect for this law depends (to use the admonitory language of the Federalist,) "nothing less than the existence of the Union, and the safety and welfare of the respective States." The author, we all know, has had frequent occasions to expound it, as a Judge of the highest Court in the country, and his views when so engaged have been convincing even to those whose minds were before doubtful. The Reports of the Supreme Court of the United

[1] It should also have been there mentioned that the office of giving lectures upon the *Common Law* is assigned to Professor Ashmun.

States while they show the clearness and correctness with which he has interpreted some of the most important positive provisions of the Constitution, exhibit also the most satisfactory testimony of his profound respect for that instrument, and of his ardent solicitude to preserve it from innovation. There is, on the whole, every reason to anticipate very beneficial results from his late appointment as regards the high branch of tuition we have just mentioned. In affording this tuition his endeavor will be "to fix in the minds of American youth a more devout enthusiasm for the constitution of their country, a more sincere love of its principles, and a more firm determination to adhere to its actual provisions against the clamours of faction, and the restlessness of innovation."

We cannot forbear availing ourselves of the present opportunity which is offered for expressing the gratification we feel at observing that the establishment of Law Professorships in our Universities is getting generally into repute. The Trustees of Trannsylvania University, in Kentucky, have lately announced to the public that they have appointed the Hon. *John Boyle*, Professor of Law in that institution, and that he has accepted the appointment. The school will be opened on the first Monday in December next, and continue until the middle of April ensuing. The price of the ticket of admission is twenty-five dollars. It has been fixed at that low rate, principally, on account of some expense which students may have to incur in providing themselves with elementary books. The method of instruction is confided to the discretion of Judge Boyle, who will pursue that which is deemed best, under the general direction of the Board of Trustees. His eminence as a profound jurist, (say the Trustees) his great moral worth and the high respectability of his character, are so well known, as to supercede the necessity of saying any thing in his commendation.

LAW OF REAL PROPERTY.

Copy of the first Report made to His Majesty by the Commissioners appointed to inquire into the law of England respecting Real Property. Ordered by the House of Commons to be printed.

Lest the above uninviting title should induce our readers to pass over what is contained under it, we assure them, in the outset, that it is not our intention to bewilder their minds with a technical disquisition of any of the modes of creating, transferring and securing real rights which have been illustrated by the researches and logic of a Fearne—a Watkins—a Cruise, or a Preston. Neither shall we handle for their edification any of the intricate webs hanging about the system of real remedies which have already been successfully disentangled by a Stearns and a Jackson. So far from undertaking any thing of the above nature, we shall not even censure or approve the doctrine of any particular judicial precedent, nor discuss argumentatively the policy of any positive legislative enactment. Our main purpose, in short, is to abstract and place before our readers the substance, of what we deem most material, of an interesting Report upon the law of real property. We call it interesting, because its object is to remodel the existing law; and because all innovations upon the law are interesting, whether they be for better or for worse—whether in the way of demolition, or in the way of repair.

That the law of real property, like every branch of the law, should be adapted as nearly as possible to the state of civilization and commerce, and to the exigences and even sentiments of the people, as well as to the nature of their government, has long been a controlling principle in the legislation of the United States. The principle we have just stated has, however, by no means commanded an equal degree of influence over the legislature of Great Britain. And so much has it governed in one country, and so little in the other, that the present state of real property in the former country is as much in advance of its present state in the latter, as the present law of real property in the latter is preferable to the ancient feudal system. In the first place, lands in this country, for all purposes of enjoyment and alienation, are

really *allodial*. "Though the doctrine of a feudal tenure," says Chancellor Kent, "by free and common socage, may be applicable in theory to a great part of the real property in this country chartered and possessed before the revolution, and though every proprietor be considered as holding an estate in fee-simple, none of the inconveniences of tenure are felt or known."[1] In New-York, it has been expressly enacted by statute, that all lands held of the king, or any other person, before the 4th day of July, 1776, shall be adjudged to be turned into free and common socage; and all grants by the State theretofore made, or thereafter to be made, shall be and remain allodial, and not feudal. This country is also free from the burthensome system of copyholds, the absurd system of tacking mortgages, the principle of survivorship in joint tenancy, and the inconvenience resulting from not registering deeds. The modes of conveying real property are in the United States simple and direct. What in England is carried into effect by fines and recoveries, is here done by deed. In some of the States, estates tail have never been known; in others, they have been abolished, or converted by statutes into fee-simple; and in others they may be barred by deed acknowledged before some court or magistrate.[2] With regard to estates held by married women in their own right, the wife in all the States may convey them by joining with the husband; though in most of the States her acknowledgment on a private examination is made necessary. With regard to *dower*—she may be barred of her dower by joining in the conveyance with the husband; and in North Carolina and Tennessee the wife can claim no dower except in lands of which the husband dies seized. Most of the statutes of limitation in this country have limited all actions for the recovery of land to but one period—and have provided, that where a party is barred of his right of entry, and consequently of his action of ejectment, he is barred of every remedy. But the principal change of the English law which has been wrought in this country, relates to the rules of inheritance.

[1] 3 Kent's Com. 112.

[2] Duponceau on Jurisdiction, 115 note. In one State only do estates tail exist as in England, and that is in New-Hampshire.—Ib.

In all the States, the children and lineal descendants inherit in co-parcenary, without any distinction as to primogeniture or sex. These are among the principal alterations and improvements, made in this country upon the English rules respecting real property, which at this moment occur to us.

Present appearances, we observe, indicate a speedy approximation of the law of real property in England to the comparative perfection it has attained in America. Most, if not all of our readers, we presume, have learned, through the medium of newspapers and reviews, that Mr. Brougham, in the British House of Commons, on the 7th day of February, 1828, made an elaborate speech on "the present state of the law." The motion upon which this speech was founded, was, that an address be presented to his majesty, praying, that he will issue a Commission for enquiring into the defects in the laws of the realm, and into the measures necessary for removing the same. Such an address, which was dated the 19th of February, 1829, was accordingly presented. Pursuant to this address, different Commissions were issued by the King for an enquiry into several branches of the law. A printed copy of one of those Commissions, which is entitled "A Commission of Enquiry into the Law of England respecting Real Property," we have now before us. It is directed to John Campbell, Esq., William Henry Tinney, Esq., John Hodgson, Esq., Samuel Duckworth, Esq., and Peter Bellinger Brodie, Esq., barristers at law. This Commission was accepted by those gentlemen, and they have since made their Report, which we have also before us. The propositions it contains, we have thought would be acceptable to our readers; for supposing the statute codes and customary law of the States in relation to real property to be ever so satisfactory, it is still gratifying to compare them to the code now proposed in England, and to learn in what respects they have been sanctioned by the authority of enlightened English jurists, when seriously devoting themselves to the work of juridical reformation.

We will commence with the system of *fines* and *recoveries*. The abolition of this system, with the whole mass of technical

learning relating to the same, is recommended by the Commissioners. The Commissioners have been studious to multiply reasons for their advice on this subject, though one of their reasons alone ought to be sufficient to produce the desired effect. For instance, "a fine divests estates and extinguishes rights, powers, &c. in cases *not intended by the parties.*" Another reason offered is, "that fines or recoveries levied or suffered by infants or lunatics are valid because they are judicial proceedings, though purely fictitious,—when at the same time, deeds executed by those persons would be void." The Commissioners, notwithstanding the cogency of these objections to the system, have presented not less than *ten.* They have thereby reminded us of what we once read of the passage of one of the Kings of France through his dominions: The inhabitants of a small town which he entered, in their anxiety to apologize for not firing a salute, told his majesty they had *nine* good reasons for not paying this accustomed mark of loyalty; and the first was, "they had no guns." His majesty assured them that this one reason was quite satisfactory. The present law of fines, in England, has its roots in the first rudiments of the common law—and that of common recoveries owes its existence to the ingenuity exercised by the ecclesiastics in eluding the statutes of mortmain. But both fines and recoveries have been for some time considered as mere forms of conveyances, or common assurances, their theory and original principles being but little regarded. Blackstone, although he considers the design of them laudable, yet with all his reverence for the existing law of England, was clearly in favour of their abolition. And it is worthy of notice, that among the substitutes he proposes in their stead for unrivetting the fetters of estates tail, is a solemn deed of the tenant in tail, which is warranted, he says, "by the usage of our American Colonies."[1] This instance of attention to, and respect for, American jurisprudence, evinces a liberality of mind which goes very far to relieve that author from the charge of entertaining narrow views and prejudices.

To effect the barring of entails, it is recommended as a

[1] 2 Bla. Com. 361.

substitute for fines and common recoveries, that a tenant in tail of lands shall have power, as against the issue in tail, and all persons claiming any estate or interest in remainder expectant, upon, or in derogation of, the estate tail, to dispose of the lands entailed as if he were a tenant in fee-simple. The report, in continuation, recommends certain regulations to be observed in such cases.

Under the head of fines and recoveries, we are met with the following proposition in relation to *married women*. It is proposed that standing commissioners shall be appointed for each county by the Chief Justice of the Common Pleas; and that a *married woman* shall, upon a private examination as to her free consent by one of the Judges, a Master in Chancery, or any two of the Commissioners to be so appointed, be allowed, with the concurrence of her husband, to dispose of her real estate by deed, as if she were a *feme-sole*. After offering this proposition, the Commissioners say, "What we have proposed with respect to land, may, we think, also apply to money to be laid out in the purchase of land. Whether the power which we have proposed to give a married woman over her real estate may not be extended to reversionary and contingent interests in personal estate, is a matter, although not strictly within our province, yet so nearly connected with the subject of this part of our inquiries, and one on which, from some recent decisions, so much difficulty has been felt, that we may, perhaps, without impropriety, suggest it as deserving consideration."

We now proceed to the law of *Dower*. This law, the Report says, "appears well adapted to the state of freehold property which existed at the time it was established; but *this state of things has for a long period been so much changed*, as to make the original law of dower highly inconvenient." Estates, it is stated, are frequently conveyed away and charged by the husband, and it is thought desirable that there should be a power of so doing free from the burden of dower. The great increase, too, of personal property is mentioned as affording other means of providing for widows. It is proposed that a provision made by will for a

widow out of personal estate, shall not deprive her of dower, unless the will, expressly or by clear implication, shall so direct; but that any devise of freehold estate shall be held to be free from dower, unless the contrary be declared. And that as to estates which the husband might by his will dispose of against his wife's right to dower, he may by his will, duly executed, declare that such right shall be discharged without making any further disposition. The enactments are not, however, to interfere with the rules of Courts of Equity, giving widows a preference over other legatees for legacies given to them in satisfaction of dower. It is proposed, also, that a declaration in any instrument devising estates of inheritance, may make the estate of the devisee not subject to his wife's dower; but Courts are not to be prevented from enforcing on equitable principles, covenants or agreements of husbands not to bar the right to dower, nor to prevent the barring of dower by agreement or settlement, or its forfeiture by adultery. Gavelkind and borough English lands to remain as now, that is, regulated by a variety of peculiar customs.

As to estates *by the curtesy*, the Commissioners consider that there are not any reasons for altering the present law, except in some trifling respects. One improvement proposed is, that curtesy should attach on the estates of inheritance, legal and beneficial, or beneficial only, to which the husband was entitled in possession in right of the deceased wife, although there may have been *no* issue of the marriage; and on the other hand, that it should be restricted to an undivided moiety of the estate, whenever and so far as but for the husband's curtesy it would immediately descend to the issue of the wife by a former marriage.

We shall next introduce the law of *Inheritance*, in respect to which, various and essential alterations are suggested by the Commissioners. The continuance of the law of *primogeniture* is recommended, as might have been expected; for the opposite law of equal partibility would in a few generations break down the aristocracy. An additional reason is, however, assigned for preserving the right of primogeniture, and that is, it will prevent an endless subdivision of the soil, which would be ultimately in-

jurious to agriculture. There are, nevertheless, many important propositions on the subject of inheritance, which are as follow:

Ascending Line.

1.—The rule that, inheritance shall not ascend, shall be abolished.

2.— The rule, that descent between brothers and sisters is immediate, shall be abolished.

3.—The ascending line shall come next after the lineal descending line.

4.—In the ascending line, preference shall be given according to proximity of blood to the person last seised or entitled, preference to the male line over the female line without regard to the proximity of blood being preserved.

5.—The lineal descendants of a deceased ancestor who would succeed to the inheritance through such ancestor, if the rule that inheritance shall not ascend were preserved, shall stand in the place of such ancestor in the order of inheritance.

Female Line.

6.—Declare and enact, that, where from failure of the male ascending line, inheritance shall pass to any female ancestor, or any person or persons claiming through any female ancestor of the first purchaser, preference in tracing inheritance shall be given to the male ascending line of the first purchaser and of his ancestors without regard to proximity of kindred, so that the mother of the paternal grandfather of the first purchaser or her kindred, shall inherit before the mother of the father and her kindred.

Half Blood.

7.—The rule that inheritance shall not pass from a person to any of his kindred of the half blood shall be abolished.

8.—As amongst kindred claiming through one and the same ancestor of the first purchaser, preference shall be given in inheritance to the whole blood of the first purchaser.

9.—Subject to such preference, the whole blood and the half blood shall stand upon equal footing as to inheritance.

Limitation of Special Heirs.

10.—Hereditaments may be limited to any person and his heirs on the part of any ancestor, in which case the same shall pass in the course of inheritance to his heirs at law on the part of such ancestor.

11.—When, in case of inheritance having passed to the half blood, the heir of the person last seised or entitled shall not be the heir of the purchaser, the heir of such purchaser shall be the person to take the same by inheritance.

12.—When the blood of any ancestor from whom, as a first purchaser, inheritance shall have descended, or of the specified ancestor, in case of a limitation to heirs on the part of such ancestor, shall fail, such inheritance shall pass as if the person last seised or entitled had been the purchaser, and had taken without reference to any ancestor.

Seisin of Ancestors.

13.—The rule that hereditaments shall pass by inheritance to the heir of the person last actually seised, shall be altered as follows: hereditaments, or the right thereto, shall pass by inheritance to the heir of the person last seised of or entitled to the estate right or interest to be taken by inheritance, although such person may not have had seisin.

14.—The above rules shall extend to copyhold and customary lands of inheritance, and lands held by the tenure of ancient demesne and to gavel-kind lands

and borough English lands, and to freehold leases for lives granted or devised or limited to any person and his heirs general.

The last subject of the Report is the *Limitation of Actions and Prescription.* The changes which are proposed in relation to this branch of the law of real property are numerous, and many of them important. There is almost as much room in this country for alteration and amendment in relation to this subject, as there is in England, and accordingly the propositions of the English Commissioners, under the head of Limitation of Actions, &c. are deserving of particular attention. The first proposition is, that *all real actions, and plaints in the nature of real actions,* (with the exception of writs of dower and *quare impedit,*) BE ABOLISHED; and that such parts of the statutes of 4 and 5 Hen. VII. c. 24; 32 Hen. VIII. c. 2; 21 Jac. I. c. 16; and 4 and 5 Anne, c. 16, as interfere with the regulations therein after mentioned, be repealed. The most important regulations then proposed by the Commissioners are as follow:

That wherever any person is entitled to an estate in possession in any lands, he may make entry upon such lands and take peaceable possession thereof, or bring an action at law or suit in equity, to recover the same without making any entry thereupon until such time as his right of entry and action or suit shall be barred in the manner hereinafter mentioned.

That no person shall hereafter make entry upon lands or bring any action or suit to recover the same, but within twenty years next after his title shall have accrued, and that after the expiration of such period of twenty years, the said person and his heirs shall be barred from making entry on the said lands, or bringing any action or suit to recover the same; and that no claim to lands and no entry upon lands shall be of any avail to the person making the same, unless he obtain actual possession of such lands.

That if any person so entitled to an estate in possession shall be, at the time when the title first accrued, within the age of twenty one years, feme covert, *non compos mentis*, or beyond the seas, such person and his or her heirs, may, notwithstanding the said twenty years are expired, make entry upon the lands, or bring an action or suit to recover the same, within ten years after full age, discoverture, coming of sound mind, or return to this realm, or death, and at no time after the said ten years.

That where any person so entitled to an estate in possession, shall be, at the time when the title first accrued, within the age of twenty-one years, feme covert, *non compos mentis*, or beyond the seas, such person and his or her heirs shall not make entry on the lands, or bring any action or suit to recover the same, but within forty years next after his or her title shall have first accrued, although such person may have remained under disability during the whole of the said space of forty years, or although ten years may not have expired from the time when such person ceased to be under disability or died.

That if any person so entitled to an estate in possession shall be, at the time when the title first accrued, within the age of twenty-one years, feme covert, *non*

compos mentis, or beyond the seas, and shall die before such disability is removed, the heir of such person so dying, although such heir be within the age of twenty-one years, feme covert, *non compos mentis*, or beyond the seas, shall not make entry on the lands, or bring any action or suit to recover the same, but within ten years after such death, if ten years or any longer time had expired before such death after the title first accrued to such person so dying, and that no heir of such person so dying shall make entry on the lands, or bring any action or suit to recover the same, but within forty years from the time when the title first accrued to such person so dying.

That absence beyond the seas in the above Propositions, shall be understood, absence from the United Kingdom of Great Britain and Ireland, the Isle of Man, and the Island of Jersey, Guernsey, and other adjacent Islands, part of His Majesty's dominions.

That imprisonment shall not be a disability to vary the period within which an entry must be made upon lands, or an action or suit brought to recover the same.

That in cases of actual and direct trust, or of concealed fraud, the period of twenty years mentioned in the fourth Proposition, shall not begin to run so long as the property subject to the trust shall remain vested in the original trustee, or in any person claiming under him without valuable consideration, or so long as the fraud shall remain concealed, but that suits may be brought in such cases as heretofore, subject to the discretion of the court.

That where a mortgagee has been twenty years in possession of the mortgaged premises, the bar to the right of the mortgagor to redeem shall not be taken away by any promise, statement or acknowledgment, unless the same be in writing and made by the mortgagee, or those claiming under the mortgagee, to the mortgagor, or those claiming under the mortgagor.

That where a person who was entitled to an estate tail in possession, shall be barred by reason of not having made an entry, or brought an action or suit, within the period allowed for that purpose from the time when the title to such estate tail accrued, all estates, rights and interests which the person entitled to such estate tail could have lawfully barred, shall be considered to be barred in like manner as if such person had lawfully barred the same.

That where any person who was entitled to any estate in land shall be barred as to such estate by adverse possession, the same shall be a bar to all other estates, rights and interests to which, during the time of such adverse possession he was entitled in remainder reversion or expectancy, unless possession shall be obtained by some person entitled to an intervening estate right or interest in such land.

That no action or suit for dower shall be brought by any woman but within twenty years next after the death of her husband; and that a woman bringing an action or suit for dower shall not be entitled to damages, or on account of the rents and profits of the land of which she is dowable, for more than six years next before the commencement of such action or suit.

That where land is held under a lease reserving rent, not less than the annual sum of twenty shillings, if such rent be paid to any person claiming to be entitled to such land subject to the lease, the receipt of such rent shall, for the purpose of creating a bar by adverse possession, be considered as adverse possession of the land comprised in the lease.

That where any person in possession, under an assurance purporting to pass an interest larger than it did rightfully pass, shall continue in possession after the rightful interest shall have determined, the possession shall, as to the interest purporting to pass by such assurance, be considered as adverse to the person entitled in remainder reversion or expectancy, from the time when the rightful interest shall have determined.

That where the younger brother or other remote heir enters on the death of the ancestor claiming as heir, his possession shall be considered adverse to the right heir.

That the actual ouster of any ceparceners, joint tenants or tenants in common shall not be necessary in order to make the possession of their share adverse, if other facts show that such possession was adverse.

That where any person shall die intestate, or leave a will without naming any executor or executors thereof, and after the death of such person his personal representatives would have been entitled to any interest in land, had administration to his estate been granted, and such administration is granted at any time after such title would have accrued, the time allowed to the administrator or administrators of such person to make entry on such land, or to bring an action or suit to recover the same, shall be considered to have run from the time when the title would have accrued had administration been then granted, and not from the grant of such administration.

That in all questions regarding rights and obligations with respect to lands, tenements or hereditaments, or any interest in over or issuing out of the same, depending upon prescription or custom, legal memory shall be understood to be the space of sixty years next before the cause of action accrued.

That adverse enjoyment during sixty years of any profit or easement in or over the soil of another, shall be conclusive evidence of a right to such profit or easement, without regard to the disabilities of the parties, or the state of the title to the land, in or over which the right is claimed.

That adverse enjoyment during twenty years of any profit or easement in or over the soil of another, shall be *prima facie* evidence of a right to such profit or easement, liable to be rebutted by proof that during that time the owner of the land was under disability, or the said land was held under a lease, or that there was a life interest therein, but such proof not to be open to the lessee or tenant for life or those claiming under them.

That the *nonuser* of any profit or easement in or over the soil of another during twenty years, shall be *prima facie* evidence of its extinguishment, liable to be rebutted in the manner mentioned in the last Proposition.

That in pleading, when a party seeks to justify any act done in the exercise of any right to a profit or easement in or over the soil of another, it shall be sufficient to allege that he was possessed of the tenement in respect of which such profit or easement is claimed, and that by reason thereof, at the time in question, he was entitled to the profit or easement claimed.

That wherever by the provisions aforesaid all remedy is barred, the right shall be considered as extinguished to the party out of possession, and absolutely vested in the party in possession, and it shall not be necessary in pleading to allege specially the facts by which the right is lost or acquired.

MODERN EDITIONS OF OLD REPORTS.

WILLIAMS' EDITION OF HOBART.

The Reports of Sir Henry Hobart, Lord Chief Justice of His Majesty's Court of Common Pleas: First American from the fifth English Edition: With Notes and References. By John M. Williams, one of the Justices of the Court of Common Pleas of Massachusetts.

"The ancients, though barbarous, had laws in so high an esteem, that they whose wisdoms had had singled out to be the first founders of them, were honoured as Gods; and others that made *additions* or *corrections* were commended to all posterity for men of no less virtue, and no less liberally beneficial to their country, than the greatest and most prosperous conquerors that ever governed them."—SIR WALTER RALEIGH.*

So says the discoverer of Virginia—and we are not prepared to say that his assertion is too extravagant, or that it is inapplicable to a certain species of legal authorship, viz: that which consists in appending modern adjudged cases to analogous cases contained in the volumes of the older reporters. The practice just referred to, has long been common in England, and, in our humble judgment, it is one that is extremely well calculated to produce important results. What, we ask, can exhibit in a stronger light the progressive tendency of the law, and the admirable manner in which it adapts itself to time, place and circumstances, without being fundamentally altered, than the legal judgments of different ages brought immediately in contact? A junction of this kind excites at once our observation,—it kindles our curiosity, and stimulates us to research and to thought; so that, in the end, we find we have a more correct conception of the nature, and a more perfect view of the grandeur, of jurisprudence. The effect created upon the mind by a perusal of a well edited series of ancient reports, may, without violence, be compared to that which is produced by observing a modern building contiguous to one of extreme antiquity. In both cases we become at once interested in studying the contrasts and coincidences, and we are not satisfied with a superficial view. The consequence is, when we have finished our examination, and indulged the

* Cited in the advertisement to the English Ed. of Hob. Rep.

train of reflection to which we afterwards surrender ourselves, we are sensible that our time has been most beneficially employed. Those who have read Littleton's Tenures in conjunction with the commentary of Coke, and the annotations of a Hargrave and a Butler, or have studied even Williams' Saunders or Metcalf's Yelverton, will not be at a loss to comprehend our meaning.

We believe that every modern lawyer, in England and in this country, has a profound respect for the memory of Lord Hobart, and we think that the fame of that Judge, as was predicted by Jenkins in his "Centuries," will be coeval with the doctrines of British law. "The monuments of their great abilities and diligence," says Jenkins, (when speaking of Coke and Hobart,) "will flourish so long as our most just and holy laws, and the splendour, majesty and name of England, shall endure. I knew, marked, observed and revered that noble pair for many years. Lord Hobart was adorned with the brightest endowments; his eloquence was excellent, and his understanding piercing." Lord Hobart succeeded Lord Coke as Chief Justice of the Common Pleas, as soon as the latter was appointed to preside in the King's Bench, that is to say, in 1614. The former retained his office till the period of his death, which happened in 1625. His reports were first printed in 1646; but a better and more correct edition was afterwards published by Lord Chancellor Nottingham.

We were much gratified when we saw announced a new edition of Hobart's Reports by Judge Williams, one of the Justices of the Court of Common Pleas of Massachusetts; and we acknowledge ourselves in fault in omitting to notice the work before. It certainly contains a very large and valuable body of English and American law, in addition to the matter which was before to be found in the English edition. We are informed by the Editor, in his preface, that those cases in which the doctrines discussed and settled are inapplicable to the institutions of the United States, are omitted. Some of the abstracts and references were furnished, he says, by Mr. Greenleaf, of Maine, who, it seems, formerly contemplated publishing an edition of the same

work. The Editor also acknowledges his obligation to a "distinguished jurist," whose name he is not permitted to disclose, for the introductory part of the note to one of the principal cases; and a note to another case was also the voluntary contribution of a friend. The Editor says, that "in a few instances he has presumed to question or controvert the legal doctrines advanced by others; but his general object has been, merely to state decisions and cite authorities on the various topics suggested in the course of his annotations."

We have observed in a late number of a literary periodical,* that the Editor of the work before us has been severely censured because he neglected to cite the cases decided in Maine and in New-Hampshire. The cases decided by the Supreme Court of the former State have been reported by Mr. Greenleaf, and we have had the satisfaction of examining all of the four volumes in which they are contained. Our opinion, unhesitatingly, is, that they deserve the attention of the profession, and would have given an increased value to the work before us. Still, we think the Editor has been treated with more severity for the offence of omission alluded to, than under all the circumstances, is just. There are always some one or more faults in the most perfect of the works that are designed for professional aid and instruction; but whenever such a work has much to recommend it, though it may be in some respects deficient, it should not, we think, be unsparingly condemned. As we before observed, we find in the present edition of Hobart's Reports a very large and very valuable collection of authorities which were not to be found in the former one. The case of Widlake v. Harding, for instance, is accompanied by an entire new note, consisting of about four closely printed pages. A note is also appended to the case of Yong v. Radford, of more than four pages, relative to the husband's interest in, and power over, his wife's terms for years. Upon the question, as to whether covenant lies upon a warrantry, where there is an eviction of the freehold, there is added a note of eight and a half pages to the case of Pincombe v. Rudge.

* The Yankee and Literary Gazette.

In this note the authorities of the Courts of many of the States, whose decisions are generally deemed most authoritative, are cited to shew the diversity of opinion and of practice in this country as to the rule for assessing damages upon covenants of warrantry, and for quiet enjoyment. The note to the case of Lovlace v. Cocket, which consists of *ten* pages, is a very rich collection of law, and is, in fact, a formal treatise upon the general rule as to the extinguishment of a former debt by the acceptance of a new security; and upon the several rules as to the *application of payment*, in cases where a payment is capable of several applications.

On the whole, we certainly are of opinion, that Judge Williams' edition of Hobart has very greatly the advantage of most of the American editions of English adjudged cases.

OVERSIGHT OF COUNSEL.

MR. CURRAN AND MR. SUGDEN.

Our readers are doubtless already informed of the singular mistake committed by the celebrated Mr. Curran, which was, his advocating, with great zeal and effect, the claims of one of the parties in a cause, when he had been engaged by the opposite party. They must also recollect the tact displayed by that eloquent lawyer, after he found himself in a situation so extremely awkward. Without hesitation, and with great presence of mind, he observed, that having placed the claims of his adversary in the strongest light in which they could be exhibited, he should proceed to show that they had no foundation. A similar oversight, it seems, has recently been committed by Mr. Sugden, of the English bar. We allude to the following case, which first appeared in the London Times; by which it will be seen, that Mr. Sugden is comparatively deficient in what is called "off-hand" talent, however profound he may be in professional knowledge.

"*Vice Chancellor's Court, Monday, Jan.* 26, 1829.

"King v. Turner.

"This case, the circumstances of which did not transpire, was put into his Honour's paper to be spoken to. The point was of

a legal nature of no public interest, but an oversight of Mr. Sugden's appeared to give considerable amusement to the court.

"Mr. Horne and Mr. Pemberton were heard on one side, and

"Mr. Sugden following, concurred in the argument of those learned gentlemen, and confidently stated that the law was quite clear.

"The Vice-Chancellor.—Then Mr. S. is with you, Mr. Horne.

"Mr. Horne said that the argument of his learned friend was, certainly to his surprize, on his side; but that his learned friend happened to be on the other.—(Great laughter.)

"Mr. Sugden, who after consulting with his junior (Mr. Jacob) appeared not a little disconcerted, said that he found he had mistaken his side. What he had said, however, was said in all sincerity; and he never would for any client, be he who he might, come into court and argue against what he thought to be a settled rule of law. As learned persons, however, had differed on the present point, he hoped his Honour would decide it without reference to what had fallen from him.

"The Vice-Chancellor *promised he would do so.*"

As to the determination expressed by Mr. Sugden, never to argue against any settled rule of law, we entirely agree with the opinion expressed by the Editors of the London Law Magazine, who say, "We are really surprized that Mr. S. should give a moment's countenance to so intensely silly and vulgar a notion, as that counsel are pledged to their own particular opinions; that he should render it necessary, at the present time, to repeat, that the only object of forensic disputation is to inform the jury or the judge of all the bearings of the case, to sift the affair to the bottom, or place the affair in all possible lights. Mr. S.'s principles would put a stop to advocacy or render it utterly contemptible."

LATE JUDICIAL DECISIONS.

AMERICAN CASES.

What constitutes burglary.—At a late term of the Supreme Court of Massachusetts, held at Springfield, in an indictment for burglary, it was proved that the prisoners entered in the night time the window of a dwelling house, the lower sash of which was raised, but which was defended only by a *double twine net*, fastened by nails at the bottom and sides, "to keep out cats." This net was torn down by the prisoners, and the question was whether

the entrance thus made was sufficient to constitute the offence charged. The judge instructed the jury, that tearing down the net was a breaking of the house, in contemplation of law. A new trial was moved for the misdirection of the Judge—but the defendants took nothing by their motion, and were severally sentenced to ten days solitary imprisonment, and afterwards to hard labour for life.

Licence for sale of liquors.—A case has lately been tried in Philadelphia, turning on the question, whether, under a licence to sell spirituous liquors in a house, for example a theatre, will authorise the licensed person to let several stands and bars, about the same house, for the same purpose, to persons who are *not* licenced, and whether the sale of spirituous liquors by the latter would be protected by a licence of the former? It was decided that it would not, and the defendant was found guilty, having been indicted for retailing, without a licence, at a bar in one of the theatres. Alderman Duane dissented, and gave his reasons.

ENGLISH CASES.

The following is a regular continuation, as promised, of the Digest of late English cases in the Courts of Common Law, with the exception of those cases which have no application in this country. The abbreviations of the names of the Reports in which these cases are contained, as generally adopted, are—

B. and C.—Barnewall and Cresswell—King's Bench.

Bing.—Bingham—Common Pleas.

Dow.—Dow's Parl. Reports.

Y. and J —Young and Jarvis—Exchequer.

Account Books.—See Evidence, 1.

Agreement.—Defendant agreed to sell the plaintiff his interest in a public house and all his fixtures, furniture, &c. therein to be appraised by two appraisers, the contract to be completed on or before the 25th March, 1828; and, as earnest of the agreement, the plaintiff paid into the hands of the defendant 30*l.* to be forfeited if the plaintiff failed to perform his part. On the 25th March, the defendant's appraiser was informed by the plaintiff's appraiser, that he was so busy on that day, that he could not complete the valuation then, but would, on the following day. No objection was then made; but, the day after, the defendant treated the contract as broken, and claimed to retain the deposit. Held that, if the defendant had meant to insist on the forfeiture, he ought to have warned the plaintiff of such his intention, on the

25th March; and that, not having done so, he was not entitled to retain the money.—*Carpenter* v. *Blandford*, 8 B. & C. 575.

Arrest.—Debt for an escape on final process. The officer seized the prisoner round the waist, who broke away from him and escaped. Held an arrest sufficient to make the sheriff liable.—*Nichol* v. *Darley*, 2 Y. & J. 399.

Award.—The cause of action had been referred, but one of the arbitrators having been guilty of corruption, the plaintiff revoked his submission, and went to reside in Scotland. An award, however, was made, by which it was found that nothing was due to the plaintiff. He commenced an action notwithstanding, and obtained a verdict; and the defendant now moved to stay execution on an affidavit stating the facts and that an action had been commenced against the plaintiff on the arbitration bond, but that it was impossible on account of his being in Scotland, to serve him with process. The object of the application seemed to be to compel the plaintiff to appear to the last mentioned action. The Court held that there was no ground for the application, and discharged the rule.—*Steward* v. *Williamson*, 5 Bing. 415.

Bill of Exchange.—A bill was drawn and accepted for the accommodation of B., who indorsed it to the plaintiff. The drawer had no effects in the hands of the acceptor, but held, that he was entitled to notice of the dishonour. The ground of this decision, though not stated in the judgment, seems to be that the drawer would be entitled to sue the indorser.—*Norton* v. *Pickering*, 8 B. & C. 610.

2. A bill was indorsed by the payee in the terms following:—"Pay to S. W. or his order for my use." The defendants discounted it for S. W., and applied the money to his (S. W.'s) use. S. W. became bankrupt; and held, that the defendants were liable to the payee for the amount of the bill, it being a restrictive indorsement.—*Sigourney* v. *Lloyd*, 8 B. & C. 622.

Constable.—Trespass for false imprisonment against a constable who had arrested plaintiff on what afterwards turned out a groundless suspicion. The judge directed the jury to consider whether the circumstances, as proved, satisfied them that the constable had reasonable grounds for supposing the plaintiff guilty, and whether, standing in the constable's place, they would have done the same; and he also told them that, if they believed the facts, and thence inferred that the defendant was acting *bona fide*, they must find for him. Held, that this direction was proper, though it was admitted that the judge was to decide the law of the case, and not leave it to the jury; for such a direction was tantamount to saying that the facts, if believed, formed good

grounds of suspicion. Held, that it was not necessary to leave it to the jury to say whether an undue degree of force had been used in arresting the plaintiff, it not appearing that such had been the case.—*Davis* v. *Russell*, 5 Bing. 354.

Contract.—The plaintiff had contracted to deliver 250 bushels of wheat within a certain time. He delivered only 130 bushels, which the defendant accepted, and when the time for delivery had elapsed, brought an action for the price of the part delivered. Held, per Bailey J., (at the last York Assizes) that he was entitled to recover, and the decision was unanimously affirmed by the Court of King's Bench. They particularly pressed the hardship of allowing a party to retain 249 bushels (which, by a parity of reason he might do) without paying, because there was one short. It would seem that the buyer in such a case should refuse to accept of part. If he does accept and take the benefit of part, no protest at the time of acceptance will vary the case. In the above case, there was no evidence of a severance of the contract beyond what may be implied from the above circumstances.—*Oxendale* v. *Wetherell*, Easter T. 1829, MS.

Custom.—See Evidence, 3.

Deed.—1. On a question whether a deed was void on the ground of unsoundness of mind in the maker, the judge directed the jury to consider whether the party was incapable "of understanding and acting in the ordinary affairs of life." This was excepted to, on the ground, that the direction should have been whether the unsoundness amounted to itiotcy, in the legal acceptation of that term. The direction was held good in the King's Bench and Exchequer Chamber in Ireland, and their judgments affirmed in the Lords. Held, that the ambiguity of a judge's direction must be objected to at the time; or it cannot be afterwards relied on as an objection.—*Ball* v. *Mannin*, 1 Dow, 380. (House of Lords)

2. On an issue directed by the C. P. to try whether certain deeds of trust for the benefit of creditors were valid, it was proved that, when the lease and release were executed, a blank was left for the sum due to the principal creditor, which was filled up the next day in the presence of the party. The jury decided in favour of the validity of the deeds, and the Court confirmed the decision, on the ground that, if the execution of the deeds in this imperfect state was nugatory, the jury were justified in presuming that it was delivered when the blank was filled, or that it was originally delivered to have operation only from the time when the sum was inserted. Held also, that as the lease and release were incorporated with an accompanying deed of trust, the whole

making but one transaction, the lease and release did not require an *ad valorem* stamp, but merely a stamp as on a deed for conveying property for the benefit of creditors.—*Hudson* v. *Revett*, 5 Bing. 368.

Ejectment.—The cottage in question was situate in the corner of a meadow belonging to the lord of the manor, but separated from the meadow and from the adjoining road by a hedge. In 1813 it was claimed by the lord, and the then occupant (under whom the defendant claimed) went out at the desire of his (the lord's) agent, who formally chained up the entrance, but immediately after let in the former occupant with an express intimation that he was to hold during the lord's pleasure. No rent was ever paid, and there was an uninterrupted possession until the present action. The jury found for the plaintiff, and the Court refused a new trial.—*Doe dem. Thompson* v. *Clark*, 8 B. & C. 717.

Estoppel.—In a deed of conveyance, the receipt of the purchase money was expressly acknowledged, but described as paid to the said E. B. (the plaintiff) *as before mentioned;* whereas the former part of the deed merely recited that it had been agreed that the money should be paid: Held (Vaughan B. diss.) that the vendor was not estopped from proving that the money was not actually paid.—*Bottrell* v. *Summers*, 2 Y. & J. 407.

Evidence.—1. The defendants had bound themselves for the fidelity of a clerk to the plaintiff (a banker): Held, that the book kept by the clerk as such, and in which there were entries in his writing of sums received by him, was admissible after his death to charge the defendants.—*Whitnash* v. *George*, 8 B. & C. 556.

2. A *prima facie* case of tenancy being made out by evidence of occupation and payment of rent, a witness was produced on the other side who stated that the tenant took the premises jointly with others, but that there was an agreement in writing: Held, that such parol testimony was not admissible to vary the *prima facie* case, but that the written agreement must be produced.—*Rex.* v. *Inh. of Rawden*, 8 B. & C. 708.

3. An entry in a book found in the registry of the bishoprick, entitled *Registrum*, &c. to the effect that in 1591, J. T. had been admitted to the cure of souls per R. T. *juxta consuetudinem*, was held admissible as evidence of a custom; (Burrough J. diss.) A new trial was granted in this case, on the ground that the attention of the jury had not been directed to the point, whether the custom in question (for the parishioners to elect the curate, to be approved by the rector) was a common law or ecclesiastical custom. The judges also said, that they should require a custom of this sort to be very clearly proved.—*Arnold* v. *Bishop of Bath and Wells*, 5 Bing. 316.

JUDICIARY INTELLIGENCE.

North Carolina Judiciary.—Mr. Toomer has been appointed to fill the vacancy in the Supreme Court, occasioned by the death of Chief Justice Taylor.

Pennsylvania Judiciary.—Philip S. Markley has been appointed Attorney General of the State of Pennsylvania, in place of Amos Ellmaker, resigned.

Vermont Judiciary.—Mr. Prentiss, late a candidate in the fifth District of Vermont for Congress, is appointed Chief Justice of the Supreme Court.

Mississippi Judiciary.—During the last session of the Legislature of Mississippi, efforts were made by some of the members to abolish the Chancery Court of that State. The Legislature, however, thought proper to continue the Court.

New-York Judiciary.—The October Term of the Supreme Court commenced in Albany on the 19th ult. Present, Chief Justice Savage and Judge Marcy. Judge Sutherland was absent from indisposition; which, it is said, has been considerably severe, but which is now nearly removed.

ADVICE OF LATE REPORTS OF CASES.

The second volume of Peters' Reports of Cases argued and adjudged in the Supreme Court of the United States at the January Term, 1829, has been lately published.

The sixth volume of Randolph's Reports of cases determined in the Court of Appeals in Virginia, is just published.

The fifth volume of Greenleaf's Reports of Cases argued and determined in the Supreme Judicial Court of the State of Maine, is also just published.

[N. B. These Reports have been cited by some of the most able and enlightened Judges in the country.]

The decisions of the Supreme Court of Pennsylvania, which have been so long and faithfully reported by Messrs. Sergeant and Rawle, are to be published in future under the sole editorship of the latter gentleman, Mr. Sergeant having retired. All who are interested in the early and correct promulgation of these valuable decisions, (and there are not a few to whom it is of the greatest importance,) will be pleased to learn that it is the intention of Mr. Rawle to continue the publication of the Reports, im-

mediately after each term, in numbers of a convenient size. The first number, which was published in May last, contained the decisions to the end of January, and was highly creditable both to the Editor and the Publishers. The cases are well reported, both in substance and style, and the typographical execution is very neat, and more free from *errata* than is usual with our editions. We understand that the second number is in the press, and will be published in a few weeks. As this work is supported by individual patronage, and not as in some other States at the expense of the government, we sincerely hope that the enterprising publishers will receive sufficient encouragement to persevere in their useful undertaking.—AM. SENTINEL.

LITERARY INTELLIGENCE.

London Law Magazine.—No. V. of the London Law Magazine, for July last, has lately reached us. The following are the contents: Art. I. Mercantile Law, No. 4—Art. II. Conveyancing, No. 5—Art. IV. On Payment of Rent, after destruction of the demised premises—Art. V. On the Construction of the 108th Section of the New Bankrupt Act—Art. VI. Review of Penford's Treatise on Universal Jurisprudence—Art. VII. Equity Judges—Art. VIII. Law of Arrest for Debt, and Suggestions for amending it—Abstracts of Statutes—Events of the Quarter, &c.

Scots Law Chronicle.—The first number of a new monthly publication, under this title, has lately appeared in Scotland; as we learn from the London Law Magazine, which under the head of the "Events of the Quarter," contains the following severe notice of it:

"To illustrate their style, would occupy more space than they merit. We will content ourselves with a specimen of their taste; in illustration of which it is sufficient to say, that they accuse the English bar of being meanly jealous of the Scoth, and retaliate the fancied affront by a long and dull invective; in the course of which, they sneer at Mr. Brougham as a *nisi prius* pleader, chiefly employed in *nisi prius* cases, and thoroughly imbued with the spirit of his fraternity. It is not thus *we* speak of their Cranstouns, their Jeffreys, their Cockburns, their Moncrieffs. It is not thus that the educated classes, of any nation whatever, speak of the great men of another. The narrow-minded nationality of these Scotch writers display, has long ago gone down to the vulgar. We entertain the highest possible respect for the Scotch bar; and that feeling, we make bold to say, is by no means at variance with a very low opinion of The Scots Law Chronicle."

LAW INTELLIGENCER.

Vol. I. DECEMBER. No. 12.

PAYMENT OF RENT, AFTER DESTRUCTION OF THE DEMISED PREMISES.

The Law Magazine, or Quarterly Review of Jurisprudence, No. V. *Art.* 4.—LONDON.

Less caution is generally manifested in the drafting of *leases* than any other contracts. It has been erroneously supposed too, even by some of the profession, that a tenant might be relieved against a demand of rent, after the destruction, by accident, of the demised premises. This view of the subject would, at first, certainly strike any one as reasonable, and it is moreover countenanced by the doctrine of the civil law—the civil code of France—the law of Scotland, and by the opinions of Lords Northington and Kenyon.[1] It is notwithstanding well settled, that nothing will protect the tenant against such a demand, save an express stipulation introduced into the contract. A writer in the London Law Magazine, for July last, has given us the decisions of the English Courts upon this subject which we propose to lay before our readers, in connexion with a few authorities we have met with, of our own country. What led the writer to whom we have referred to his investigation was the late case of Leeds v. Chatham,[2] before Sir John Leach, which carries the doctrine of the non-interference of equity, between landlord and tenant, yet further than before. He partially investigates, as a preliminary measure, the tenant's liability to repair or rebuild, whether arising from ex-

[1] Puffendorf L. 5. c. 6. s. 2.—Civil Code, Du contract de Lonage Art. 1722, 1733, 1 Bell's Com. 362. 1 Chan. Ca. 83. Amb. 619. 6. T. R. 328. 1 Esp. N. P. C. 398, 1 T. R. 708.

[2] 1 Simon 146.

press agreement, or from the implied contract between landlord and tenant: and as fire is the accident by which the destruction of the premises is commonly occasioned, to this particular case has he, for the sake of simplicity, confined his enquiries, which commence and proceed as follows:—

"By the common law, the burning of the tenement by negligence or mischance was a species of permissive waste;[1] but tenants for years, or the tenants for life, who came in by contract with the owner and not by mere act of law, were never responsible, merely as tenants, either for that or any other kind of waste;[2] for which, if the landlord intended them to be answerable, it was his his own folly, said they, not to provide for it by the terms of his contracts. The statutes of Marlbridge and of Gloucester, by making these tenants liable for waste without any exception, rendered them consequently responsible for destruction by fire; and, by the last of these statutes, a very penal one, he that was attainted of waste was to lose the thing he had wasted, and to recompense "thrice so much as the waste should be taxed at." Afterwards came the statute of 6 Anne, c. 31. at first temporary, but since made perpetual, which enacts, that no action shall be prosecuted against any person in whose house any fire shall accidentally begin, or any recompense be made by such person for any damage suffered or occasioned thereby—with a proviso that nothing therein contained "shall extend to defeat or make void any contract or agreement between landlord and tenant." By the operation of this statute, the tenants we have mentioned are, it is generally supposed, exempted from all actions by their landlords, for damage by accidental fire, unless they have entered into a general covenant or agreement to rebuild or repair.[3] We cannot, however, find any decision to this effect; and it may be material to observe, that the language of the exceptive proviso is large enough to embrace implied, as well as express contracts between landlord and tenant; and that the sole object of the framers of the act *may* have been to relieve him whose house is destroyed by a fire accidentally breaking out therein, from an action by the owner of an adjacent house for damages occasioned by the spreading of the flames.[4] It should also be remarked, that Lord Hardwicke says, extra-judicially indeed, that, if the house is burnt down, the tenant is bound to rebuild, though there is no covenant:[5] and that Gibbs, C. J. in an argu-

1 Co. Lit. 536. 1 Will. Saunders, 322. n. 7.
2 Lady Shrewsbury's Case, 5 Rep 13 b.
3 Cruise Dig. tit. 8. c. 2. s. 16. 2. Bl. Com. 281. Woodfall, Landlord and Tenant, 255.
4 See, as to this action, 1 Bl. Com. 431, and Panton v. Isham, 3 Lev. 359.
5 1 Ves. 462.

ment to prove that tenants *at will* are not liable to general repairs, appears to imply the same thing.[1] But, though it is highly probable, if not quite so clear as the text books suppose, that tenants are relieved by this statute from the obligation of rebuilding, where they have not entered into a *general* covenant to repair; yet if they *have* entered into such a covenant their liability is unquestionable. For the law, as is well stated in Paradise v. Jane,[2] distinguishes between a duty implied by *law*, and one created by the express act of the *party*. For "when the law creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him: as in waste, if a house be destroyed by tempest, or by enemies, the lessee is excused; Dyer 33 a. Inst. 53 b." So in escape, if a prison be destroyed by tempest or enemies, the gaolor is excused:[3] "but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore, if a lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he is bound to repair it."

"Thus, where tenant for life under a marriage-settlement, covenanted generally, to keep the house in good and sufficient repair during his life, and so leave the same at his death; and the house was burnt down: in covenant against him for non-repair, it was held that he was bound by this covenant, at all events to repair the house, and in case it were burnt or fell down, to rebuild it.[4]—And as the covenant to repair is one that runs with the land, the assignee of a a lease, whereby the lessee had covenanted for himself and his assigns to repair without any qualification, was held bound to rebuild when the premises were destroyed by an accidental fire.[5] And though the agreement to repair do not assume the shape of a formal covenant, yet is the covenantor equally liable: as where in the original lease the tenant had covenanted to repair, and to insure against fire for 600*l.* and the term being expired, the tenant remained in possession under a verbal agreement, by which the rent was advanced, but nothing was said as to the other terms: the premises being accidentally burnt, the tenant was held liable to rebuild, nor was his liability limited to the amount of the insurance.[6] The foregoing cases also show, that no distinction is made between a covenant to repair, and one to rebuild."

[1] Holt's Rep. 7. [2] Alleyn, 27.
[3] Will. Saunders, 422. n. 2. [4] Chesterfield v. Polton, Com. Rep. 627
[5] Bullock v. Domett, 2 Chit. Re. 608 [6] Digby v. Atkinson, 4 Camp. 275.

In the year 1819, in the Supreme Court of Massachusetts, in an action of covenant broken[1] on a demise by indenture by plaintiff to the defendant, of a dwelling house and barn, with one acre of land, for four years, it was alleged as a breach of covenant, that the defendant would keep in repair all the fences and buildings, (natural decay excepted,) and at the determination of the lease, would surrender the premises, in as good condition as they were at the date of said indenture; but, that, although the said dwelling house, with the appurtenances, was wholly fallen down and ruinous, yet the defendant did not repair the same as covenanted. In his fifth plea, the defendant averred, that the house and fences were by accident consumed by fire, and the barn greatly injured thereby, and that they had not been repaired or rebuilt. To this plea the plaintiff demurred generally, and the defendant joined in the demurrer. Parker C. J., who gave the opinion of the Court, observed, "A formal opinion in a case so free from doubt, and so well settled in the books, would be unjustifiable, were it not for the ignorance generally prevailing in the country, of the legal effect of covenants in leases and other instruments, which are often executed without any particular inspection or knowledge of their contents. And thus people are surprised into contracts which neither party intended, when the instrument was executed." He thought the authorities in favor of the plaintiff numerous, clear and decisive, and that there was no escape from the law, until the legislature should see fit to alter it, which it was hardly possible they would do, since parties may always protect themselves against it, by due caution in making their contracts. He then referred to the imperfection of printed forms of leases as most generally used, by which covenants are transmitted from one generation to another, which in England, are never made, without being very well understood; but in this country often astonish the party to be bound, when the occasion arises, which calls for the performance of them. Men, he said, must be more cautious in making their contracts, and not rely upon the hardship of their cases to relieve them when brought into difficulty. He concluded, by saying, "the law must have its course, and the citizens must take care of themselves in making their bargains."

[1] Phillips v. Stevens, 16 Mass. Rep. 238.

Whenever an exception of casualties by fire is introduced in covenants to repair, in favour of the tenant, it does not subject the landlord, it seems, to the obligation of rebuilding.[1] And notwithstanding any such exception in the covenant to repair, yet if there is a general and express covenant to pay rent, the tenant, though the premises are utterly destroyed, and whether they are rebuilt or not, is liable, at law, to pay the whole rent, during the residue of the term.[2] Before the year 1796, however, there was a period when the current of judicial feeling set much more strongly in favour of the tenant. Thus in the case of Brown v. Quilter, which came before Lord Northington in 1764,[3] the plaintiff, who took a house and wharf for a term of years, covenanted to repair, *accidents by fire excepted*, and the defendant covenanted for quiet enjoyment. The house was burnt, and the defendant, having insured it at 500*l.* and received the insurance money, brought an action for rent grown due, while the house was in ruins, but would not rebuild. The plaintiff's counsel insisted he had a right to specific performance of the covenant for quiet enjoyment by rebuilding. The Chancellor, however, said, there was no room for a specific performance, but he added the justice of the case is so clear, that a man *should not pay rent* for what he cannot enjoy, and that occasioned by an accident which he did not undertake to stand to, that I am much surprised, it should be looked upon as so clear a thing that there should be no defence to such an action at law. And he added, though the covenant does not extend to oblige the defendant to rebuild, yet when an action is brought for rent, after the house is burnt down, there is good ground in equity, for an injunction till the house is rebuilt. The case, however, went off on another ground. Lord Northington, it seems, adhered to the same opinion in the case of Campden v. Morton.[4] These two cases seem to have been considered by Lord Kenyon as establishing the doctrine in equity, that "if a tenant will give up the lease, he shall not be bound, under such circumstances, to pay the rent."[5] And in Phillipson v. Leigh, a case at *nisi prius*, his lord-

[1] 1 T. R. 312.
[2] 2 Str. 763. S. C. 2 Ld. Raym. 1477. 1 T. R. 312, 705.
[3] Amb. 619.
[4] Vide Eden's Chan. Ca. 219.
[5] 6 T. R. 323.

ship said, "that although sitting in that place, he was disposed to be of opinion with Lord Northington, who was a very great lawyer." In 1773, the case of Steele v. Wright occurred, in which the then Chancellor is stated to have held that "although the landlord is not bound to rebuild, yet the tenant is neither obliged to rebuild, nor to pay rent till the premises are rebuilt."[2]

But in the year 1796, Macdonald C. B. decided, after much deliberation, in opposition to the above views of Lords Northington and Kenyon, in the case of Hares v. Groves.[3] In that case, the tenant had bound himself by a general covenant for the due payment of the rent, and by a qualified covenant to keep and leave the premises in repair—damage by fire only excepted. The Chief Baron reviewed most of the preceding cases, and then distinguished the one before him, in which there was no insurance, from the case of Brown v. Quilter, (where, as was before stated, an insurance was entered into, and the landlord received the insurance money,) and refused to extend any equitable relief to the tenant, on the ground that the equity of the parties was equal, and the rule of law ought therefore to prevail. "By the misfortune which has happened," said he, "both the parties are damnified. The lessee is owner of the house during the lease; the lessor after its expiration. By the fire each loses his interest in it; and what equity is there to throw the whole of the burden upon one of the parties, whose equity is certainly equal to the other?" He said also, that the exception in favour of the lessee, that he should not be bound to repair in case of fire, was merely negative. It saved him from one of the duties to which he would otherwise have been liable in that event, under the general covenant to repair; but did not necessarily excuse him from all the other duties to which he had made himself liable; and there did not seem to be any immediate connexion between this saving and the covenant for payment of rent. These principles and reasonings have governed the English Courts in subsequent cases; and in Baker v. Holtzapffel,[4] where the circumstances were precisely similar, Lord Eldon remarked, that after so solemn a determination of this question upon a hearing, the Court ought to abide by it; and that he re-

1 1 Esp. N. P. C. 398.
2 1 T. R. 708.
3 3 Anstr. 687.
4 18 Ves. 115.

ally could not perceive the equity claimed for the tenant in such a case.

The Supreme Court of Massachusetts, it seems, have been regulated, with regard to this subject, by the rule which governed the court in the cases last cited. In the case of Fowler et al. v. Bott et al.[1] which was an action of covenant brought to recover the rent, alleged to be due, of a chocolate mill, it was pleaded, that after the commencement of the lease, and before any of the rent, for which the action was brought, accrued, the said mill was, against the will and without the fault of the defendants, consumed by fire, of which the plaintiffs had due notice: and that the plaintiffs were requested to rebuild the same, but refused so to do. The question was whether the burning of the mill constituted of itself a good and valid defence against the action. Most of the foregoing English authorities were cited by the counsel, and the supposed hardship of the case was also urged upon the attention of the court by the counsel for the defendant. It was held by *Sewall* J. that a lease for years was a sale of the demised premises for the term; and that unless in the case of an express stipulation for the purpose, the lessor does not insure the premises against inevitable accidents, or other deterioration. That the rent is, in effect, the price, or purchase money, to be paid for the ownership of the premises during the term; and their destruction, or any depreciation of their value, happening without the fault of the lessor, is no abatement of his price, but entirely the loss of the purchaser. When there is no covenant, he said, on the part of the lessor to *insure* against fire, or any engagement to repair the premises, in that event, or any other casualty, by which they may be impaired or destroyed, the accident becomes the misfortune of the lessee, and he is not excused from his rent.[2]

The case to which we have been referred by the writer we have mentioned, as having carried the doctrine of the non-interference of equity in favor of tenants still further, is the late case of Leeds v. Chatham, before Sir John Leach.[3] In that case the tenant covenanted to repair the inside only, but the landlord not only covenanted

1 6 Mass. Rep. 63.

2 Vide also 1 Har. and Johns. 42, and Smith v. Ankrim, 13, S. and Rawle, 39.

3 1 Simon, 146.

to maintain the outside in good and substantial repair, but also insured the building, and received the insurance money. "Yet," said the Vice-Chancellor, "equity must follow the law. The plaintiff might have provided in the lease for a suspension of the rent, in case of fire; but not having done so, a court of equity cannot supply that provision which he has omitted to make for himself; and it must be intended that the purpose of the parties was according to the legal effect of the contract. With respect to the equity which the plaintiff alleges to arise from the defendant's receipt of the insurance money, there is no satisfactory principle to support it. The defendant having so contracted with the plaintiff as to render himself liable to rebuild the outer work, in case of accident by fire, has very prudently protected himself by insurance from the loss he would otherwise have sustained by such an accident. But upon what principle can it be that the plaintiff's situation is to be changed by that precaution on the part of the defendant, with which the plaintiff has nothing whatever to do? The plaintiff has sought his protection in the contract by the covenant which he has required from the defendant; and to those covenants must he alone resort. The remedy is at law, and this court cannot interfere."

BENCH OF SOUTH CAROLINA.

THE LATE JUDGE GAILLARD.

An Eulogium on the late Hon. Theodore Gaillard, one of the Judges of the Court of Common Pleas, and formerly a Chancellor of South Carolina, delivered May 19, 1829, *by William Lance.*—CHARLESTON.

This we consider to be a chaste and classic production, and one which indicates throughout a natural and strong inclination in the author to admire and applaud individual excellence. Our object, on the present occasion, is to avail ourselves of its pages for the purpose of giving an outline of the life of a Judge, who in that character has long been known to the American Bar—though to many but partially.

Judge Gaillard was a native of South Carolina. His ancestry both paternal and maternal were of great respectability in France, and of Huguenot origin. About the close of the revolution he went to England and pursued the study of law in the Inns of Court in London. While abroad he became also a polished scholar and attained a perfect knowledge of the French language. He studied law, "not merely as a livelihood and a means of money-getting, but as the magical and invincible dispenser, under Heaven, of equal justice and equal rights to his fellow-creatures." At the period of his arrival in South Carolina, the bar of that State "could boast of some of the first and greatest lawyers in the United States." As a practitioner at that bar, he was upright, judicious and able; gave universal satisfaction to his clients, and displayed an intellect active, well-stored and vigorous. He was appointed to preside as Speaker of the House of Representatives of South Carolina at a season of great political effervescence, and this appointment proclaimed the voice of that State for Mr. Jefferson. As Speaker he preserved order and dignity and was never taken by surprise at the parliamentary questions which arose in debate.

As an orator, whether at the forum, in the Senate, or in a popular assembly, his rank was among the most eloquent. "His ideas escaped from his lips in the garment exactly fitted to him, illustrating the philosophical remark of Buffon—'*Le style est l'homme meme.*'" He was also powerful in argument and capable of rousing and captivating, when occasion required, the passions of his auditory. He possessed melody of voice, distinctness of elocution and animation of manner.

After a service of several years in the Legislature, he retired to private life, where he remained until the elevation of Mr. Madison to the Presidency, when he was again returned a member of the House, and made Speaker. It was at this time that the Court of Appeals in Equity was established, over which he was appointed to preside. In this office, says Mr. Lance,

"So vitally important to the great interests of property, and the domestic and business relations of society at large, his unclouded intelligence, quick-sighted acumen, and solid strength of judgment, applied with readiness and singular aptitude the doctrines of Chancery to the cases which called for his adjudication. Of these doc-

trines his knowledge was extensive, profound and eminently practical. His decrees were pronounced with a promptness and decision equally removed from precipitancy or unnecessary delay. They were the exact type of his ideas, clear and easily intelligible to all. They were encumbered by no superfluous reference to authorities, no pedantry of the science, (of which for the occasion he conceived himself the expositer and the minister,) no useless elaboration in arriving at a conclusion. His analyzing mind had thoroughly investigated the original sources of our jurisprudence by which he was to be governed. A most felicitous memory could array instantly the printed guides he was to follow, while his nice discrimination developed the spirit and reason of the equitable and legal codes he was dispensing. No Chancellor submitted with more deference to points already decided, though they met not his concurrence. No one was more zealous in preserving inviolate the great land-marks of the system, though the bold independence and activity of his penetrating mind would discern, and would fearlessly assert, when requisite, the inapplicability of some antique principles to our unparalleled institutions. What was said of Lord Thurlow by an admirer, may be repeated of him, "I never found that he meant to break through the rule. No man criticised more upon rules laid down by other judges, but no man was more rigid in observing them, when he could once deduce them."—3*d Vesey*, 527."

While it was the aim of Judge Gaillard to sustain the boundaries between the tribunals of law and equity, he endeavored to assimilate, as far as practicable, and amalgamate the nature of each with the other. Mr. Lance observes—

"His view might be somewhat similar to what Lord Eldon declared of two objects of his admiration—'Chief Justice De Grey said, he never liked equity so well as when it was like law. The day before I heard Lord Mansfield say, he never liked law so well as when it was like equity;—remarkable sayings, (he added,) of those two great men, which made a strong impression on my memory.'—6 *Ves.* 259. There was a very general acquiescence in, or confirmation of, his decrees. When he differed with the bench of his judicial colleagues, it was then he took more than ordinary pains.—His lights and learning became then peculiarly public property.—They were put forth to be examined by all, not for display or effect, but from an imperative sense of indispensable duty, which would withhold nothing from the suitors, the bar, and the community. His ambition was to satisfy himself that his judgment was supported by principle and precedent,—and when precedent failed, the exurberance of his intellect was never bewildered in reaching the point where justice should prevail. A Judge who should commence with, 'Hav-

ing had doubts upon this Will for twenty years,' would, (however extraordinary his attainments,) in our country, be soon transferred to the chair of a professorship, as better adapted to his lucubrations than the business for which laws and courts are designed."

In 1824 a new arrangement of the Circuit and Appeal Courts was organized, and the duties of the Law Bench were allotted to Judge Gaillard.

"The versatility of his genius, the variety of his information, and the speediness with which he could recover the recollection of former and grasp the extension and accumulation of any knowledge, soon rendered his novel situation light and familiar to him. It furnished too a wider and more apposite scope for his popular, delightful and commanding eloquence, than the fabric of the Chancery scarcely ever presents. His charges to the jury comprised so succinct a compendium of the circumstances and proofs, that the various capacities of our citizens embraced without fatigue the compass of the case. His abstract so divested it of the extraneous and irrelevant, that their good sense could review the concentrated weight of the testimony with the ease their memory could retain the incidents of an impressive narrative. In conducting their attention to the law which was absolutely to control them, he was distinct, confident and energetic, avoiding authoritative dictation, but maintaining the prerogative of office bestowed by the popular sovereignty for the public good. He knew and participated in the feelings of the people of this country too well, not to be certain that they would firmly and conscientiously enforce the dominion of their laws, the only omnipotence under heaven which they acknowledge."

As to the political sentiments and conduct of Judge Gaillard, Mr. Lance says—

"He was a great advocate of the reform of our representation in the legislature, and of the extension of the elective franchise which has given our citizens equal privileges and equal participation in the enactment of the laws which are to govern them. He was a politician, not for the gratification of his own ambition. He never swerved from uniformity to gain office, or for his own aggrandizement. He declined the solicitation of influential admirers during the late war, (while he resided at Colombia,) to represent them in Congress; as also two appointments (of District Judge) from the General Government. He was satisfied with the judicial honor which his native state had bestowed on him, though, nature seemed to have destined him for a statesman."

Mr. Lance then gives a most flattering picture of the private life of the subject of his obituary respect, who was exemplary for morality, benevolence and religion. After enduring a serious bodily

affliction for three years—during a part of which time, the State was deprived of his services—he died, says Mr. Lance, "at his post."[1]

A REVIEW

OF LEGISLATIVE ACTS, OF THE PRESENT YEAR, IN AMENDMENT OF AMERICAN JURISPRUDENCE.

The American Jurist and Law Magazine, No. IV. *Art.* 6, *entitled,* "*Obstructions to National Legislation.*"

Besides the intelligence which we have monthly afforded our readers, under appropriate heads, we have some to offer, in relation to the enactment, repeal and alteration of statutes. As the present number of our work terminates the year, we now propose to give a summary of what has been effected, and has come to our knowledge, since the year 1828, in the manner we have just mentioned. Our resolution at first was to have confined ourselves to the mere details of information, without the introduction of any observations or criticism of ourselves or others. We have since perceived, however, that there are good reasons for not adhering strictly to our original plan.

According to the order which is naturally suggested for giving the details of the positive law created during the present year, our attention was first directed to the acts of the last Congress of the United States. The first act of that Congress, if not the only one which can be said to have much relation to the general jurisprudence or existing judicial tribunals of the country, is respecting the adjournment of the Supreme Court. This act provides, "that if at any session, four justices shall not attend, such justice or justices as may attend shall have authority to adjourn from day to day for twenty days" (instead of four days, as before limited.) The peculiar circumstances which led to this act are probably within the recollection of our readers;[2] and it is doubtless not forgotten that the credit of

[1] The death of Judge Gaillard, as we mentioned in the June No. of this Periodical, occurred at Darlington Court House, in South Carolina, in the latter part of March last.

[2] Vide February No. of this Review, p. 53-4.

its rapid passage, (which was rendered necessary by those circumstances,) is due to Mr. Webster. Five acts were passed on the subject of *internal improvement*—one act making the *drawback on refined sugars* five cents per pound—one for the regulation of the penitentiary, within the district of Columbia—one for the *payment of the salaries of public officers, pensions, &c.*—one for the *sale of lead mines*—two respecting the time and place of holding Courts in Florida—one for the apprehension of foreign deserters—and one for distributing "An abstract of infantry tactics." The public lands and territories were the subjects of nine acts—the Indian department of two—and the improvement of harbours of three. These, with twenty-four private acts, completes the summary of the legislation of the last session of Congress.

"We have sometimes heard it remarked," (says the American Jurist, No. IV. p. 267,)" rather by way of indirect animadversion than as a literal expression of opinion, that the evils of our legislation are in the direct ratio of its quantity; that every new law is a new mischief, and all the sessions of Congress so many public calamities. If such were the fact, (continues the Jurist,) *the last session* would make a brilliant era in our annals, memorable by the negative glory of harmless attempts and abortive labours." We are very happy in observing that the respectable work from which we have just quoted has taken up the subject of the "meagre legislation" of our General Government, and exposed so ably the want of "an enlarged national policy," as it has done in the article to which we have referred.

If a particular number of persons should be employed to perform the most ordinary work, and, instead of regarding the object for which they were employed, they should direct their principal attention to something else, they would soon be dismissed without the stipulated compensation, and with a very serious loss of their reputation for fair dealing. Yet, in this country, it seems to be excusable in those who are commissioned to act in the elevated sphere of legislation, to avail themselves of their appointment to serve the views of a party—to gratify avarice—or to display egotism, and indulge vanity. The last session of Congress will justify us in this assertion. The daily newspapers of the Federal metropolis, it is very true, during

the last session were teeming with Congressional speeches; but all that was actually done to improve the general jurisprudence of the country might be compressed in at least a dozen lines. Well may we apply the common quotation from Horace—

"Parturiunt montes, et nascitur ridiculus mus."

We contend that the plain members of our State Legislatures are far more mindful of their trust, and exhibit (some gentlemen may start, but we cannot help it) a much nicer sense of honor, than most of those who sit in the legislative hall and chamber, and loiter in the fashionable levees of Washington.[1] We certainly hope never to see the time when a Cromwell shall enter our national Legislature and tell the members to "make way for better men;" but we do sincerely hope, that the *people* of this country will not continue any longer to be duped by representatives who are totally unworthy of confidence "The system of politics," the Jurist with too much truth remarks "to which we are verging, is one of which every man is the centre: the first great object is his own interest; subordinate to this, and next in order, are those of his town, district, state, and last of all, if at all, the national." Again, says the Jurist, "It cannot be expected of the most ardent and devoted labourer for the public good, who stands aloof from all interested combinations, to toil in elaborating and proposing laws of permanent utility, when his proposition is postponed to a debate whether a printer shall be chosen by ballot or a *viva voce* vote, or if not put aside, is tossed like a bubble upon this troubled sea of discord."

[1] Just after the Dunciad appeared, it was taken up in the Bookstore by Dennis, who, when carelessly dipping into it, came suddenly on the following lines:

"Some have for wits, and then for poets passed;
Turned critics next, and proved plain fools at last."

"By G—d," said Dennis, "he means *me*" Perhaps what we have said of our members of Congress may lead some of them to draw a similar conclusion, in relation to our remarks.

"When you censure the age
Be cautious and sage,
Lest the courtiers offended should be;
If you mention vice or bribe,
'Tis so pat to all the tribe,
Each cries—*That was levelled at me*,"

This extract is meant to be applied with some exceptions; and in its fullest extent, will certainly apply to but few.

It is with much satisfaction that we turn from the barren waste of Federal legislation, to contemplate the less extensive, though more prolific parliamentary field belonging to the individual states.

In NEW-HAMPSHIRE, a law has been passed, by which execution for debts under $200 can be issued on confession by debtors—and by which debts of $200 and under can be settled by referees. Another law of New-Hampshire authorises justices to issue warrants for the arrest of *fugitives from justice* in other States and their delivery and passage through the State, and to subpœna witnesses in that State for trials in another State.

MASSACHUSETTS, in addition to the acts heretofore passed, in relation to *divorce*, has passed the following:—

Sec. 1.—That when any married woman shall hereafter be divorced from bed and board for any of the causes for which by law such divorce may be decreed, the Court by which such decree shall be passed shall have power to assign to her, for her own use, all the personal estate which her husband hath received by reason of the marriage, or such part thereof as shall be just and reasonable, under all the circumstances of the case; and also such part of the personal estate of the husband as may be necessary for her comfort and for the better support of such children of the marriage as shall be assigned to her care and custody, pursuant to law.

Sec. 2.—That all promissory notes and other choses in action belonging to the wife before marriage, or made payable during the coverture to her alone, or jointly with her husband on account of property belonging to her on debts due to her before the marriage, and all legacies to her and personal property which may have descended to her as heir, or be held for her in trust, or in any other way, appertaining to her in her own right, which legacies, personal property, promissory notes, or choses in action shall not have been reduced to possession by the husband before the libel is filed, on which such decree may be passed, shall be and remain the sole property of the wife so divorced, and she is hereby authorized and empowered to bring and maintain actions for the recovery thereof, in the same manner as if she were a *feme sole:* Provided, however, that nothing in this act contained shall be construed to make void any attachment or seizure in execution of any personal property in the possession of the husband, or any lien created by service of process in foreign attachment which shall be made to secure any debt from him, if such attachment shall have been made, or process in foreign attachment commenced, before the filing of the libel on which such divorce shall be decreed."

Several other important alterations have been made in the statute code of Massachusetts—for instance, every illegitimate child is made an heir to its mother, and the mother heir to the child, where the latter has no lawful heirs. This provision was doubtless the result of Judge Parker's decision in Cooley et al. v. Dewey et al. 4 Pick. 93. The law in Massachusetts relating to Real Actions has also been amended: Any minister, or other sole corporation, may bring a writ of right or writ of entry on the seisin of his predecessor, although barred by lapse of time, provided the same be brought within ten years after such predecessor's death, resignation or removal. In writs of entry *sur intrusion*, &c. founded on the seisin of remainder or reversion, it will in future be sufficient to allege and prove such seisin within thirty years; and the demandant need not allege or prove an actual seisin of the land. The opinion we entertain of the intelligence of the General Court of Massachusetts induces us to believe that the next time their attention is turned to this subject, the whole system of real actions will be abolished, and that there will be but one limitation of time for suing for the recovery of real property. The late amendment of the law of real actions in that State, also provides that cotenants when disseised, may all, or any two or more of them, join in a suit for their right of property or possession; or any one may sue alone for his share. The following we think a good provision on the subject of *nuisance*:

"When judgment shall be rendered for the plaintiff in any action on the case for a nuisance, the Court may, on motion of the plaintiff, besides the execution for damages and costs, issue a warrant to the sheriff, or his deputy, to abate and remove the nuisance at the expense of the defendant." Executors and administrators are also enabled to prosecute suits for injuries to real property which have been commenced by the testator or intestate, and which before abated by the death of the parties. The executor or administrator of the plaintiff or defendant dying, may either become a party voluntarily, or be made such by being summoned by the other party. Defendants out of the State are to be notified of suits in such manner as the Court may direct. Suits brought by a feme-sole shall not abate on her marriage, but the husband may become party on motion.

NEW-JERSEY, has passed an act in relation to *Bills* and *Notes*, which provides that every notary and justice of the peace on protesting any bill or note, shall, in addition to the duties before imposed, keep a record of the time when, place where, and upon whom demand of payment was made, with a copy of the notice of non-payment, how served, and the time when ; or if sent, in what manner, and the time when; and if sent by post, to whom the same was directed, at what place and when the same was put into the post-office.

INDIANA.—A Probate Court for each county has been established in Indiana, the judge of which is to be chosen once in seven years, and he is authorized to solemnize marriages. When the estate of any person deceased is declared insolvent, the nett proceeds of his real and personal estate are distributed by decree of the Court rateably among all the creditors of the estate, with the exception of expenses of sickness, funeral, and administration, which are first to be paid, and with the exception also of the claims of creditors who have a *special* lien.

NEW-YORK.—According to the late law of New-York, after the first day of January next, all endorsers, creditors for money lent, and such as have heretofore been considered confidential creditors, and entitled to a preference, are to be put on the same footing with business and other creditors. Any person who shall so assign or convey away his property, and it afterwards appearing that he was in bankrupt circumstances at the time, shall be deprived of the benefits, of the insolvent act, and the property assigned shall be liable to be taken, wherever found for the equal benefit of his creditors, &c. Such a law, or one similar, should exist in every State.

RHODE-ISLAND, has also commenced legislating upon the important subject of assignments in trust for the benefit of creditors ; and at a late session of the General Assembly the following act was passed: "*Be it enacted, &c.* That the Supreme Judicial Court of this State be, and hereby is vested with equity jurisdiction in all cases relating to trust estates, created by deeds of assignment for the benefit of creditors; with all the powers which Courts of Chancery possess and exercise in such cases."

MISSISSIPPI, has provided by statute, that in all cases where there is widow or husband surviving any deceedent, whose property would

escheat to the State by defect of heirs, the widow or husband, as the case may be, shall be entitled to the estate. And has also passed a statute providing that when the County and Probate Court shall be of opinion, that it will be for the benefit of the estate of a person deceased, or a minor to sell real instead of personal estate to pay debts, they may authorize such sale, and the estate sold shall be pledged for the payment of the purchase money when the sale is on credit, in the same manner as if the same *had been mortgaged for that purpose.*

While the legislature of Mississippi, at their last session, were actively debating schemes of *education* and *internal improvement*, the following law, respecting *Runaway Slaves*, was passed: "All county and corporate towns *are offered the use of runaway slaves* committed to the respective jails, to *labour on the streets and highways*, on providing a superintendant and giving security for their safe keeping; *the slaves to be secured by a chain and ball*, or otherwise while at work, and *returned to the jail every night.*" "*Annexuit Africa lauros*," has been applied to Mr. Wilberforce, but would not be very appropriate to the new State of Mississippi.[1]

ALABAMA has passed the following act, to repeal in part, and in part to amend an act defining the *liability of endorsers*:

"SEC 1.—*Be it enacted by the Senate and House of Representatives of the State of Alabama, in General Assembly convened*, That so much of an act approved January 15th, 1828, entitled "An Act defining the liability of endorsers, and for other purposes," as authorises the assignee or endorsee, to maintain a joint action against the maker and endorser of any bond, obligation, note, or other contracts in writing, be, and the same is hereby repealed.

SEC. 2.—*And be it further enacted*, That that part of the *proviso* in the second section of the before-recited act, which requires suit

[1] It will applv very well, however, to the hardy sons of *Vermont*, as is shewn by the following anecdote related by the Vermont Patriot:

Several years since, a slave left the employment of his master in New-York, and crossing over into Vermont, hired himself out to some of our Yankee farmers, to turn up as a free man, the soil of the Green Mountains. His master, tracing him out, brought an action before one of our Vermont Courts against his employer, for the amount of his wages. Several witnesses were brought on to prove that the negro was a slave. The testimony of all, however, was pronounced by the Judge to be insufficient. At length the counsel for the plaintiff rather indignantly demanded of his honor, "what evidence was necessary to prove the fact?" "*A bill of sale from the Almighty*," was the comprehensive reply.

to be brought to the first Court, shall be construed to be, that suit be brought to the first Court to which the writ can properly be made returnable.

"SEC. 3.—*And be it further enacted*, That suit shall be brought on assigned or endorsed obligation, notes or other contracts in writing, for the payment of money or other thing, when the balance due thereon, does not exceed fifty dollars, within thirty days after the said endorsement, unless the endorser or assignor consent in writing that a further time may be given to the maker and obligor, unless the maker or obligor be absent from the place of his residence, or residence unknown, or unless the assignor or endorser require in writing the assignee or endorsee to bring suit immediately after the maturity of said bond, note or other instrument in writing, or if endorsed after the same becomes due immediately thereafter, then and in those cases the endorsee or assignee shall commence suit within five days thereafter, and no assignor or endorser of any bond, obligation, note, or other writing, shall be liable on said assignment or endorsment, unless suits be brought within the time prescribed by this act, or the act to which this is an amendment.

"SEC. 4.—*And be it further enacted*, That when judgment shall be recovered, either in the circuit or county courts, or before a justice of the peace, by the assignee or endorsee of any assigned or endorsed bond, note, or other writing, and writ of fieri facias shall be returned by the proper officer no property found, the said assignee or endorsee may commence his action against the assignor, or endorser on said assignment or endorsment; and the return on said fieri facias shall be sufficient evidence of the insolvency of the maker or obligor, to authorise a recovery against him on his said assignment or endorsment.

"SEC. 5.—*And be it further enacted*, That any right which may have accrued under and by virtue of the act to which this is an amendment, shall in no wise be impaired by the passage of this act."

In the Territory of FLORIDA a law has been recently enacted, respecting marriage, which contains the following section:—"That if any person shall marry within the *Levitical degrees*, he shall be subject to a fine of one thousand dollars, one half to the informer, the other half to the Territory; and the said marriage shall be annulled and set aside by any court of competent jurisdiction in the Territory; and the court may require the parties to give bond and security, that they will not, in future, cohabit with each other, and commit them in case of non-compliance: Provided, That nothing herein contained shall be construed to render illegitimate the issue of the marriage thus annulled."

NORTH-CAROLINA.—We learn from the last No. of the American Jurist, that the Legislature of North-Carolina has lately made the following provisions:

"*Damages on Protested Bills of Exchange.* Every bill of exchange hereafter drawn or endorsed in this State, and which may be protested, is to carry interest, not from the date, but from the time of payment mentioned in the bill. The damages on such protested bill drawn or endorsed in this State, when payable in any other part of the United States, except Louisiana, are made six per cent. on the principal; when payable in any other part of North America, or the islands thereof, except the North West Coast, or in the West India or Bahama Islands, ten per cent; when payable in Madeira, the Canaries, the Azores, the Cape de Verd Islands, Europe, or South America, fifteen per cent; when payable in any other part of the world, twenty per cent.

"*Limitation of Writs of Error, and Bills of Review.* Writs of error for matter of fact, and bills of review and petitions for rehearing in equity, must be brought within five years from the passage of the act, or from the time of judgment rendered. The rights of infants, *femes coverts*, and persons *non compotes mentis*, are saved for three years after their disabilities are removed.

"*Dower in Equities of Redemption.* The widow of any person dying seised of an equity of redemption, or other equitable or trust estate in fee, shall be entitled to dower therein, subject to the incumbrances.

"*Digest of the Law of Executor and Administrator.* The Governor is authorized to appoint two competent persons, commissioners, 'to revise, digest, alter, and amend all the statute and common law, in force in this State relating to executors and administrators, and also to revise, digest, alter, and amend so much of the statute and common law concerning heirs, devisees, and creditors of deceased person's estates, as shall be properly connected in the opinion of said commissioners, with the law relating to executors and administrators, so as to form a code or system on the title of executors and administrators, which shall be founded on principles of justice, and suited to the true policy and present situation of this State.'

"*Divorce and Alimony.* The superior courts of law are to 'have jurisdiction of all applications for alimony, as well as those for divorce, or for divorce and alimony.' In cases entitling a woman 'to claim a divorce from bed and board or an allowance of alimony,' the court may decree alimony only, if no more be demanded, to continue as long as justice requires it. The wife of any man who becomes an habitual drunkard or spendthrift, may claim alimony, to be decreed by the court. His property is still liable for just claims against him up to the period when alimony shall be granted. The effect of

the decree 'shall be to secure to the wife any property which she may subsequently acquire either by her own labor, gift, devise, or operation of law,' unless the court decrees otherwise."

KENTUCKY has passed a law more effectually to *coerce the payment of money* officially collected—by sheriffs, constables and *lawyers*. This law enacts, "that whenever any *attorney* shall have collected money upon a judgment recovered in any court, and fails to pay over the money, upon demand at his residence, the court shall enter a rule against him, to show cause, why he should not be suspended from practice, and on the return of the rule, if it shall appear that the attorney has collected, and fails or refuses to pay over the money, the court shall suspend him from practice for *twelve months* and until he does *pay over the money;* and if such attorney shall presume to practice in any other Court during his suspension, he shall wholly forfeit the privilege of an attorney." These proceedings are to be barred after two years from the time the money is collected—and the act is prospective only.

CONSPIRACY AND REVOLT OF SEAMEN.

By the twelfth section of the act of Congress of 1790, Ch. 36, it is provided that "if any seaman shall confine the master of any ship or other vessel, or *endeavor to make a revolt* in such ship; such person or persons, &c. shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars." It has been decided in relation to this provision, that an endeavor to make a revolt is an endeavor to excite the crew to overthrow the lawful authority and command of the master and officers of the ship. That it is, in effect, an endeavor to make a mutiny among the crew of the ship, or to stir up a general disobedience or resistance to the authority of the officers of the ship. (*U States* v. *Smith*, 1 Mason, 147.) In another case where the question was brought before the Supreme Court of the United States, the Court held "that the offence consists in the endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel, by assuming the government and navigation

of her, or by transferring their obedience from the lawful commander to some other person." (*U. States* v. *Kelly*, 11 Wheaton, 417.) This definition, it seems, includes those cases where seamen conspire together not to do duty, so as to compel the master to yield to their wishes, in respect to the navigation, or course of the voyage, or the exercise of his proper functions, as commander. (*U. States* v. *Hemmer*, 4 Mason.)

At the late term of the U. S. Circuit Court, in Boston, five men were indicted for a conspiracy and revolt on board a brig called the Apthorp, while lying in Boston harbour. We copy from the Boston Courier the facts of this case, and the opinion of Judge Story.

"It appeared by the evidence produced on the part of the government that these men shipped at Charleston in June last for two or three ports in Europe, and a *final* port of discharge in the United States. The Apthorp arrived in Nantasket Roads from St. Ubes, on the 13th October. Previous to arrival, through the medium of a pilot-boat, the captain (Boden) received directions from the owners not to enter the harbour, but to proceed with her cargo directly to Alexandria, which directions he communicated to his mate and crew, and prepared to comply with. Subsequently, considerations connected with his health induced him to anchor in the Roads and proceed to this city, where he was discharged by his employers, and a new captain (Lord) appointed to the command. The mate (Barker) and the four men indicted with him declined proceeding on the new voyage, and were immediately arrested for the offence charged, viz. a conspiracy against the authority of the captain. One of the men (Lee) examined the shipping paper, and said his contract was with captain Boden only, and that he could not be compelled to proceed, in which the other three acquiesced. The mate acted, as it appeared, for himself alone, and without conference with the crew.—Judge Story instructed the jury, upon the proper construction of a ship's paper, that a change in the commander may be made for satisfactory reasons, the change making no difference with the contracts of the men, which are with the vessel. The port of destination is not necessarily the port of discharge; to make it a port of discharge, some portion of the cargo must be unladen, and although only a portion, it is enough as regards the crew, who ship to a port of discharge, and are bound to go to that port. But when the shipment is made to a port of *final discharge*, they may be carried from port to port, and the port where the last portion of the cargo is unladen is also the port for the discharge of the crew. In the present case, it was not sufficient that the vessel had arrived in the outer harbour of Boston, for the owner had the right to send her

to Alexandria, and the crew were bound till the arrival at the *final* port of discharge. Upon the defence Judge Story remarked that a common understanding, persisted in for a common purpose, to accomplish a common object, was an endeavor to commit a conspiracy of the kind charged. That these men knew the captain would be discharged, and a new captain would be appointed previous to their refusal; that they were together four and twenty hours during his absence, and before his arrival with the new captain, and from the common refusal to proceed, it must be inferred whether there was any collusion between the men; whether they were silent until he came on board. If then each man answered for himself, and without any intention to affect others, there was no common object, and neither of the men was guilty of the offence. An absolute refusal to a positive command is not necessary, but it was a necessary inference that captain Boden, after resigning his authority did not put the question to the crew without the consent of captain Lord; therefore after refusal to obey an order it was not necessary so give it. A combination not to do duty is a revolt ; entering into a plan to produce such an object is an endeavor to promote a revolt. With respect to the case of the mate, it was in some degree different from that of the men; it appeared that he did not act with them, that his reply was always equivocal, and that it was only when pressed for a direct answer that he made a positive refusal. If this was done by himself without intention to influence them, or without any former connection with them, then he was not guilty. But the jury must examine his conduct, as an officer's disobedience was more injurious than that of the men: if, however, he was considered as acting alone for himself then he would not be convicted."

The Boston Gazette of October 19, contains two other trials, in the same Court, of a similar nature. The first is the United States v. Haynes, &c. in which Haynes and five other seamen of the ship Plato were charged with the offence of endeavoring to make a revolt in the ship.

" It appeared that the ship several months since sailed a short distance from Boston, under the command of Capt. Thomas Dimmick; that she returned in a few hours to Nantasket Roads, in consequence of a violent sickness of the master. A new master, Capt. Charles Knapp, was appointed, but the seamen refused to serve under him, alleging that they had not shipped under him—a part returned to their duty, but the remainder of the crew, the persons indicted, obstinately refused. When ordered to hoist the anchor, they refused, and went forward in a body; when the new Captain gave orders for those disposed to go to their duty to go on the starboard side, and those otherwise disposed to go to the larboard side, the prisoners went together on the larboard side of the vessel.—

When arrested and brought before the District Judge, they one and all persisted in the refusal to go the voyage, although the law was explained to them by the Judge; and they were informed, that the change of master being from necessity, did not release them from their obligation. His Honor Judge Story charged the jury fully on the law and evidence, and instructed them that, if the testimony, which was unimpeached and uncontradicted, should be believed, the case was fully made out, and the prisoners, not being released from their obligation by the substitution of the new master under the circumstances of the case, had combined together to resist the lawful orders of the master—consequently they had been guilty of the offence for which they had been indicted. The jury returned a verdict of guilty against all the prisoners, and the Court sentenced them to pay a fine of five dollars each, and suffer sixty days imprisoment."

The other case was the case of an attempt to cause a revolt on board the ship Ganges.

"It appeared that a part of the crew, among whom were the prisoners, when the vessel was about departing on her voyage from Boston, in July last, refused to do duty and to get the ship under weigh, unless the captain would promise them that they should have a forenoon's watch below. It was testified by the pilot that this was an unreasonable request for the crew to make, and an improper one for the master to accede to. The case was submitted without argument, and the jury, after instruction from the Court, returned a verdict of guilty against all the defendants, two of whom were sentenced to pay a fine of five dollars each, and to suffer imprisonment for sixty days.—The other two, in whose favor there were several mitigating circumstances, were sentenced to pay a fine of two dollars each, and to suffer ten days imprisonment. The Court, in passing sentence in both the above cases, observed to the prisoners, that the statute authorized the infliction of a fine of one thousand dollars, and an imprisonment of three years; but that they had dealt with them in mercy, in hopes that it would have a salutary effect."

DIGEST OF LATE ENGLISH CASES, AT COMMON LAW.

[CONTINUED.]

Insurance.—1. Action on a policy, whereby the ship was valued at 2,000*l.* The ship was stranded, and evidence was given that it would have cost 1,450*l.* to repair her, and that when repaired, she would not have been worth that sum. Held, that the question, whether the loss be partial or total, is the same whether the policy be valued or open; the only difference being that, in the latter case, the value must be proved; Held also, that the present was a total loss. "And" (per Lord Tenterden C. J.) "a total loss ought therefore to be paid for, and that is the sum agreed upon as the value of the ship *minus* the value of the materials saved."—*Allen* v. *Sugrue*, 8 B. & C. 561.

2. Assumpsit on a policy on the life of the Duke of Saxe Gotha. The defence was, that proper information of the Duke's state of health had not been given. Held, that the question for the jury was, whether there were any facts material to be known which were not mentioned to the assurers; and not whether any facts material in the opinion of the party giving the information were kept back: in other words, that the materiality is to be determined by the real state of the facts, and that it is not enough to say that the information was *bona fide.*—*Lindenau* v. *Desborough*, 8 B & C. 586.—(Vide Steam Boat.)

Libel.—1. A communication, as to the character of a servant, containing a charge of robbery, is *prima facie* privileged, though volunteered by the former master; but it is for the jury to consider, whether the communication was made *bona fide*, or from ill will to the servant. The jury having found for the plaintiff, the court refused to interfere; and per Littledale, J. "I should not perhaps have come to the same conclusion, but I think the verdict ought not to be disturbed."—*Pattison* v. *Jones*, 8 B. & C. 578.

2. It is no defence to an action for libel, that the libellous matter was communicated to the defendant by a third person, and that the informant's name was published at the same time with the libel.—*De Crespigny* v. *Wellesley*, 5 Bing. 392.

It seems doubtful whether such a defence would be good in an action for slander. The following expressions were used by Best C. J. "We do not hesitate to say, that even if we were to admit, *what we beg not to be considered as admitting*, that, in oral slander, when a man at the time of his speaking the words, names the person who told him what he relates, he may plead to an action brought against him that the person whom he names did tell him what he related,—such a justification cannot be pleaded to an action for the republication of a libel.

3. The libel, as stated in the declaration, was to the effect that the plaintiff, a justice of the peace and chairman of the finance committee for the county of Warwick, had in the latter capacity audited accounts containing items to a large amount, for the nominal purpose of furnishing lodgings, &c. for the judges, but which expenditure was really for the accommodation of the magistrates; with an inuendo, "thereby meaning that the plaintiff had conducted himself corruptly, unduly, improperly, in his office of justice of the peace." The jury found for the plaintiff, but judgment was arrested on the ground that the matter stated was not libellous, it being held that a verdict would cure a case defectively stated, but not a defective case —*Adams* v. *Meredew*, 2 Y. & J. 417.

Lien.—If a partner or joint adventurer become bankrupt, his assignees can obtain no share of the partnership effects or proceeds of the adventure, until they satisfy all that is due from him to the partnership or in respect of the adventure. In the present case, the bankrupt's share had been separated from the rest and marked with his initials, but the custom being to detain the shares till the due proportion of the disbursements had been paid, this was held to be merely a qualified appropriation not divesting the lien.—*Holderness* v. *Shackles*, 8 B. & C. 612.

Money Paid.—A payment of ground rent by the occupier, made under the apprehension of distress, is compulsory, although the ground landlord allows the occupier time for paying it. The occupier is entitled to deduct such payment from the next rent becoming due to the mesne landlord, though not due at the time the payment was made; and the occupier having tendered the balance remaining due after such deduction, was held entitled to maintain case for an excessive distress against the mesne landlord who refused to accept the balance, and subsequently distrained for the whole rent so becoming due.—*Carter* v *Carter*, 5 Bing. 406.

Mortgage.—Mortgage with power to enter and sell if the money not paid on a certain day. The mortgagor continuing in possession, held that the mortgagee may bring ejectment without notice to quit, or demand of possession.—*Doe dem. Fisher* v *Giles*, 5 Bing. 421.

Notice.—The 4 Geo. 4. c. 95. s. 87. (relating to statute work on roads) authorizes an appeal, provided notice of such appeal be given within six days after *the cause of complaint* shall arise. Held, that *the cause of complaint* does not arise until a copy of the order complained of is served, and that the six days are to be computed from the service and not from the making of the order.—*Rex* v *Just. of Lancashire*, 8 B. & C. 593.

Notice of Action.—The plaintiff whilst occupied in spreading beach and shingle for the purpose of making a road in the parish of W., was asked by the defendant, the feureeve of the parish, by whose authority he was so employed. The plaintiff answered, by the authority of the magistrates; but showed no warrant or order; whereupon the defendant, after fruitlessly warning him to desist, carried him before a magistrate, who refused to receive the complaint. Held, that as the defendant thought he had a right to apprehend the plaintiff, and was not actuated by malice, he was entitled to notice of action under 7 & 8 Geo. 4. c. 30.—*Wright* v. *Wales*, 5 Bing. 336.

Omission.—In the obligatory part of a bond the word *pounds* was left out, the penalty being merely described at 7,700, without any species of money being mentioned; but the bond was conditioned for the payment of divers sums properly described. Held, that the omission was not material.—*Coles* v *Hulme*, 8 B. & C. 568.

Pleading.—Trespass for breaking and entering, ejecting, &c. Defendants justified under an *elegit* on a judgment recovered against John E. P. Dormer, Lord Dormer. Replication that the *said* Lord Dormer being seised lor life by indenture before the judgment demised to the plaintiff. The defendants craved oyer of the indenture, in which Lord Dormer was described without the christian name of John. Demurrer to the replication, and Held, that it was not incumbent on the plaintiff to show in his replication the commencement of Lord D's estate, as both plaintiff and defendant claimed under him; and that as the word "*said*" identified the person, the variance in the names was immaterial; and that, as the lease set out in the replication shewed that Lord D. at the time the judgment was obtained had no interest in the premises the plaintiff was entitled to recover.—*Chatfield* v. *Parker*, 8 B. & C. 543.

Postmark.—To prove that a letter dated in 1824 was really sent in 1825, the postmark was appealed to. The C. J. who tried the cause offered to send to the post-office for a clerk to prove the mark, but this was not insisted upon, and the jury declared themselves satisfied from the mark that the letter was sent in 1825, and gave their verdict accordingly. A new trial was applied for and refused, on the ground principally of the objection having been waived at the time. The main point was not decided. *Abbey* v. *Lill*, 5 Bing. 299.

Power of Attorney.—Assumpsit by assignees of a bankrupt on a policy. The bankrupt and the defendant were members of a mutual insurance club, each member of which had a ship insured therein, and a power of attorney was executed by all the members appointing certain persons their attornies to execute policies, by virtue of which they signed each policy with the names of all the members, ex-

cept that of the owner of the ship insured. Held, that such power required but one stamp.—*Allen* v. *Morrisson*, 8 B. & C. 565.

Practice.—1. The defendant, a foreigner, was arrested on an affidavit (by the plaintiff as liquidator, legally appointed by the law of France, of the estate of V. and T. lately trading at Paris) stating that the defendant was indebted to the plaintiff as liquidator, &c. The bail bond was cancelled, on the ground that it did not appear by the affidavit, that a liquidator is by the law of France entitled to sue.—*Tenon* v. *Mars*, 8 B. & C. 638.

2. Issue was joined upon demurrer to a plea in abatement. Judgment of *non pros* was signed by the defendant in consequence of the plaintiff's omitting to enter the issue upon record. Held, that the defendant was not entitled to the costs of judgment.—*Michlam* v. *Bate*, 8 B. & C. 642.

3. The defendant being under the terms of rejoining issuably, may plead *puis darrein continuance.*—*Bryant* v. *Perring*, 5 Bing. 414.

4. An agreement was executed, and was to be left with a third party. The defendant fraudulently procured possession of it and made affidavit that it was lost or destroyed, and that it had never been stamped. It appeared, however, by letters of the defendant, that the agreement was in existence, and the plaintiff made affidavit that he meant to have it stamped; upon which the court ordered the defendant to produce it if he had it, and, if not, to produce a copy in his possession to be taken to the stamp-office; and that, if the copy could be stamped, the defendant should be precluded from producing the original to defeat it.—*Bousfield* v. *Godfrey*, 5 Bing. 418.

5. In the Exchequer, when the proceeding is according to the ancient practice by *venire* and *distringas*, personal service of the *venire* is not required. Service at the dwelling house is sufficient.—*Kemp* v. *Sumner*, 2 Y. & J. 405.

6. A nonsuit cannot be entered on a valid objection taken at the trial but not reserved.—*Mathews* v. *Smith*, 2 Y. & J. 426.

Steam Boat.—The agent had been directed not to insure against marine risks; but he did not mention this to the assured, and their *contract* was general; though by the actual *policy* the risk was suspended while the vessel was at sea. The policy, however, was never delivered to the assured. Held, that the assured were not bound by the exception.

The property insured was a steam-boat, and was lost by fire at sea. The court of session held, that the general insurance against fire did not apply to the risk of fire on board steam-boats at sea, but this opinion was overruled in the Lords, though the judgment was confirmed on the grounds stated above.—*Pattison* v. *Mills*, 1 Dow, 342. (In the House of Lords, on appeal from the Court of Session in Scotland.)

Sham Plea.—Declaration on two bills of exchange due the 5th and 6th December, 1828. Plea, judgment recovered on the same bills in the Michaelmas Term preceding. Plaintiff treated the plea as a nullity, and signed judgment on the ground of its being false on the face of it; and a rule for setting aside the judgment was discharged by the court.—*Vere* v. *Carden*, 5 Bing. 413.

Sheriff.—The execution creditor authorised the bailiff to quit possession, the debtor consenting that he might return at any time and sell. At the end of some months the bailiff reseised, and gave notice of sale. Before the sale, another *fi. fa.* was delivered to the sheriff, to which he returned *nulla bona*. The second creditor sued and recovered for a false return. Held, that the sheriff, who had previously paid over the proceeds of the sale to the first creditor, was entitled to recover them, no proof being given that the sheriff, when he paid the money, was acquainted with the misconduct of the officer; it being held, that, as between the creditor and the sheriff, the act of the officer in quitting possession by the creditor's authority, was not to be considered as the act of the sheriff.—*Crowder* v. *Long*, 8 B. & C. 598.

Statute of Frauds.—The defendant in consideration of plaintiff's entering into a bond of indemnity, promised to indemnify him. Held, that the promise was binding without writing.—*Thomas* v. Cook, 8 B. & C. 728.

Taxes.—The collector went to the plaintiff's house in his absence and demanded certain sums due for the assessed taxes and land tax. The servant informed him that the plaintiff was not at home, but he entered the house and distrained for the amount. Held, that there ought to be a reasonable time between a demand, made like this, in the absence of the defaulter, and the seisure, and the plaintiff having obtained a verdict in trespass, the Court refused to disturb it.—*Gibbs* v. *Stead*, 8 B. & C. 528.

Trover.—The charterers of the plaintiff's ship for three voyages, on her return from the first, removed the anchors and cables to the defendant's wharf; and soon after the ship was seised under an Admiralty warrant and sold. Two days before the sale the plaintiff demanded the anchors and cables from the defendant, who refused to give them up; and thereupon the plaintiff brought an action on the case for an alleged injury to his reversionary interest; contending, that if the anchors and cables had been left on board and sold with the ship, there would have been a surplus, and that his revisionary interest was injured to the extent of that surplus. There was a count in trover for the anchors and cables. Held, that neither would lie; there being no injury to the reversion, and the plaintiff not being entitled to the possession of the anchors and cables.—*Ferguson* v. *Christall*, 5 Bing. 305.

LATE AMERICAN DECISIONS.

A friend and correspondent in Plymouth, (Mass.) has favored us with the minutes which he took at a late law term of the Massachusetts Supreme Court, held at Plymouth, for the counties of Plymouth, Bristol, Barnstable and Dukes. We have extracted from them the following:

Commonwealth v. *Chace.*—Indictment for stealing fourteen tame doves, property of Benjamin Williams. It appeared from the testimony of B. Williams, that he had in his out buildings dove houses, in which he reared doves, and used them for food: that the doves mentioned in the indictment occupied these houses and were claimed by said Williams as his property: that he took care of them: fed them as regularly as his barn-door fowls; that they would come to be fed when called, and eat the grain given them, close to his feet, and between his legs. There was also evidence tending to shew that the defendant shot the doves and used them for food—animo furandi: and upon this evidence the defendant's counsel contended that the doves were not so far the property of the said Williams, as to be the subject of larceny, but instructed the jury, that if they believed the testimony of Williams in relation to said doves, and also that they were taken with a felonious intent, they ought to find him guilty,—and so the jury found. And now on motion by the defendant for a new trial, the court said there were some authorities tending to shew that larceny might be committed in taking doves from a dove-cote, and they were not disposed to controvert this principle—yet, as these animals were *feræ naturæ*, and though in some degree domesticated, they still retained a portion of the original wildness of their character; and as it did not appear, in this case, that the doves were in the enclosure, or under the immediate control of the owner, a new trial was granted.

Joy and others v. *Sears.*—On the 11th of August one Lovell made a bill of sale of one eighth part of a vessel at sea to the plaintiff, and delivery could not be made at that time in consequence of the absence. The vessel was on a coasting voyage, and was expected then next to arrive at Boston, but instead thereof arrived at Hyannis, where the other owners resided, and from whence to Nantucket, the plaintiff's residence, was a regular packet communication three times a week. The vessel remained at Hyannis seven days and then sailed for the Eastward, and possession under the bill of sale was not taken until forty two days after its date. The vessel returned on the 16th of September, was attached as Lovell's property on the 18th, and replevied in this action on the 23d. There was no evidence tending to shew that plaintiff had any knowledge of her being at Hyannis before he took possession, as she was not

expected to have arrived there. The defendant contended that plaintiff had not used due diligence in taking possession, and that they should have had an agent at Hyannis. The court were of opinion that the foregoing facts did not constitute any negligence on the part of plaintiffs, and that plaintiffs' title was good under their bill of sale against the attaching creditors.

JUDICIARY INTELLIGENCE.

TENNESSEE JUDICIARY.—In the House of Representatives of Tennessee, on the 14th Oct. a report was made by a special committee, appointed to inquire into the conduct of Nathaniel W. Williams, one of the Judges of the Circuit Courts of Law and Equity. They had examined a number of witnesses, and, from the testimony before them, reported that Judge W. had been guilty of high crimes and misdemeanors. The specifications in the report are nine, referring to the Judges having fraudulently and privily taken the acknowledgment of a deed by a married woman; having given conflicting decisions on points of law, as he was biassed by personal motives; allowing political considerations to sway his judgment; neglecting to hold courts, to the prejudice of suitors; and expressing intemperate opinions in a capital case, which might subsequently have been tried by himself. The Committee reported a resolution that seven managers should be appointed to prepare articles of impeachment, and conduct the same before the Senate, on the part of the House of Representatives. The consideration of the report was postponed to the 17th, and the report ordered to be printed. A reconsideration was moved on the 15th, the object of which was to make public all the testimony taken before the Committee. The motion, however, was lost.

LITERARY INTELLIGENCE.

AMERICAN JURIST.—No. IV. of this work for October last was received a day too late to be announced in our last No. Its contents are as follows:—I. Rights of Municipal Corporations; II. Conflict of Laws; III. Day's Connecticut Reports; IV. Question of Insurance; V. Literary property; VI. Obstructions to National Legislation; VII. Ordeals; VIII. Wendell's Reports; IX. Improvements on land; X. Chancery Jurisdiction; Digest of recent Decisions; Intelligence, &c.

CAROLINA LAW JOURNAL.—Proposals have been issued for the publication of a new Quarterly at Columbia, S. C. to be entitled the

Carolina Law Journal, and to be edited by Messrs. M'Cord and Blanding. The work is to be in octavo form, at five dollars per annum, payable on the delivery of the first number. The editors say, they "do not intend the work exclusively for Lawyers, but hope to furnish matter which will interest the intelligent reader of every profession and calling, who feels an interest in the great moral and political concerns of society."

Law of Partnership.—Our correspondent who has favored us with several articles unfolding the doctrines belonging to some of the principal divisions of the Law of Partnership, has been so much occupied with his professional avocations that he has not yet completed his disquisitions according to the plan he proposed. His next No. will relate to the *right of one partner to bind the firm by Deed;* and we are happy to say that he will be able to furnish us with it for the next number of our work.

DEATH OF JUDGE WASHINGTON.

We have to perform the melancholy duty of recording in this number of our work the death of MR. JUSTICE WASHINGTON of the Supreme Court of the United States. This venerable individual and enlightened and experienced Judge died at the Mansion House Hotel, in Philadelphia, on the 26th ult. in the 68th year of his age. The following brief sketch of his life and character which, it is clear, was written by one who knew him personally, and who justly appreciates his private virtues and the services he has rendered his country, we have copied from the Boston Daily Advertiser:—

The death of Mr. Justice Washington is an event, which cannot but cast a gloom upon all the real friends of our country. He was born on the 5th of June, 1762, and was of course now in the 68th year of his age. It is well known that he was the nephew, and we have a right to say the favorite nephew of President Washington. The latter bequeathed to him by his will his celebrated estate on the Potomac, Mount Vernon, which was the residence of this great Patriot during the most brilliant periods of his life, the delightful retreat of his old age, the scene of his dying hours, and the spot, where by his own order his ashes now repose in the same tomb with his ancestors. To him also President Washington gave all his valuable public and private papers, as a proof of his entire confidence and attachment, and made him the active executor of his will. Such marks of respect, from such a man,—the wonder of his own

age, and the model for all future ages,—would alone stamp a character of high merit, and solid distinction, upon any person. They would constitute a passport to public favor, and confer an enviable rank far beyond the records of the herald's office, or the fugitive honors of a title.

It is high praise to say, that Mr. Justice Washington well deserved such confidence and distinction. Nay more. His merits went far beyond them. He was as worthy an heir as ever claimed kindred with a worthy ancestor. He was bred to the law in his native State of Virginia, and arrived at such early eminence in his profession, that as long ago as 1798, he was selected by President Adams as a Justice of the Supreme Court upon the decease of the late Judge Wilson, of Penn. For thirty-one years he has held that important station with a constantly increasing reputation and usefulness. Few men, indeed, have possessed higher qualifications for the office, either natural or acquired. Few men have left deeper traces in their judicial career of every thing, which a conscientious Judge ought to propose for his ambition or his virtue, or his glory. His mind was solid, rather than brilliant: sagacious and searching, rather than quick or eager; slow, but not torpid; steady, but not unyielding; comprehensive, and at the same time cautious; patient in inquiry, forcible in conception; clear in reasoning. He was by original temperament, mild, conciliating, and candid; and yet was remarkable for an uncompromising firmness. Of him it may be truly said, that the fear of man never fell upon him; it never entered into his thoughts, much less was it seen in his actions. In him the love of justice was the ruling passion—it was the master spring of all his conduct. He made it a matter of conscience to discharge every duty with scrupulous fidelity, and scrupulous zeal. It mattered not, whether the duty were small or great, witnessed by the word, or performed in private, every where the same diligence, watchfulness, and pervading sense of justice were seen. There was about him a tenderness of giving offence, and yet a fearlessness of consequences in his official character, which I scarcely know now how to portray. It was a rare combination, which added much to the dignity of the bench, and made justice itself, even when most severe, soften into the moderation of mercy. It gained confidence, when it seemed least to seek it. It repressed arrogance by overawing or confounding it.

To say, that as a Judge he was wise, impartial, and honest, is but to attribute to him those qualifications, without which the honors of the bench are but the means of public disgrace, or contempt His honesty was a deep vital principle, not measured out by worldly rules. His impartiality was a virtue of his nature, disciplined and instructed by constant reflection upon the infirmity, and accountability of man. His wisdom was the wisdom of the Law, chastened and refined and invigorated by study, guided by experience, dwelling little on theory, but constantly enlarging itself by a close survey of principles.

He was a learned Judge. I do not mean by this, that every day learning, which may be gathered up by a hasty reading of books and cases. But that, which is the result of long continued, laborious services. and comprehensive studies. He read to learn, and not to quote, to digest and master, and not merely to display. He was not easily satisfied. If he was not as profound as some, he was more exact than most men. Put the value of his learning was, that it was the key-stone of all his judgments. He indulged not the rash desire to fashion the law to his own views; but to follow out its precepts with a sincere good faith and simplicity. Hence he possessed the happy faculty of yielding just the proper weight to authority, neither on the one hand surrendering himself blindfold to the dictates of other Judges, nor on the other hand overruling settled doctrines upon his own private notion of policy or justice.

In short, as a Magistrate, he was exemplary, and able, one whom all may reverence, and but few may hope to equal.

But after all, it is as a man, that those, who knew him best, will most love to contemplate him. There was a daily beauty in his life, which won every heart. He was benevolent, charitable, affectionate and liberal in the best sense of the terms. He was a Christian, full of religious sensibility, and religious humility. Attached to the Episcopal church by education and choice, he was one of its most sincere, but unostentatious friends. He was free from bigotry, as any man; and at the same time, that he claimed the right to think for himself, he admitted without reserve the same right in others. He was, therefore, indulgent even to what he deemed errors in doctrine, and abhorred all persecution for conscience sake. But what made religion most attractive in him, and gave it occasionally even a sublime expression, was its tranquil, cheerful, unobtrusive, meek and gentle character. There was a mingling of christian graces in him, which shewed that the habit of his thoughts was fashioned for another and a better world. Of his particular opinions on doctrinal points, it is not my intention to speak. Such as they were, though good men may differ, as to their correctness, all must agree, that they breathed the spirit of an inquisitive christian.

He was a real lover of the Constitution of the United States; one of those, who assisted in its adoption, and steadily and uniformly supported it through every change of its fortunes. He was a good old fashioned Federalist, of the school of the days of Washington. He never lost his confidence in the political principles, which he first embraced. He was always distinguished for moderation in the days of their prosperity, for fidelity to them in the days of their adversity

I have not said too much, then, in saying, that such a man is a public loss. We are not, indeed, called to mourn over him, as one, who is cut off prematurely in the vigor of manhood. He was ripe in honours. and in virtues.—But the departure of such a man severs so many ties, interrupts so many delights, withdraws so many confidences, and leaves such an aching void in the hearts of friends, and such a sense of desolation among associates, that while we bow to the decree of Providence, our griefs cannot but pour themselves out in sincere lamentations.

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The following resolutions were passed by the members of the Philadelphia Bar, at a meeting held on the day following the death of Judge Washington:—

The members of the Bar of Philadelphia having heard that the Hon. Bushrod Washington, a Justice of the Supreme Court of the United States, and the Judge of the Circuit Court of the United States for this District, died in this city yesterday afternoon—

Resolved, That this lamented occurrence leaves our country to deplore the loss of an able, experienced and faithful functionary, and ourselves deeply to regret a wise and instructive guide, a brilliant ornament to our professional ranks, and a beloved companion in social intercourse.

Resolved, That in order to evince our sense of this public and private calamity, and as a tribute of respect to the memory of a man long and universally cherished and admired, the members of the Bar of Philadelphia will wear mourning on the left arm for thirty days.

On motion of Mr. J. R. Ingersoll, it was ordered that a committee be appointed to express to the family of Judge Washington the affection of this Bar for his memory, and their deep regret for his loss, and that the same committee be authorised to take order in regard to such other measures as they may deem expedient to convey these sentiment to the public.

Hor. Binney, Secretary. R. RAWLE, Chairman.