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Supreme Court of Pennsylv'a
AT NISI PRIUS—IN EQUITY.

PHILADELPHIA LIBRARY COMPANY v. HENRY J. WILLIAMS, Executor and Trustee.

The testator bequeathed his estate in trust to select and purchase a lot of ground, and thereon to erect a building sufficiently large to accommodate and contain all the books of the Library Company of Philadelphia; and in further trust to convey said lot and building to the said company for the uses and purposes of their library, subject to the restrictions and conditions named in his will. By a codicil he authorized and allowed his execu or "under a broad and thoughtful foresight, to increase the size of the lot, and *select any situation he may deem most expedient*, without regard to any provision of my will or codicils." In the lifetime of the testator, and after said codicil had been made, the executor promised him that he would erect the building upon a lot of ground at Broad and Christian streets, Philadelphia, which had been previously purchased by the testator. Upon a bill filed to restrain the exec tor from proceeding to erect said bu lding upon the lot at Broad and Christian, upon the ground, principally, that his promise to the testator had influenced his judgment and prevented the exe cise of the sound discretion required in the selection of said lot, the court referred the matter to a master to report the law, the facts and a decree proper to be made therein. Upon exceptions to his report, *the court held*:

1. The purchase of the lot by the testator, after the execution of his will, with the express object of having the library building located thereon, was not an ademption *pro tanto* of the bequest, and the executor must rely upon the will alone as it stands, for his authority to act in the matter.
2. The executor being authorized by the will to select any lot which commended itself to his own free, unbiassed judgment as most suitable, if he acted in good faith and if no improper influences were acting upon his mind and warping his judgment, equity will not interfere with the exercise of that discretion.
3. The facts, in the opinion of the court, showing that his judgment was biassed by the promise given to the testator in his lifetime, the court will interfere to prevent the selection of a lot by the executor, contrary to the "broad and thoughtful foresight" required of him by said will.

Exceptions to report of master dismissed.

Opinion by MERCUR, J. Delivered December 31st, 1872.

This case comes before me upon exceptions to the report of a master. He was directed to report the law, the facts, and a decree proper to be made therein. Twenty-two exceptions have been filed to his report. The very able arguments of counsel, however, have not been directed to each exception separately, but rather to the discussion of two questions, which may be stated to be covered by these, to wit:

First. What powers were vested in the defendant under the trust created by the will of Dr. James Rush in regard to the location and purpose of the library building?

Secondly. Has he properly executed those powers in selecting the lot at Broad and Christian streets as the site for said library building?

The first question can be more satisfactorily answered by referring at some length to different portions of the will.

The testator, by his will of the 26th of February, 1860, devised and bequeathed the whole of his real and personal estate to his brother-in-law, Henry J. Williams, his heirs and assigns, in trust, to pay certain legacies, annuities, gifts, and bequests, to be thereafter expressed in codicils, and then to hold the residue and remainder of his estate "in trust, to select and purchase a lot of ground, not less than one hundred and fifty feet square, situate between Fourth and Fifteenth and Spruce and Race streets, in the City of Philadelphia, and thereon to erect a fireproof building, sufficiently large to accommodate and contain all the books of the Library Company of Philadelphia." And upon the further trust, "so soon as this building is completed and ready for occupation, then in trust to convey the same, with the lot of ground whereon it is erected, unto 'The Library Company of Philadelphia' aforesaid, and their successors, for the uses and purposes of their library, and for no other use or purpose whatever." Providing, however, before such conveyance should be made to the said Library Company, they should, either by an alteration in their charter or in some other way satisfactory to his executor, bind themselves and their successors to conform to, and comply with, certain express conditions therein specified. One of the conditions was "that all the accounts of the receipts and expenditures from the estates aforesaid, real and personal, shall be kept separate and distinct from all other accounts of the said Library Company, and shall all be headed and kept as the accounts of 'The Ridgway Branch of the Library Company of Philadelphia.'"

He also appointed said Williams executor of said will.

By a "first codicil" thereto, dated the 16th of May, 1866, he imposed additional restrictions upon said Library Company, and designated the beneficiaries of the legacies, annuities and gifts indicated in his original will.

In his "additional codicil" of the 18th of April, 1867, he says, "I authorize and allow my executor, under a broad and thoughtful foresight, to increase the size of the lot and select any situation he may deem most expedient, without regard to any provision of my will or codicils."

On the 18th of January, 1869, Doctor Rush purchased by contract a lot at Broad and Christian streets, in the City of Philadelphia for the avowed purpose of having the library building erected thereon, and made a payment of $1,000 upon the contract. He held this lot subject to the payment of the residue of the purchase money at the time of his death. That occurred upon the 26th of May, 1869. The defendant has selected this lot as the site for the library building. Had he the power in equity so to do? He says he had; that the will left it to his sole judgment and discretion, and not to the judgment and discretion of anybody else; and in the exercise of that judgment and discretion he has made the selection. Superadded to the power given him in the will he points to the purchase of this identical lot by the testator, after the execution of his will, with the express object of having the library building located thereon, and claims that was an ademption *pro tanto*.

I, however, am of the opinion that the doctrine of ademption or double portion cannot be applied to the facts in this case. The defendant must fall back upon the will, and rely upon that alone, for his authority. By that instrument he was authorized to select any lot which commended itself to his own free, unbiassed judgment as most suitable. If no improper influences were operating upon his mind and warping his judgment in the exercise of his discretion, and he acted in good faith, a court of equity will not interfere with that discretion. Hill on Trustees, 488; Goehenauer v. Froelich, 8 Watts, 19; Chew v. Chew, 4 Casey, 17; Pulpress et al. v. Af. M. E. Church, 12 Wright, 204. But discretionary powers like other authorities must be exercised in the manner prescribed by the trust instrument. Hill on Trustees. 488.

To the defendant was given by this instrument, the power to select any lot which, "under a broad and thoughtful foresight" commended itself to his judgment. The selection must be made under and by the exercise of the defendant's judgment, entirely free from any obligations imposed upon it by the testator other than those contained in the will and codicils. Such a discretion the defendant must bring to the discharge of his trust, and then it only marks the limits of the power given to him. The exercise of such a discretion the claimants have a right to demand. They can require no more, and may not submit to any less.

Secondly. Did the defendant properly use his own discretion, and execute the power intrusted to him in the selection of the lot in question? The complainants aver that this site will be prejudicial to the interests of the library, utterly destructive of the trusts which they have hitherto administered, and which they claim it was the manifest design of the testator to promote. They further allege that the defendant assumed the trust under such a trammelled and crippled discretion, that he was thereby disabled from using his natural, unbiassed judgment in the selection of the lot. The master concurred in this, and in his very able report has found "that the trustee, by his promise to the testator, had so crippled his discretion as to make it impossible to say how much his preference for the lot in question is due to his unbiassed opinion that it is most expedient for the purpose, and how much to his promise to Dr. Rush," and that the action of the defendant should be subject to the control of the court.

This presents the controlling question in the case. Do the facts and the law justify the master in his conclusions?

The evidence shows that some weeks before the death of the testator he became very anxious to have the location of the intended library building fixed and settled; and he desired the defendant to ascertain the size and cost of all the vacant lots on Broad street (upon which street he desired it to be placed). The defendant procured statements of the sizes and prices of all he thought suitable, from Vine to South street; but Doctor Rush was not satisfied with any of them. Some other gentlemen brought him a plan of the lot on Christian street, and he was so much pleased with it that he directed the defendant to buy it at once. The defendant did so, by the aforesaid contract of May 18th, 1869. The Doctor thereupon expressed great pleasure that it was concluded, as it relieved his mind from all anxiety. "Some days after," says the defendant (in his letter of the 30th December, 1870, to Doctor Charles Willing, chairman of a committee appointed by the complainants), "the Doctor recurred again to this subject, as it had probably occurred to him that he had given me an absolute discretion as to the situation of the library by the terms of his will, and that I might be induced to overrule his decision after he was gone. He called me to his bedside and asked me to give him a promise that I would build the library on that lot, and nowhere else. I gave him this promise as fully and solemnly as language could express it, and he then thanked me, and said he could now die in peace."

In his testimony taken before the examiner on the 17th of April, 1872, he says:—"I think it was about the second day after the interview with Mr. Wharton (which he had just stated was on the 20th or 21st of May, 1869), when I was seated by Doctor Rush's bedside. I think the lot had been the subject of conversation between us, when the Doctor turned to me and said, 'Harry, now you will promise me to put the building upon that lot?' I said, 'Certainly, Doctor, if you desire it; I will promise you that I will put it there, and nowhere else.' The Doctor merely expressed his satisfaction. I think he said, as near as I can recollect, 'Well, I am very glad of it; it is now all settled.'"

The Doctor died within five or six days thereafter. This promise, then, was de-

manded and given a very few days prior to his death. It was two years after the last codicil to his will had been executed. It was demanded of a brother-in-law to whom he was about to intrust more than a million of dollars—I say about to intrust, for there was yet time for him to revoke the will and all of its trusts. He was unwilling to pass all his vast estate into the hands of the defendant upon the implied assurance that the library building would be located upon the lot which he had purchased for its site. Hence he made the specific demand. What his action would have been, had the defendant's answer not been in accord with his judgment, is left to conjecture. He suffered his will to remain unchanged. He passed from this earth, there is every reason to believe, in an abiding faith that he had restrained the free choice of the defendant, and that he had secured the erection of the library building upon the lot designated by himself.

What was the position of the defendant? He knew that he had been named in the testator's will as his trustee and executor. Sitting by the bedside of his dying friend and brother—recognizing the Doctor's right to control his own property—wishing to relieve his mind from all doubt upon the subject that troubled him, the defendant then and there promised, as fully and as solemnly as language could express it, to put the building on that lot and nowhere else. Do not all the attendant and surrounding circumstances impress the mind of every conscientious and reflecting person with the very strong moral obligation thereby imposed upon the defendant? I can scarcely conceive one stronger. The greater the integrity, the higher the moral sense, the stronger would be the obligation upon the conscience. That the defendant possesses both in a high degree is manifest in his letter of the 30th December before referred to. When asked, in behalf of the claimants, to reconsider his intention of building on said lot, and locate the building elsewhere, his answer was such as did credit alike to his conscience and to his heart. After repeating the promise which he had made, and the circumstances under which it was made, he says:—"Now, do you think it would be at all consistent with truth and honesty for me voluntarily to violate a pledge given under circumstances which render it as sacred as an oath, and made to a dying man who had confided to me the whole of his estate? Would you, with your well-known delicacy and sensibility to all honorable engagements, feel yourself justified in doing so were the case your own, and should I not lose your respect and regard (which I value very highly) were I to hesitate for a moment as to what was my duty?"

Therein and thereby he proves the indelible stamp made upon his mind. Conscience, resting under an obligation strong as an oath, bound him to the observance of his promise. With that deep recognition of moral obligation resting upon his conscience, he assumed the duties of the trust. He thinks he executed the power and discharged the trust under the written will alone, wholly uninfluenced by his promise.

The well known integrity and high moral character of the defendant do not permit me to doubt that he honestly thinks so. If, however, he be correct, there must have been a time when his conscience was absolved from this deep moral obligation—a time when he threw it off, and when the lawful one took exclusive possession of his judgment. I understand the answer to be that it was at the time he was obligated to take the usual oath in order to assume the duties of executor. This was on the 31st of May, 1869. This latter oath, he says, created a legal as well as a moral obligation. Did it, however, wholly eradicate the moral obligation, "sacred as an oath," under which he had rested up to that time? In his letter of 30th December, 1870, he refers to it as still resting strongly upon him, and that his duty required him to be influenced thereby.

It is contended, however, inasmuch as the defendant has sworn in his answer, and again before the examiner, that he has considered and decided the question as to the site of the library building entirely irrespective of and uninfluenced by any promise made by him to Dr. Rush, that the complainants have failed to make a case in which a court of equity will interfere with the discretion which he has exercised.

In considering the act which the defendant has committed, or is about to commit, we must look at the position of the donor, the donee, and of the beneficiaries of the power. The beneficiaries have the right to require the power to be executed according to the terms of the written instrument creating it. If the donor induced the donee to accept the trust under a pledge that he would execute it otherwise than was provided in the instrument, he committed, in equity, a fraud upon the power. If the donee accepted it under such pledge and so executed it, he committed a fraud upon the power. It is not necessarily a moral fraud. A wilful departure from the terms of the power is a fraud upon it, without regard to whether the motive thereto was good or bad. Topham v. the Duke of Portland, 1 De Gex. Jones & Smith, 571. Nor does it change the rule of law in regard to the agreement to pervert the trust from the original purpose for which the power was intended, whether that influence be exerted before the appointment or after it, provided that in both cases it secures the consent of the appointee to fulfil the wishes of the appointer. Topham v. Portland, 31 Beavan's Reports, 539-540.

No American authority has been found which covers the case under consideration, but in Topham v. The Duke of Portland, reported in 5 Chan. Appeal Cases, 40, it is held that although the donor and the donee both swore that the power was not executed to carry out any agreement between them, other than those specified in the written instrument, yet that a chancellor might look beyond the oaths and see whether the presence of a moral obligation did not at the date of the appointment, and when the trustee came to act, weigh upon her mind with such force as to make her a passive instrument of the donor's intentions.

A judge or juror is forbidden to sit in a case wherein a party litigant is closely related to him by blood or marriage. He will not be permitted to purge himself of his disqualification by answering that he can, and will, act wholly uninfluenced by such relationship.

Certain facts, which the wisdom of ages has recognized as influencing the judgment of mankind generally, create a conclusion of law that they will influence the judgment of each individual.

Applying the law and reasons to this case, testing the uncontradicted evidence by all those principles which I have ever been taught to believe influence the human mind, and control the actions of men, it does establish such a state of facts as would naturally and reasonably restrain and trammel the free judgment of the donee of a power. Such a general presumption cannot be removed by the honest opinion of a donee that in his particular case he is not influenced thereby. Hence I am unable to conclude that the defendant had, when he made the selection of the lot in question, or has now, such a free discretion and unbiassed judgment as the complainants are entitled to invoke and a court of equity bound to provide. It should therefore be referred to a master to inquire and report what will be the most expedient location for said library building, without my indicating any opinion as to whether or not the lot at Broad and Christian streets is a suitable one.

The exceptions to the report are dismissed, the report of the master is confirmed, and decree accordingly.

Supreme Court of Pennsylv'a at Nisi Prius.

BIRKINBINE v. BOYER.

The defendant, an attorney at law, came to Philadelphia to advise with his associate counsel in a case, and whilst there was served with a summons. *Held*, that the facts did not show such an active pendency of the case requiring the professional services of the defendant at that time, as to permit him to claim his privilege from the service of the summons.

Rule to show cause why the service of the writ shall not be set aside.

Opinion of the court by MERCUR, J. Delivered December 31st, 1872.

The defendant, an attorney at law, residing at Lebanon, in this State, was served with a writ of summons while in this city. He claims that he was privileged from the service, and asks that it be set aside.

Was he here attending upon court as an attorney, at the time?

The depositions read show that in 1868 a bill was filed in the Circuit Court of the United States for the third district, in favor of Wallace & Sons, by Furman Sheppard and George M. Wharton, Esqs., attorneys at law, residing in Philadelphia, and William M. Derr, an attorney at law, residing at Lebanon, against Bubb, for an alleged infringement of a patent right for a plough, and for an account. No answer was put in, and a decree *pro confesso* was taken.

Testimony was taken by complainant and injunction issued. This being disregarded, an attachment was ordered.

Subsequently, and some time in 1869 or 1870, by agreement of counsel, the injunction and attachment were vacated.

Thus the case rested so far as is shown down to the present time.

In the spring or summer of 1872, the defendant was employed by Wallace & Sons, under an agreement that he should have a certain interest in the plough, as a contingent fee for his professional services "in the matter."

Upon the 19th November, 1872, the defendant and Mr. Derr came to this city for the purpose of advising with Mr. Sheppard, and taking some action in the case in behalf of Wallace and Sons. The defendant testifies: "Our object in going to Philadelphia, was to see our associate counsel, Messrs. Sheppard and Dallas, for the purpose of making a motion to have the injunction again granted upon the testimony before the court." He further says: "If action had been taken, I suppose I would have taken an advisary part in the matter."

Mr. Dallas was out of the city. Upon the defendant and Mr. Derr going to the office of Mr. Sheppard, on the morning of the 20th of November, they ascertained he was engaged in the trial of a cause, so they were then unable to see him, and could have no opportunity so to do, until the next morning. Mr. Derr returned home; the defendant remained in the city. The next morning defendant called again to see Mr. Sheppard, and found he had already left his office; but that he could be seen between twelve and one o'clock that day. The defendant then returned to his hotel with the intention of there remaining until the time arrived for meeting Mr. Sheppard. Upon reaching the hotel, the defendant was served with the writ.

The defendant came to this city without knowing whether the Circuit Court was in session. It was not. The business, however, he says, could have been done in the District Court, which was in session.

No action was taken. The defendant had never taken any part in anything which had been done in court in the case. No reason existed why action should be taken at that particular time. The case had rested for two or three years. The defendant therein was not moving. The "advisary part" which the defendant expected to take, would not necessarily require him to go into court. He was here rather to counsel and advise with the attorneys of record as to what they, not he, should do in court. It might have resulted in no action. It is true the case was pending in court, but it was not such a pendency as necessarily required any action in court at that particular time.

We do not think the facts show such an active pendency of the case requiring the professional services of the defendant at that time, as to put him in a position to claim his privilege from the service of a summons.

Rule discharged.

F. C. Brewster, Esq., for rule.

Theo. McFadden, Esq, contra.

[From 13 Wallace in advance of publication.]

Supreme Court United States.

PHŒNIX INS. CO. v. HAMILTON.

1. Insurance may be effected in the name of a nominal partnership where the business is carried on by and for the use of one of the partners; especially when the property insured (grain) is held by the parties insured on commission only, and in the policy is described "as held by them in trust or on commission, or sold and not delivered."
2. In case of an insurance thus effected, where no representations are made with regard to the persons who compose the firm, there is no misrepresentation on that subject which avoids the policy.
3. And where the firm has no actual care of custody of the property insured (grain), but so far as regards its preservation from fire, it is entirely in the control of the other parties, and is so understood to be by the company making the insurance, the omission to inform the insurance company of an agreement of dissolution previously made cannot be considered a concealment which will avoid the policy.

Error to the Circuit Court for the Northern District of Ohio; the case being thus:

Hamilton and Cook were partners in the grain commission business, at Toledo, Ohio, and kept their consignments of grain in store in an elevator at that place, belonging to the Michigan Southern Railroad Company, whose servants had the entire charge and care of it. Hamilton retired from the firm in July, 1867, but no notice of the dissolution was given, and by common agreement Cook was allowed to carry on the business in the partnership name until the end of the year. During this term, insurance to the amount of $10,000 was effected with the Phœnix Insurance Company of Brooklyn, through their agent, in the name of the firm, Hamilton & Cook, against loss or damage by fire on the "grain in store, their own, or held by them

in trust or on commission, or sold and not delivered," this being the usual method of taking insurance among commission merchants in Toledo. A loss occurred on the 21st of December, whilst the policy was running, and the insurance company declining to pay it, Hamilton & Cook sued them. The defence set up was:

1st. Want of insurable interest in Hamilton; and,

2d. Misrepresentation and concealment with regard to the interest.

The plaintiffs, on the trial, waived any claim for grain belonging to themselves individually, and asked a verdict but for the value of the grain which was received on commission; asking to recover this amount for the use and benefit of the owners.

At the request of the plaintiffs' counsel, the court charged that if no representations were made with regard to the individuals who composed the firm of Hamilton & Cook, there was no misrepresentation which could avoid the policy; and that if Hamilton & Cook had no actual care or custody of the grain, but that so far as regarded its preservation from fire, it was entirely in the control of the railroad company, and so understood by the company's agent when the policy was effected, the omission to inform the defendant of the agreement of dissolution could not be considered a concealment which would avoid the policy. Verdict and judgment went accordingly for the plaintiffs, and the case now came here on exceptions to the charge of the court.

Mr. *A. C. Bradley*, for the insurance company, plaintiff in error.

1. Cook, alone, at the date of the policy and of the fire, *held* the grain in question in trust or on commission. He alone was the bailee, and alone had an insurable interest. Hamilton had no custody, was no bailee, and had no insurable interest. No action, therefore, can be maintained; not a joint action, because the interest was sole, nor a sole action, because the policy was joint.

It is true, indeed, that a nominal partner is sometimes regarded as a real one. But he is only so regarded adversely and to subject him to the obligations of a partner. And this is but right. When a partner retires from a firm, still keeping his name before the public, he can mean nothing but to give to the firm a credit which it does not deserve. Here, Hamilton, whose name doubtless made the firm attractive, withdraws; leaving his name in order that business might be drawn to Cook. This was a deception. Such an act may subject a person to the liabilities of a partner, but surely should not give him a partner's benefits and advantages.

2. The policy was void for fraud. Hamilton and Cook *had* been partners under their joint names, and the firm name continued to be used by each of them, from the time of the dissolution till the time of insurance and afterwards. Every such use of that name was a representation that both persons still composed that firm. Such representation was untrue and of a material matter. Had Cook been alone held out to the world, less insurance would have been needed. It was obviously Hamilton's name which made the firm attractive and brought business to it. Indeed, but for the *prestige* which Hamilton's name gave the firm, it does not appear that Cook would have had any business or needed any insurance. Then, again, if Hamilton, in addition to the name, had felt the care and exercised the natural vigilance of a partner, he might have prevented the destruction of the building. At all events, every untruth uttered with an intent to deceive others for the benefit of the party uttering it, or the benefit of his friends, is a fraud on all parties deceived. Here the company's agent issued the policy, believing both Hamilton and Cook to be partners. They so represented themselves; herein committing a fraud on the company. That fraud vitiates the policy.

Mr. *R. Phillips* (a brief of Messrs. Waites, Aissell, and Gorill being filed), contra.

Mr. Justice BRADLEY, delivered the opinion of the court.

The principal question is whether insurances can be effected in the name of a nominal partnership where the business is carried on by and for the use of one of the partners.

Hamilton was a nominal partner, held out to the world as a member of the firm by his own consent, and affected with every liability of a partner—to consignors, creditors, and all persons dealing with the concern. The plaintiffs contended that this was a sufficient interest to support the policy, at least, in a commission business where insurance was effected for the benefit of the real owners of the goods. It is objected that a nominal partner is only held such, adversely, for the purpose of subjecting him to liability as a partner, and not for the purpose of giving him the benefits and advantages of a partner. But whilst this is generally true, the interest of a nominal partner in the liabilities of the firm is such as should entitle him, in the absence of any attempt to defraud, to join with the other members of the firm in effecting insurance on the property of the concern. As Chief Justice Jones remarked in De Forest v. Fulton Insurance Co., 1 Hall, 110: "It does not always require either the legal title or beneficial interest in the property to entitle a party otherwise connected with it to effect a valid insurance upon it. A carrier may insure goods he contracts to convey, yet he has neither the legal title nor the beneficial interest in them, but he is responsible for their loss."

But the case of a nominal partnership carried on for the benefit of one or more members of the firm seems to be still stronger. For it may be said that the legal interest in the business is in the firm, whilst the beneficial interest is in the member or members for whose use it is carried on. In the case before us, as to all the world except themselves, the legal interest of the business was in the firm of Hamilton & Cook, the beneficial interest in Cook alone. And as it is well settled that a trustee or agent may insure the property held in that capacity for the benefit of all concerned, there seems to be no valid reason why persons constituting a nominal partnership should not be competent to effect insurance as well as transact the other business in the partnership name. In this case the intimate connection of Hamilton with the business, and the fact that as between him and the consignors of the grain insured, the railroad company with whom it was stored, and all other persons dealing with it, he was actually a partner, and incurred all the responsibility and risk attaching to that relation, constituted, in our judgment, a sufficient basis of interest for effecting insurance in the name of the firm. The doctrine, established by a number of cases, that nominal partners are proper plaintiffs, as well as proper defendants, in actions by and against the firm, lends support to this view.

See Parsons on Partnership, 134; Story on Partnership, §§ 241, 242; 1 Smith's Leading Cases, 1190.

The case before us is an especially strong one, from the fact that the policy was effected mainly for the benefit of the owners of grain held by Hamilton & Cook on commission. The action was prosecuted solely for their benefit. The plaintiffs, on the trial, expressly waived any claim for grain belonging to themselves, individually, and asked a verdict only for the value of the grain which was received on commission, claiming to recover this amount for the use and benefit of the owners. The liberality with which policies of this character, issued to trustees and agents for the benefit of parties really interested, are sustained by the courts, is stated and illustrated in the case of The Insurance Company v. Chase, 5 Wallace, 509, decided by this court in December Term, 1866. As looking in the same direction, we may refer to the cases in New York which decide that a sale by a retiring partner to his copartners of his interest in the firm, is not a breach of the condition that the policy shall be void if the property is conveyed without the consent of the insurance company. See Hoffman v. Ætna Insurance Company, 32 New York, 405, and cases there reviewed.

The other ground of defence was, that there was misrepresentation and concealment, as to the interest, which vitiated the policy. It is laid down by this court in The Columbian Ins. Co. v. Lawrence, 2 Peters, 49, that an applicant for insurance is bound to fair dealing with the underwriters, and, in his representations, should omit nothing which it is material for them to know; nothing which would probably influence the mind of the underwriter in forming or declining the contract. This doctrine is repeated in several subsequent cases, and is undoubtedly the well established law. But its application will depend upon the circumstances of each case. Generally speaking it is undoubtedly true that any misrepresentation with regard to the ownership of the property insured will suffice to vitiate the policy. But policies are constantly applied for and granted on general stocks of goods, held in trust or on consignment for numerous and unknown parties. In such cases it is not expected, nor would it be possible, that the insurers should be informed as to the ownership. They are content to insure for the benefit of whom it may concern. Of course, an omission to disclose the ownership in such cases cannot be regarded as an improper concealment. In some cases it is important to the insurers to know who is interested in the property, in order that they may form a judgment as to the probable care which will be bestowed in its custody and preservation. In other cases this knowledge may be a matter of little importance. In the case before us the grain insured was in the sole custody and care of the railroad company, and the insurers were little concerned, as, in fact, their agent made no inquiry, who were the owners or interested therein; and no representation was made on the subject, farther than to make the application in the name of Hamilton & Cook, and to ask for a general insurance on the grain in the elevator, whether their own, or held by them in trust, or on commission, &c. Under the circumstances of the case we do not see that anything material for the insurers to know, or that would have had a bearing on taking the risk or fixing the premium, was concealed or withheld. On this subject the court, at the request of the plaintiffs' counsel, charged the jury that if no representations were made with regard to the individuals who composed the firm of Hamilton & Cook, there was no misrepresentation which could avoid the policy, and that if Hamilton & Cook had no actual care or custody of the grain, but that so far as regards its preservation from fire, it was entirely in the control of the railroad company, and so understood by the defendant's agent when the policy was effected, the omission to notify the defendant of the agreement of dissolution could not be considered a concealment which would avoid the policy. Under the circumstances of the case, we do not think there was any error in this charge.

Judgment affirmed.

Mr. Justice Clifford dissented.

manded and given a very few days prior to his death. It was two years after the last codicil to his will had been executed. It was demanded of a brother-in-law to whom he was about to intrust more than a million of dollars—I say about to intrust, for there was yet time for him to revoke the will, and all of its trusts. He was unwilling to pass all his vast estate into the hands of the defendant upon the implied assurance that the library building would be located upon the lot which he had purchased for its site. Hence he made the specific demand. What his action would have been, had the defendant's answer not been in accord with his judgment, is left to conjecture. He suffered his will to remain unchanged. He passed from this earth, there is every reason to believe, in an abiding faith that he had restrained the free choice of the defendant, and that he had secured the erection of the library building upon the lot designated by himself.

What was the position of the defendant? He knew that he had been named in the testator's will as his trustee and executor. Sitting by the bedside of his dying friend and brother—recognizing the Doctor's right to control his own property—wishing to relieve his mind from all doubt upon the subject that troubled him, the defendant then and there promised, as fully and as solemnly as language could express it, to put the building on that lot and nowhere else. Do not all the attendant and surrounding circumstances impress the mind of every conscientious and reflecting person with the very strong moral obligation thereby imposed upon the defendant? I can scarcely conceive one stronger. The greater the integrity, the higher the moral sense, the stronger would be the obligation upon the conscience. That the defendant possesses both in a high degree is manifest in his letter of the 30th December before referred to. When asked, in behalf of the claimants, to reconsider his intention of building on said lot, and locate the building elsewhere, his answer was such as did credit alike to his conscience and to his heart. After repeating the promise which he had made, and the circumstances under which it was made, he says:—"Now, do you think it would be at all consistent with truth and honesty for me voluntarily to violate a pledge given under circumstances which render it as sacred as an oath, and made to a dying man who had confided to me the whole of his estate? Would you, with your well-known delicacy and sensibility to all honorable engagements, feel yourself justified in doing so were the case your own, and should I not lose your respect and regard (which I value very highly) were I to hesitate for a moment as to what was my duty?"

Therein and thereby he proves the indelible stamp made upon his mind. Conscience, resting under an obligation strong as an oath, bound him to the observance of his promise. With that deep recognition of moral obligation resting upon his conscience, he assumed the duties of the trust. He thinks he executed the power and discharged the trust under the written will alone, wholly uninfluenced by his promise.

The well known integrity and high moral character of the defendant do not permit me to doubt that he honestly thinks so. If, however, he be correct, there must have been a time when his conscience was absolved from this deep moral obligation—a time when he threw it off, and when the lawful one took exclusive possession of his judgment. I understand the answer to be that it was at the time he was obligated to take the usual oath in order to assume the duties of executor. This was on the 31st of May, 1869. This latter oath, he says, created a legal as well as a moral obligation. Did it, however, wholly eradicate the moral obligation, "sacred as an oath," under which he had rested up to that time? In his letter of 30th December, 1870, he refers to it as still resting strongly upon him, and that his duty required him to be influenced thereby.

It is contended, however, inasmuch as the defendant has sworn in his answer, and again before the examiner, that he has considered and decided the question as to the site of the library building entirely irrespective of and uninfluenced by any promise made by him to Dr. Rush, that the complainants have failed to make a case in which a court of equity will interfere with the discretion which he has exercised.

In considering the act which the defendant has committed, or is about to commit, we must look at the position of the donor, the donee, and of the beneficiaries of the power. The beneficiaries have the right to require the power to be executed according to the terms of the written instrument creating it. If the donor induced the donee to accept the trust under a pledge that he would execute it otherwise than was provided in the instrument, he committed, in equity, a fraud upon the power. If the donee accepted it under such pledge and so executed it, he committed a fraud upon the power. It is not necessarily a moral fraud. A wilful departure from the terms of the power is a fraud upon it, without regard to whether the motive thereto was good or bad. Topham v. the Duke of Portland, 1 De Gex. Jones & Smith, 571. Nor does it change the rule of law in regard to the agreement to pervert the trust from the original purpose for which the power was intended, whether that influence be exerted before the appointment or after it, provided that in both cases it secures the consent of the appointee to fulfil the wishes of the appointer. Topham v. Portland, 31 Beavan's Reports, 539–540.

No American authority has been found which covers the case under consideration, but in Topham v. The Duke of Portland, reported in 5 Chan. Appeal Cases, 40, it is held that although the donor and the donee both swore that the power was not executed to carry out any agreement between them, other than those specified in the written instrument, yet that a chancellor might look beyond the oaths and see whether the presence of a moral obligation did not at the date of the appointment, and when the trustee came to act, weigh upon her mind with such force as to make her a passive instrument of the donor's intentions.

A judge or juror is forbidden to sit in a case wherein a party litigant is closely related to him by blood or marriage. He will not be permitted to purge himself of his disqualification by answering that he can, and will, act wholly uninfluenced by such relationship.

Certain facts, which the wisdom of ages has recognized as influencing the judgment of mankind generally, create a conclusion of law that they will influence the judgment of each individual.

Applying the law and reasons to this case, testing the uncontradicted evidence by all those principles which I have ever been taught to believe influence the human mind, and control the actions of men, it does establish such a state of facts as would naturally and reasonably restrain and trammel the free judgment of the donee of a power. Such a general presumption cannot be removed by the honest opinion of a donee that in his particular case he is not influenced thereby. Hence I am unable to conclude that the defendant had, when he made the selection of the lot in question, or has now, such a free discretion and unbiassed judgment as the complainants are entitled to invoke and a court of equity bound to provide. It should therefore be referred to a master to inquire and report what will be the most expedient location for said library building, without my indicating any opinion as to whether or not the lot at Broad and Christian streets is a suitable one.

The exceptions to the report are dismissed, the report of the master is confirmed, and decree accordingly.

Supreme Court of Pennsylv'a at Nisi Prius.

BIRKINBINE v. BOYER.

The defendant, an attorney at law, came to Philadelphia to advise with his associate counsel in a case, and whilst there was served with a summons. *Held*, that the facts did not show such an active pendency of the case requiring the professional services of the defendant at that time, as to permit him to claim his privilege from the service of the summons.

Rule to show cause why the service of the writ shall not be set aside.

Opinion of the court by MERCUR, J. Delivered December 31st, 1872.

The defendant, an attorney at law, residing at Lebanon, in this State, was served with a writ of summons while in this city. He claims that he was privileged from the service, and asks that it be set aside.

Was he here attending upon court as an attorney, at the time?

The depositions read show that in 1868 a bill was filed in the Circuit Court of the United States for the third district, in favor of Wallace & Sons, by Furman Sheppard and George M. Wharton, Esqs., attorneys at law, residing in Philadelphia, and William M. Derr, an attorney at law, residing at Lebanon, against Bubb, for an alleged infringement of a patent right for a plough, and for an account. No answer was put in, and a decree *pro confesso* was taken.

Testimony was taken by complainant and injunction issued. This being disregarded, an attachment was ordered.

Subsequently, and some time in 1869 or 1870, by agreement of counsel, the injunction and attachment were vacated.

Thus the case rested so far as is shown down to the present time.

In the spring or summer of 1872, the defendant was employed by Wallace & Sons, under an agreement that he should have a certain interest in the plough, as a contingent fee for his professional services "in the matter."

Upon the 19th November, 1872, the defendant and Mr. Derr came to this city for the purpose of advising with Mr. Sheppard, and taking some action in the case in behalf of Wallace and Sons. The defendant testifies: "Our object in going to Philadelphia, was to see our associate counsel, Messrs. Sheppard and Dallas, for the purpose of making a motion to have the injunction again granted upon the testimony before the court." He further says: "If action had been taken, I suppose I would have taken an advisary part in the matter."

Mr. Dallas was out of the city. Upon the defendant and Mr. Derr going to the office of Mr. Sheppard, on the morning of the 20th of November, they ascertained he was engaged in the trial of a cause, so they were then unable to see him, and could have no opportunity so to do, until the next morning. Mr. Derr returned home; the defendant remained in the city. The next morning defendant called again to see Mr. Sheppard, and found he had already left his office; but that he could be seen between twelve and one o'clock that day. The defendant then returned to his hotel with the intention of there remaining until the time arrived for meeting Mr. Sheppard. Upon reaching the hotel, the defendant was served with the writ.

The defendant came to this city without knowing whether the Circuit Court was in session. It was not. The business, however, he says, could have been done in the District Court, which was in session.

No action was taken. The defendant had never taken any part in anything which had been done in court in the case. No reason existed why action should be taken at that particular time. The case had rested for two or three years. The defendant therein was not moving. The "advisary part" which the defendant expected to take, would not necessarily require him to go into court. He was here rather to counsel and advise with the attorneys of record as to what they, not he, should do in court. It might have resulted in no action. It is true the case was pending in court, but it was not such a pendency as necessarily required any action in court at that particular time.

We do not think the facts show such an active pendency of the case requiring the professional services of the defendant at that time, as to put him in a position to claim his privilege from the service of a summons.

Rule discharged.

F. C. Brewster, Esq., for rule.

Theo. McFadden, Esq, contra.

[From 13 Wallace in advance of publication.]

Supreme Court United States.

PHŒNIX INS. CO. v. HAMILTON.

1. Insurance may be effected in the name of a nominal partnership where the business is carried on by and for the use of one of the partners; especially when the property insured (grain) is held by the parties insured on commission only, and in the policy is described "as held by them in trust or on commission, or sold and not delivered."
2. In case of an insurance thus effected, where no representations are made with regard to the persons who compose the firm, there is no misrepresentation on that subject which avoids the policy.
3. And where the firm has no actual care of custody of the property insured (grain), but so far as regards its preservation from fire, it is entirely in the control of the other parties, and is so understood to be by the company making the insurance, the omission to inform the insurance company of an agreement of dissolution previously made cannot be considered a concealment which will avoid the policy.

Error to the Circuit Court for the Northern District of Ohio; the case being thus:

Hamilton and Cook were partners in the grain commission business, at Toledo, Ohio, and kept their consignments of grain in store in an elevator at that place, belonging to the Michigan Southern Railroad Company, whose servants had the entire charge and care of it. Hamilton retired from the firm in July, 1867, but no notice of the dissolution was given, and by common agreement Cook was allowed to carry on the business in the partnership name until the end of the year. During this term, insurance to the amount of $10,000 was effected with the Phœnix Insurance Company of Brooklyn, through their agent, in the name of the firm, Hamilton & Cook, against loss or damage by fire on the "grain in store, their own, or held by them

in trust or on commission, or sold and not delivered," this being the usual method of taking insurance among commission merchants in Toledo. A loss occurred on the 21st of December, whilst the policy was running, and the insurance company declining to pay it, Hamilton & Cook sued them. The defence set up was:

1st. Want of insurable interest in Hamilton; and,

2d. Misrepresentation and concealment with regard to the interest.

The plaintiffs, on the trial, waived any claim for grain belonging to themselves individually, and asked a verdict but for the value of the grain which was received on commission; asking to recover this amount for the use and benefit of the owners.

At the request of the plaintiffs' counsel, the court charged that if no representations were made with regard to the individuals who composed the firm of Hamilton & Cook, there was no misrepresentation which could avoid the policy; and that if Hamilton & Cook had no actual care or custody of the grain, but that so far as regarded its preservation from fire, it was entirely in the control of the railroad company, and so understood by the company's agent when the policy was effected, the omission to inform the defendant of the agreement of dissolution could not be considered a concealment which would avoid the policy. Verdict and judgment went accordingly for the plaintiffs, and the case now came here on exceptions to the charge of the court.

Mr. *A. C. Bradley*, for the insurance company, plaintiff in error.

1. Cook, alone, at the date of the policy and of the fire, *held* the grain in question in trust or on commission. He alone was the bailee, and alone had an insurable interest. Hamilton had no custody, was no bailee, and had no insurable interest. No action, therefore, can be maintained; not a joint action, because the interest was sole, nor a sole action, because the policy was joint.

It is true, indeed, that a nominal partner is sometimes regarded as a real one. But he is only so regarded adversely and to subject him to the obligations of a partner. And this is but right. When a partner retires from a firm, still keeping his name before the public, he can mean nothing but to give to the firm a credit which it does not deserve. Here, Hamilton, whose name doubtless made the firm attractive, withdraws; leaving his name in order that business might be drawn to Cook. This was a deception. Such an act may subject a person to the liabilities of a partner, but surely should not give him a partner's benefits and advantages.

2. The policy was void for fraud. Hamilton and Cook *had* been partners under their joint names, and the firm name continued to be used by each of them, from the time of the dissolution till the time of insurance and afterwards. Every such use of that name was a representation that both persons still composed that firm. Such representation was untrue and of a material matter. Had Cook been alone held out to the world, less insurance would have been needed. It was obviously Hamilton's name which made the firm attractive and brought business to it. Indeed, but for the *prestige* which Hamilton's name gave the firm, it does not appear that Cook would have had any business or needed any insurance. Then, again, if Hamilton, in addition to the name, had felt the care and exercised the natural vigilance of a partner, he might have prevented the destruction of the building. At all events, every untruth uttered with an intent to deceive others for the benefit of the party uttering it, or the benefit of his friends, is a fraud on all parties deceived. Here the company's agent issued the policy, believing both Hamilton and Cook to be partners. They so represented themselves; herein committing a fraud on the company. That fraud vitiates the policy.

Mr. *R. Phillips* (a brief of Messrs. Waites, Aissell, and Gorill being filed), contra.

Mr. Justice BRADLEY, delivered the opinion of the court.

The principal question is whether insurances can be effected in the name of a nominal partnership where the business is carried on by and for the use of one of the partners.

Hamilton was a nominal partner, held out to the world as a member of the firm by his own consent, and affected with every liability of a partner—to consignors, creditors, and all persons dealing with the concern. The plaintiffs contended that this was a sufficient interest to support the policy, at least, in a commission business where insurance was effected for the benefit of the real owners of the goods. It is objected that a nominal partner is only held such, adversely, for the purpose of subjecting him to liability as a partner, and not for the purpose of giving him the benefits and advantages of a partner. But whilst this is generally true, the interest of a nominal partner in the liabilities of the firm is such as should entitle him, in the absence of any attempt to defraud, to join with the other members of the firm in effecting insurance on the property of the concern. As Chief Justice Jones remarked in De Forest v. Fulton Insurance Co., 1 Hall, 110: "It does not always require either the legal title or beneficial interest in the property to entitle a party otherwise connected with it to effect a valid insurance upon it. A carrier may insure goods he contracts to convey, yet he has neither the legal title nor the beneficial interest in them, but he is responsible for their loss."

But the case of a nominal partnership carried on for the benefit of one or more members of the firm seems to be still stronger. For it may be said that the legal interest in the business is in the firm, whilst the beneficial interest is in the member or members for whose use it is carried on. In the case before us, as to all the world except themselves, the legal interest of the business was in the firm of Hamilton & Cook, the beneficial interest in Cook alone. And as it is well settled that a trustee or agent may insure the property held in that capacity for the benefit of all concerned, there seems to be no valid reason why persons constituting a nominal partnership should not be competent to effect insurance as well as transact the other business in the partnership name. In this case the intimate connection of Hamilton with the business, and the fact that as between him and the consignors of the grain insured, the railroad company with whom it was stored, and all other persons dealing with it, he was actually a partner, and incurred all the responsibility and risk attaching to that relation, constituted, in our judgment, a sufficient basis of interest for effecting insurance in the name of the firm. The doctrine, established by a number of cases, that nominal partners are proper plaintiffs, as well as proper defendants, in actions by and against the firm, lends support to this view.

See Parsons on Partnership, 134; Story on Partnership, §§ 241, 242; 1 Smith's Leading Cases, 1190.

The case before us is an especially strong one, from the fact that the policy was effected mainly for the benefit of the owners of grain held by Hamilton & Cook on commission. The action was prosecuted solely for their benefit. The plaintiffs, on the trial, expressly waived any claim for grain belonging to themselves, individually, and asked a verdict only for the value of the grain which was received on commission, claiming to recover this amount for the use and benefit of the owners. The liberality with which policies of this character, issued to trustees and agents for the benefit of parties really interested, are sustained by the courts, is stated and illustrated in the case of The Insurance Company v. Chase, 5 Wallace, 509, decided by this court in December Term, 1866. As looking in the same direction, we may refer to the cases in New York which decide that a sale by a retiring partner to his copartners of his interest in the firm, is not a breach of the condition that the policy shall be void if the property is conveyed without the consent of the insurance company. See Hoffman v. Ætna Insurance Company, 32 New York, 405, and cases there reviewed.

The other ground of defence was, that there was misrepresentation and concealment, as to the interest, which vitiated the policy. It is laid down by this court in The Columbian Ins. Co. v. Lawrence, 2 Peters, 49, that an applicant for insurance is bound to fair dealing with the underwriters, and, in his representations, should omit nothing which it is material for them to know; nothing which would probably influence the mind of the underwriter in forming or declining the contract. This doctrine is repeated in several subsequent cases, and is undoubtedly the well established law. But its application will depend upon the circumstances of each case. Generally speaking it is undoubtedly true that any misrepresentation with regard to the ownership of the property insured will suffice to vitiate the policy. But policies are constantly applied for and granted on general stocks of goods, held in trust or on consignment for numerous and unknown parties. In such cases it is not expected, nor would it be possible, that the insurers should be informed as to the ownership. They are content to insure for the benefit of whom it may concern. Of course, an omission to disclose the ownership in such cases cannot be regarded as an improper concealment. In some cases it is important to the insurers to know who is interested in the property, in order that they may form a judgment as to the probable care which will be bestowed in its custody and preservation. In other cases this knowledge may be a matter of little importance. In the case before us the grain insured was in the sole custody and care of the railroad company, and the insurers were little concerned, as, in fact, their agent made no inquiry, who were the owners or interested therein; and no representation was made on the subject, farther than to make the application in the name of Hamilton & Cook, and to ask for a general insurance on the grain in the elevator, whether their own, or held by them in trust, or on commission, &c. Under the circumstances of the case we do not see that anything material for the insurers to know, or that would have had a bearing on taking the risk or fixing the premium, was concealed or withheld. On this subject the court, at the request of the plaintiffs' counsel, charged the jury that if no representations were made with regard to the individuals who composed the firm of Hamilton & Cook, there was no misrepresentation which could avoid the policy, and that if Hamilton & Cook had no actual care or custody of the grain, but that so far as regards its preservation from fire, it was entirely in the control of the railroad company, and so understood by the defendant's agent when the policy was effected, the omission to notify the defendant of the agreement of dissolution could not be considered a concealment which would avoid the policy. Under the circumstances of the case, we do not think there was any error in this charge.

Judgment affirmed.

Mr. Justice Clifford dissented.

LEGAL GAZETTE.

Friday, January 3, 1873.

JOHN H. CAMPBELL,
EDITOR.

THEODORE F. JENKINS,
ASSOCIATE EDITOR.

OUR FIFTH VOLUME.

With this number we commence our fifth yearly volume, and we are happy to say, with bright prospects and gratifying assurances of continued success. It has been our aim, during the last four years, to make the Gazette a *live* newspaper, furnishing early and accurate reports of all the important decisions of the courts of this city and of Pennsylvania and the other States. How far we have succeeded in this endeavor, our readers can judge for themselves. Our columns have always been open to communications and articles on topics interesting to the profession, and for items of legal information; nor have we abstained from freely criticizing and commenting upon the acts of the judges and the proceedings in our courts. The Gazette is now recognized as authority in all the courts of Pennsylvania, and, we are glad to notice, is extensively quoted from by contemporary journals throughout the country. Looking back now over the difficulties and trials through which, in common with all new enterprises, we have had to fight our way; looking at the mass of prejudice and old fogyism which we have had to remove; the conservative distrust of innovation which we have had to deal with, and our final establishment on a solid and recognized footing, we have felt tempted, out of our ordinary custom, to say these few words about ourselves, and to return thanks to our numerous subscribers for their intelligent and appreciative support of our no longer doubtful undertaking. During the present year we expect to be able to make still further improvements in the Gazette, and to furnish a much larger amount of information on legal matters in other States besides Pennsylvania. There is no reason why the Gazette should not be a *National* paper, reporting not only the decisions of Philadelphia and Pennsylvania courts in full, but also those of the Supreme and other courts of the United States, and of the courts of last resort of the various States of the Union, and we fully intend that it shall be one.

FIELD'S INTERNATIONAL CODE.

The second book of Mr. David Dudley Field's Outlines of an International Code, has just been issued. The first book, which we noticed in this paper at the time of its publication, treated of the relations of nations and of their members in time of peace. This one treats of those relations during a state of war, discussing in their order the status of belligerents, allies and neutrals, and the commencement, conduct, and termination of war. Mr. Field gives his views and ideas in reference to what should be embodied in an international code, whenever it is possible for nations to rise to the sublime pitch of submitting their international relations to the jurisdiction of a permanent tribunal. That the day will come when some such arbitrament shall be substituted, to a great extent, among civilized nations, for the present mode of deciding questions of international law, we have no doubt, and when such a day does come, it will be necessary to have a code of laws, which the moral sanction of the people and governments of the various States of the world will give effect to and enforce. References of inter-State and National questions to tribunals of friendly or neighboring powers, or to a supreme council or general representative of a number of small states, have been frequently resorted to in the history of the world, but nothing like a general code, defining and regulating the duties, rights, and powers of all the nations, great and small, of the civilized world, has ever yet been attempted. The settlement of the Alabama dispute by the tribunal at Geneva, has awakened an unusual degree of interest as to the feasibility of putting such a code in force, and the labors of Mr. Field and his associates will do much towards keeping alive this interest and effecting some practical result from the agitations and discussions consequent upon it. We will in this article content ourselves with giving Mr. Field the benefit of his own words, as to the objects of the work, reserving until some other time a more extended commentary upon them:

"The adoption of such a code, as this outline proposes," says Mr. Field, "contemplates the prolongation and, if possible, the perpetuation of a state of peace, between the nations uniting in its adoption. It is among its chief objects, by defining rights and obligations that are now uncertain, to remove, or at least to diminish, the causes of war; by reducing, upon common consent, the excessive armaments of modern times, to reduce the temptations to war, and, by the establishment of tribunals of arbitration, to render a resort to it unnecessary and wrongful, in ordinary cases of difference.

"The regulations for these purposes contained in the first book of this code, narrow the scope of the regulations necessary for the second book. The adoption of the system would unite the assenting nations in an alliance for mutual advantage, under which it seems both practicable and safe for them to renounce, as against each other, the most mischievous of the old rights of war; and to concede to each other the exemptions which the most humane of modern treaties have recognized, and the ameliorations of the evils of war for which the most enlightened jurists have contended.

"The influence of modern civilization has affected the usages of war in two opposite directions. It has increased the deadly character of combat by scientific improvement of the instruments of war; while on the other hand, it has diminished the surface upon which war acts in the destruction of life and property, by exempting, to a large degree, non-combatants and private property; and, while increasing the rights and protection of neutrals, has practically increased, also, the stringency, if not the extent, of their obligations to refrain from aiding either party.

"The best authorities are now discussing the question whether the time has not come when civilized nations should disavow the old maxim that war makes every subject of one belligerent an enemy of every subject of the other; and recognize the principle that war is a duel between nations, in which the governments and the persons impressed with their military character, are alone to be deemed enemies.

"This change in the theory of the state of war, has already made great progress among publicists, and is now supported by eminent modern authorities, while it has received some practical sanction in the provisions of special treaties. It is submitted that it is both practicable and safe to make the modern doctrine the basis of a general code.

"In accordance with these considerations, the general principles which have been followed in the preparation of the articles of this book, have been.

"1. That as between the military forces of the belligerents, hostilities are sanctioned without other limits than those already recognized by the laws of civilized warfare, as modified by recent general conventions, such as those respecting small explosive balls, and the treatment of sick and wounded. One qualification should be added, namely: that the use of false colors and signals is forbidden, as an act of bad faith;

"2. That nations, when they engage in war with each other, should confine their struggle to military measures; and as far as possible leave undisturbed all undefended persons and places, all peaceful relations and modes of intercourse, and all property, public or private, which does not directly subserve the purposes of war;

"3. That those nations which remain neutral, must not only refrain from active assistance, but [illegible] exert themselves to prevent their people from furnishing implements of warfare to either combatant. In accordance with the rule adopted in some recent treaties, and with usage in one or two cases, war material alone is declared contraband, and all other private property not engaged in illegal traffic, is protected from capture.

"In considering the application of the provisions of this book, it should be remembered that its object is not to state all the rules of public law which are in force during war, but only those rules unknown in time of peace, which war calls into application. By article 7, in the beginning of book first, it is declared that the first book treats of the relations of nations and of their members to each other, except as they are modified by a state of war; and the second treats of the modifications in these relations produced by a state of war. Therefore, the provisions for the protection of foreigners and their property, which are contained in book first, are not repeated here; as they will continue uninterrupted in war as in peace, except so far as the provisions of this book would suspend them during war.

"The notes, without attempting to refer to all the authorities, give a sufficient number to afford the reader a convenient clue to the discussions contained in the books concerning the various topics referred to, without burdening him with multiplied references."

DISPOSED OF.

The bar of the United States has been disgusted for a good while past by a discreditable exhibition in the bar of New York; an indecent attack by three or four men—who, though making themselves rather public, were after all but little known—upon one of their own brethren David Dudley Field, a brother of Cyrus W. Field, and of Judge Stephen Field of the Supreme Court of Washington; a man of admitted high abilities, great practice, large wealth, and wide-spread reputation; and who, if he *was* a villain, was certainly a villain on that sort of scale that demanded dignified accusers and a solemn trial. We have referred to the matter once or twice already. Mr. Field seems to have let "the pack," as he calls them, go on for nearly two years, as much as to say, "You rather annoy me, to be sure; but I am a busy man, making a good deal of money, and I really have *not the time* to attend to you just now." It appears, however, that some of the party have come lately rather close to his heels; for at a recent meeting of the Bar Association of New York, an opportunity being given, Field "let fly," and certainly he deals an awful blow. The whole pack are sent up into the air as a lot of curs might be by the kick of a Connestoga stud horse. His remarks to the bar are now printed, being followed by letters from *counsel on both sides* of the suits in which he was said to have misconducted himself; all the counsel on both sides testifying to his perfectly correct course in the cases throughout. We have no room for the whole matter; nor is it edifying, however amusing. But as illustrating a class of lawyers, peculiar, we hope, to the Metropolitan Bar, we make an extract from Mr. Field's remarks.

"I did not begin this quarrel, but I mean to end it. For two years or more I have been followed by a noisy pack, whose bark has disturbed the neighborhood, but who have never bitten, and I will now see whether they can bite or not. Shall I show you who these men are? They are not many—less than a score in all. I confess to feeling some embarrassment how to speak of them here. While I know that my own professional life will bear the closest scrutiny, I am certain that theirs will not. I have in my possession evidence of disreputable practices by most of them and a clue to further evidence. I am sure that in their assaults upon me they have been impelled by the basest motives. Shall I use here the facts which I have in my possession against them, or shall I leave them for a future occasion? Shall I, for instance, dwell upon the scandals which attach to the name of Barlow, or shall I leave them to the Tribune and the next Assembly? Shall I mention the stigma which I have heard cast upon Van Cott, or shall he be left to the trials which perchance await him? Shall I utter the name of Stickney, or shall he be left to the little newspaper notoriety that he has coveted, begged, and earned? If I were to go into the history of these men I might give you an amusing and instructive chapter; but I forbear. One may bribe and lobby; another may live on lawsuits which he gets by drumming and pursues upon speculation, and others, still, may fall into other disreputable professional practices, but I shall not drag them into this debate. A majority of them, I think I may say without contradiction, have so little knowledge or experience of difficult lawsuits, that they do not know whether an order is right or wrong. Let me, by way of example, name four of them—Messrs. Barlow, Peckham, Van Cott, and Stickney. There is Mr.

Barlow, with knowledge so infinitesimal that in a suit upon a note of hand he actually interposed as a counter claim the damages which he insisted that the maker sustained by being called upon to pay at maturity, contrary to a promise by the payee when he took the note that he would give time for payment, and he so managed a suit in the Marine Court about tanner's bark, that his client has consulted counsel whether to sue him for causing the loss of his case, and he and Mr. Peckham together have for several months been vainly trying to frame a good complaint upon an assigned claim growing out of the late city frauds. It is perfectly well known to lawyers that Mr. Barlow does not venture himself to try the cases appertaining to his office of attorney general. His display in the office is a most laughable burlesque. Would you have me justify my action to such a man—so incompetent, so ignorant? I might as well talk to a child as to him about a course of action in a difficult case. Then here is Mr. Van Cott, who, having signed an administrator's bond at the surrogate's office for his brother, as administrator of the estate of another brother, and being sued upon the bond by a creditor of the estate, has pleaded in his defence that the bond was taken without jurisdiction, because the deceased brother was not an inhabitant of the county when he died, and the administering brother procured his signature upon false representations as to the residence. Would you have me justify my action to one who thinks that a defence either in morals or in law? And here is Mr. Stickney, the newspaper lawyer, whose chief practice has been the prosecution of fifteen lawsuits which he took on speculation, for alleged differences in gold contracts made in the Black Friday gambling shambles, and which suits it has been my lot to defend."

While we are not disposed even after reading such a piece to imitate the Pharisee and to thank God that *our* bar is not like *other* bars, and especially like that bar of New York, we may certainly feel a satisfaction at the spirit of good brotherhood which among *us* has always prevailed, and which found so splendid an exhibition in the recent tribute to Chief Justice Thompson, where the *whole* bar, after an election canvass unparalleled in interest, united really like a "band of brothers" in originating, arranging, and carrying through one of the most splendid social entertainments ever given anywhere. It was not less a tribute to Chief Justice Thompson than it was to the Philadelphia bar itself; for at no bar where a spirit of unity—of real cordiality—did not prevail, could *such* a manifestation have been developed; no jealousies, no dissatisfaction, anywhere. And, thank heaven! we have no Barlows, Peckhams, Van Cotts, or Stickneys here to trouble the peace of a successful lawyer any more than of an honored judge. Long may it be before this bar, in all gradations of it, ceases to be an honorable bar, or before we ever know among *our* barristers any of those low feelings which seem to be so common in our neighboring city! any feelings, indeed, but those which *now* prevail; feelings of that honorable rivalry at the bar, with which friendship, respect, and most cordial intercourse in social life are entirely harmonious, and, with us, constantly co-exist.

"The pack," indeed, as Mr. Field calls them, at the New York bar, are for the present doubtless "disposed off;" but in the atmosphere of such a place, some new one will soon be littered, for some new and discreditable exhibition. May such vermin,—under whatever names, or at whatever bar, appearing—receive the same reward that they have got from Mr. Field. He has done a service to honorable men in all professions everywhere.

To those of our subscribers who are members of the Constitutional Convention, we will furnish without charge an *extra* copy of the Gazette, during their attendance at the sessions of the convention in this city. Such extra copies will be served either at the hall of the convention or the hotels, or other places of stopping of the subscribers, as is preferred.

THE CONSTITUTIONAL CONVENTION.

We have reserved a portion of our space for articles upon the Constitutional Convention, and the subjects which will probably come before that body for consideration. All communications intended for publication in this department, should be addressed to the Editor of the Legal Gazette, and must in all cases be accompanied by the name and address of the writer. Correspondents will please state under what names they wish their communications to appear.

LETTERS OF PERICLES.

IV.

To the Editor of the Legal Gazette:

My present letter will contain the remaining sections of the Declaration of Rights of the proposed constitution. Many of them are taken verbatim from the present constitution of the State. Some of them, however, are entirely new. The sections which are adopted without alteration, are not exactly as I would wish them, as there are several changes which I might suggest. But there is a strong, conservative element in the State, that opposes any alteration in the Declaration of Rights, and which will resist any change. Hence, in order to make the draft, submitted by me, as acceptable as possible, I have retained several minor provisions, which I would otherwise have omitted. I have retained in all cases the phraseology of the originals, as far as it could be done, without marring the sense—With this explanation I will proceed.

Art. I. Declaration of Rights.

Sect. 11. *That all courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have a remedy by the due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the commonwealth in such manner, in such courts and in such cases, as the Legislature may by law direct.*

This section is taken verbatim from the present constitution, with the exception of the word *person* being substituted instead of the word *man*, in order to make it as general as possible.

Sect. 12. *That no power of suspending laws shall be exercised, unless by the Legislature or its authority*

Sect. 13. *That excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.*

Sect. 14. *That all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it.*

Sect. 15. *That no commission of oyer and terminer or jail delivery shall be issued.*

Sect. 16. *That the person of a debtor, where there is no strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law.*

These sections (12 to 16) are taken from the present constitution,

Sect. 17. *That no ex post facts law, nor any law impairing contracts, nor laws making any irrevocable grant of special privileges or immunities shall be made.*

I have made the addition, "nor laws making any irrevocable grant of special privileges or immunities," which is taken from the Illinois constitution of 1870 (art. II. sec. 14), in order to prevent companies incorporated in this State from claiming under the Dartmouth College Case, that their charters were contracts containing grants of power that could *never* be altered or revoked. There should be no irrevocable delegation or grant of special privileges or immunities, whether to individuals or corporations, and it is both proper and necessary to make some provision upon this subject.

Sect. 18. *That no person shall be attainted of treason or felony by the Legislature.*

Sect. 19. *That no attainder shall work corruption of blood, nor except during the life of the offender, forfeiture of estate to the commonwealth; that the estates of such persons as shall destroy their own lives, shall descend or vest as in case of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof.*

Sect. 20. *That the citizens have a right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance.*

Sect. 21. *That the right of the citizens to bear arms, in defence of themselves and the State, shall not be questioned.*

Sect. 22. *That no standing army shall in time of peace, be kept up without the consent of the Legislature; and the military shall, in all cases and at all times be in strict subordination to the civil power.*

Sect. 23. *That no soldier shall, in time of peace be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.*

Sect. 24. *That the Legislature shall not grant any title of nobility or hereditary distinction, nor create any office for a longer term than during good behavior.*

The foregoing sections (18 to 24) are taken entire from the present constitution.

Sect. 25. *Emigration from the State shall not be prohibited. Foreigners who are, or who may hereafter become bona fide residents of this State, shall enjoy the same rights in respect to the acquisition, possession, enjoyment and descent of property as native born citizens.*

Section 25 of the present constitution merely provides "that emigration from the State shall not be prohibited." I have thought it best to add a provision in reference to foreign born residents of the State and their powers in relation to property. The constitutions of Oregon, California, Florida, Nevada, Iowa, Kansas, Michigan, Mississippi, Nebraska, Arkansas and Wisconsin contain substantially the same provision. It is but fair and in accordance with an enlightened and liberal policy towards foreigners, who actually settle in the State and become bona fide residents.

The remaining sections which follow the foregoing are new.

Sect. 26. *No property nor educational qualification shall ever be required for any person to become an elector or an officer in this commonwealth.*

In Pennsylvania, fortunately, the citizens can exercise their franchises as electors and officers under the commonwealth, without necessarily owning any property, or having educational qualifications prescribed for them. In the section proposed, I have given an emphatic enunciation of the doctrine conveyed in its words, as I think it necessary, in view of the effort which will no doubt be made to adopt some property or educational qualification for a voter or officer. In the language of the North Carolina constitution of 1868 (art. I. sec. 22). "as political rights and privileges are not dependent upon or modified by property, therefore, no property qualification ought to affect the right to vote or hold office." The same is true of education. In some of the Southern States, since the war, it was found necessary in order to protect the negroes in their rights as newly made citizens, to adopt sections similar to the one proposed. Now, although it is objected that ignorant voters cannot vote freely at elections nor hold office intelligently, and that poor men, possessed of no property, should not be intrusted with the power to legislate over or control by voting, the interests of property holders, nor interfere with the acquisition, control or disposition of property, yet it is held by many, and by myself among the number, that it is absolutely necessary for the existence of genuine liberty and free institutions,—which should be for the many and not for the few,—that the greatest possible extension of the franchise, consistent with sound reason, should have effect in order to counterbalance the influence and power of property.

That influence and power, if left unchecked or untrammelled, are seldom exerted for the public good. All history proves that the power of property is selfish, its views narrow and its end destructive of the liberty of the masses.

Athens, at the time when Solon was called upon to reform its political affairs (594 B. C.), presented a fearful picture of the possession of unlimited power by the rich or property holding classes. The masses of the poorer population are described (Grote, vol. 3, p. 126, chap. XI.) "as weighed down by debts and dependence, and driven in large numbers out of a state of freedom into slavery—the whole

mass of them, we are told (Plutarch, Solon 13), being in debt to the rich, who were proprietors of the greater part of the soil," And again (p. 127), "The manifold and long continued suffering of the poor under this system, plunged into a state of debasement not more tolerable than that of the Gallic plebs—and the injustices of the rich, in whom all political power was then vested, are facts well attested by the poems of Solon himself, even in the short fragments preserved to us." When Kleisthenes commenced and Pericles afterwards completed the establishment of a pure democracy, founded upon the suffrages of *all* the citizens, then was seen the gradual development and full growth of that political liberty which has made the Athens of Pericles, the admiration and the wonder of every succeeding age.

After the revolution which drove out the Turquins in Rome, and abolished the life kingship, political power fell into the hands of the aristocracy, whose government, says Mommsen (vol. 1, p. 346), "appears to have aimed from the first at the destruction of the middle classes, particularly of the intermediate and smaller holdings of land, and at the development of a domination of landed and moneyed lords on the one hand and of an agricultural proletariate on the other." In describing the state of Italy during a later period (third century B. C.), says Mommsen (vol. 2, p. 460): "But above all, the deep rooted immorality which is inherent in an economy of pure capital, ate into the heart of society and of the commonwealth, and substituted an absolute selfishness for humanity and patriotism." At the time of Julius Cæsar's advent to supreme power, the radical misfortunes of Italian society were "the disappearance of the agricultural and the unnatural increase of the mercantile population, with which an endless train of other evils were associated." "In consequence of this economic system, based both in its agrarian and mercantile aspects on masses of capital and on speculation, there arose a most fearful disproportion in the distribution of wealth." (Mommsen, vol. 4, pp. 606–7.) "It is a dreadful picture (idem, p. 621), this picture of Italy under the rule of the oligarchy. The wider the chasm by which the two worlds were externally divided, the more completely they coincided in the like annihilation of family life, which is yet the germ and core of all nationality; in the like laziness and luxury, the like unsubstantial economy, the like unmanly dependence, the like corruption, differing only in its scale, the like criminal demoralization, the like longing to begin the war with property." It was only when the poorer classes of the citizens were represented in the government by their tribunes and had their share in the other offices of the State, that anything like liberty was experienced in ancient Rome.

France, immediately preceding the revolution of 1789, is another fearful example of the tyranny of class and property. "Its state, political and economical," says Thiers, "was in truth intolerable. There was nothing but privileges belonging to individuals, towns, provinces, and to trades themselves; nothing but shackles upon the industry and genius of man. Civil, ecclesiastical and military dignities were exclusively reserved for certain classes, and in those classes for certain individuals. A man could not embrace a profession unless upon certain titles and certain pecuniary conditions." "All was therefore monopolized by a few hands, and the burdens bore upon a single class. The nobility and the clergy possessed nearly two-thirds of the landed property. The other third belonging to the people, paid taxes to the king, a multitude of feudal dues to the nobility, the tithe to the clergy, and was moreover liable to the devastations of noble sportsmen and their game. The taxes on consumption weighed heavily on the great mass, and consequently upon the people. The mode in which they were levied was vexatious; the gentry might be in arrear with impunity, the people, on the other hand, ill treated and imprisoned, were doomed to suffer in body in default of goods. It subsisted, therefore, by the sweat of the brow; it defended with its blood the upper classes of society, without being able to subsist itself." "Justice, administered in some of the provinces by the gentry, in the royal jurisdictions by magistrates who purchased their offices, was slow, frequently partial, always ruinous, and particularly atrocious in criminal cases." (Hist. French Rev., vol. 1, p. 21, ed. Bentley, London.)

I might fill a volume with citations like the above to prove that the exercise of the political power of a State, by property owners or by a special privileged class, is dangerous to liberty, and that the only true safety of a republican form of government lies in the possession of free, untrammelled suffrage and privileges by the masses of the people. Hence I would have no property or educational qualification required for electors or public officers. The extended discussions in the press upon the recent and still continued struggles in England to extend the right of suffrage and do away with property qualifications for electors, clearly exhibit the gross injustice both in England and in Ireland, of the present English electoral system.

In our own country Rhode Island has in her constitution (art. II, sects. 1 and 2) most unjust and unrepublican provisions as to property qualifications, and Delaware is also behind the age in this respect. The Connecticut and Massachusetts constitutions require electors to be able to read and write, and that of Florida has a similar provision to go into effect after 1880, and of Missouri to go into effect after January 1st, 1876. On the other hand, Mississippi and North Carolina expressly forbid any property qualifications, and the latter, also, educational qualifications, for electors. For eligibility to office, the constitutions of Arkansas, Minnesota, Kansas, Alabama, South Carolina, Louisiana and Mississippi expressly prohibit any property qualifications from being required.

To prevent the establishment of any restrictions upon citizens, as above referred to, there should be inserted in the Declaration of Rights, a provision securing, beyond doubt, total exemption from such restrictions. The section I have proposed will accomplish that purpose.

There are two other sections of the Declaration of Rights, viz.: concerning the taking of private property for public use, and the rights of married women over their separate property, which I will give in my next letter. I will also commence Article II. which will treat of Suffrage, Elections and Representation.

December 31, 1872. PERICLES.

PUBLICATIONS RECEIVED.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF OREGON FROM 1869 TO 1870; and Cases in the Circuit Courts of Oregon from 1867 to 1872. By Joseph C. Wilson, Ex-justice of the Supreme Court, and Official Reporter—Vol. III., 8vo., pp. 641. San Francisco, A. L. Bancroft & Co., publishers, 1872. Received from the publishers.

This volume as far as regards its mechanical execution is neat, well printed, and well bound. It forms the third volume of the regular series of Oregon reports. There are numerous interesting decisions contained in it, among which we may note especially, Wills v. Wilson, as to alterations and interlineations in promissory notes; Bird v. County of Wasco, as to legislative regulation of fees of municipal officers; Hedges v. Paquett, as to the powers of directors of private corporations; Oregon & Cal. R. R. Co. v. Barlow et al., as to the measure of damages for taking land for railroad purposes; Oregon Cascades R. R. Co. v. Bailey & Oregon Nav. Co., as to crossing of one railroad by another; Howe v. Douglas County, as to mileage; State v. Bertrand, as to question of malice in trials for homicide; Heath v. Glisan et al., as to liability of physicians and surgeons for malpractice; Weise v. Smith, as to navigable rivers and riparian rights. Many points of practice in the Oregon courts are treated of in the cases reported. The volume, to a lawyer on the Pacific coast, is a necessity, and farther East, it will be requisite to complete sets of State and United States reports, and will be very useful to have as a report of recent decisions.

THE ILLINOIS REPORTS—An address of the Chicago Law Institute to the Bar and Press of the State, Chicago, 1872.

This is a fierce attack upon Mr. Freeman, the present reporter of the Supreme Court of Illinois, who is accused of managing the reportership "on the principle of profit to the reporter rather than to the public." His volumes are complained of "as excessive in price, deficient in quantity, and dilatory in appearance." If this indictment is as true as the report seems conclusively to make it, the sooner the reporter is removed the better. The Institute, it is announced, wish to have legislative action "to cheapen and expedite the reports of our Supreme Court." It is quite a pretty little quarrel, and we shall watch the further proceedings in it with great interest.

THE LAND OWNER,—Chicago, December, 1872, Vol. 4, No. 12.

This number contains several large, well executed wood engravings of fine buildings in "rebuilt Chicago," and is decidedly interesting.

WOOD'S HOUSEHOLD MAGAZINE, Vol. 12, No. 1, Newburgh, N. Y.

DRAFT OUTLINES OF AN INTERNATIONAL CODE. By David Dudley Field. 8vo., pp. 205. New York, Baker, Voorhis & Co., 1872. Received from the author.

A more extended notice of this important publication will be found in our editorial columns.

The DRUGGISTS' JOURNAL, a weekly newspaper, New York.

The LEDGER ALMANAC for 1873.

Recent Decisions.

UNITED STATES COURTS.

The U. S. DISTRICT COURT of Oregon, per DEADY, J., November 23d, 1872, decided in the case of In re Francis & Buchanan.

1. That participation in the profits of a business is presumptive or primary proof that the participator is a partner in such business, and in the absence of other proof is sufficient evidence thereof, but such presumption may be overcome by showing that such profits were received by the party simply as wages for services performed, or interest for money loaned to the person carrying on such business.

2. The English and American authorities examined and commented on, touching the rule announced in Waugh v. Carver (2 H. Bl. 235), upon the authority of Grace v. Smith (2 W. Bl. 298), "that he who shares in the profits indefinitely, shall, by operation of law be made liable to losses" and the rule denied to be law.

3. Upon the evidence, and as a matter of fact, a partnership found to exist between two parties, where the transaction was intentionally and for collateral reasons disguised under the cloak of a pretended loan and employment as bookkeeper.

Pacific Law Reporter.

MISSOURI.

SUPREME COURT OF MISSOURI, October Term, 1872. Snider, Executor, v. Murdock. Decision by ADAMS, J.

This was an action on two promissory notes executed to the plaintiff's testator. There were allegations in the defence to the effect that the notes were given for land and fixtures, that a bond was given for title, and that there had been a failure to convey.

In the replication it was admitted that the notes were given for real estate, but contended that the testator had always been ready to comply with his bond on the payment of the purchase money, and that on the trial a deed was tendered. *Held:*

1. That after an executory contract for the conveyance of real estate is entered into by the execution of a bond for title, and notes for the purchase money, the property is at the risk of the purchaser.

2. The plaintiff's right to sue on these notes did not depend upon a tender of a deed.

3. A vendor ordinarily is not bound to part with his title until all the purchase money is paid.—*The Law News*, Dec. 27th.

[Our thanks are due to P. F. Smith, Esq., State Reporter, for advance sheets of Vol. 19 of his reports. We make the following selections from them.]

PENNSYLVANIA.

Duff v. Wilson.

1. Smethers owning land subject to a mortgage, sold an undivided half clear of encumbrances to Duff, who leased his moiety to Smethers. Wilson became surety for Duff's performance of the covenants in the lease. In a suit against Wilson as surety on Duff's breach of his covenants, the court below rejected evidence that the land had been sold under the mortgage, and Smethers evicted by the sheriff's vendee. *Held* to be error.

2. On the sale by the sheriff, the relation of landlord and tenant between Smethers and Duff ceased, and the sheriff's vendee might have affirmed the lease and required the rent to be paid to him.

3. There being an implied covenant for quiet enjoyment in every lease, whenever the enjoyment ceases by lawful title, the rent ceases.

4. Wilson was surety only that Smethers should pay the rent; compelling Wilson to pay after the eviction, would indirectly be paying for Smether's breach of covenant to pay the mortgage, for which he was not surety.

October 5th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the District Court of Allegheny county: No. 53, to October and November Term, 1870.

Bindley's Appeal.

1. Gregg died in 1857; in 1858, on petition of the administrator, part of his land was sold by order of the Orphans' Court, for payment of debts, and distributed. In 1860, on a like petition, a further portion was sold for the same purpose; in 1863, another portion was sold for a like purpose, one of the debts being a judgment against the decedent in his lifetime; the purchaser asked that the sale be set aside on the ground that the lien of the debts had expired. The application was dismissed and the sale confirmed. *Held*, that the proceeds of the sale of 1863 were distributable amongst the heirs to the exclusion of the common creditors, because as to them the lien of their debts had expired.

2. The previous orders of sale, although within five years of the death, did not extend the lien of the debts.

3. The court had jurisdiction to order the sale, one of the debts being a judgment which as against heirs was indefinite, and the purchaser took a good title.

4. The presentation of his claim within five years by a creditor before an auditor distributing under a previous sale, and the receipt of a dividend, did not continue the lien.

5. Such presentation was not "an action commenced" within the act of February, 1834.

6. The principal intention of the 24th section of the act of 1834, was to promote security in titles in devisees, heirs and purchases; no admission however solemn will dispense with an action.

October 2d, 1872. Before THOMPSON, C. J., READ, SHARSWOOD and WILLIAMS, JJ.

Appeal from the decree of the Orphans' Court of Allegheny county: Of October and November Term, 1869: No. 158; In the distribution of the estate of O. Ormsby Gregg, deceased.

Neel et al. v. McElhenny et al.

1. S. claimed title to land against J. by twenty-one years, adverse holding. J. gave in evidence a lease of the land by him within the twenty-one years, in which S. recognized J.'s title. Declarations of J. made after the twenty-one years, were evidence to show that he was holding as trustee for S., and not by absolute title.

2. J. permitting S. to hold the land as his own for twenty-one years under an alleged trust, made the title of S. perfect.

3. Where one holds land for himself, taking the profits to himself exclusively for twenty-one years, with no evidence to stamp upon it a different character, the presumption, except as to co-tenants, i that the possession is adverse.

October 2d and 3d, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, J J.

Error to the District Court of Allegheny county: No. 15, to October and November Term, 1870.

McClurkan v. Thompson et al.

1. C. being much in debt, gave to B. a mortgage, to be sold, and his creditors paid at 50 per cent. The mortgage could not be sold, and with the consent of the creditors it was assigned to S., their attorney, for their use. The land bound was sold under the mortgage, bought by S. for the same use and rented by him. He then sold to T., one of the creditors, the consideration being the payment of a preferred claim against C., T.'s own debt *in full*, and the balance in three notes of T., payable in one, two and three years, with an agreement by deed with T. that he would reconvey to S. in one year, upon payment of the above consideration. T. received the rent, made no improvements nor exercised any other act of ownership, nor paid his notes. Ten years afterwards S. sold the land to M., to hold in trust for the creditors of C. In ejectment by M. against T., the court below held the transaction between S. and T. a conditional sale, and nonsuited M. *Held*, to be error: the facts raising the question for the jury whether the transaction was a mortgage.

2. The deed to T. and his agreement under the facts, were but one instrument, and under the general rule would constitute a mortgage.

3. If considered as a conditional sale, the facts of the deferred payments, and the continued receipt of the rent showing that the reconveyance was not limited to one year, would produce the same result.

October 3d and 4th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the District Court of Allegheny county: No. 46, of October and November Term, 1870.

Dougherty v. The Commonwealth.

1. In a trial for homicide, the record showed that the indictment was found in the Quarter Sessions; the defendant was admitted to bail by the Supreme Court, to appear at the Oyer and Terminer to answer the indictment at June sessions; a motion there by the defendant to quash the indictment was overruled, and the defendant pleaded; the jury found him guilty of manslaughter. On the 13th of July he was sentenced; on the 20th, a writ of error issued; on the 27th, the district attorney moved the court to certify the indictment into the Oyer and Terminer, "*nunce pro tunce*, as of March 9th." On the 29th, against the objection of the defendant, the motion was allowed. *Held*, that the record showed that the proceedings were irregular, and the sentence was reversed.

2. The record appearing to be that of Quarter Sessions, the recognizance to appear in the Oyer and Terminer, and the order to certify into that court, could not be divided from the other parts.

3. The record showing that the defendant had been arraigned, tried, convicted and sentenced in the Quarter Sessions, the conviction and sentence were void for want of jurisdiction.

4. The exclusive jurisdiction to try and punish homicides is in the Oyer and Terminer.

5. In capital felonies, it must appear by record that the prisoner was present at the trial, verdict and passing sentence; his presence cannot be presumed.

6. When substantative parts of a proper record are wanting, they cannot be supplied by the presumption that all things were rightly done.

7. The sentence in this case was held to be erroneous because the record did not show that the prisoner was present when the jury were sworn, and the verdict rendered; nor that he was asked if he had anything to say why judgment should not be pronounced against him.

8. The Court of Quarter Sessions had authority to amend their record by the order *nunc pro tunce*; and the record was to be treated as if the certificate had been ordered on the 9th of March; but the Oyer and Terminer could not obtain jurisdiction except by the transmitting of the order duly attested from the Quarter Sessions.

9. Such certificate should be filed in the Oyer and Terminer and noted on the docket, that the jurisdiction might appear from its own record.

10. The Oyer and Terminer and Quarter Sessions in the same county should keep distinct records.

11. Cathcart v. Commonwealth, 1 Wright, 110; Dunn v. Commonwealth, 6 Barr, 385; Taylor v. Commonwealth, 8 Wright, 131; remarked on.

October 2d, 1872. Before THOMPSON, C. J., READ, SHARSWOOD and WILLIAMS, JJ.

Writs of error and of certiorari to the Court of Quarter Sessions and Oyer and Terminer of Armstrong County: Nos. 144, 145, 146, 147, to October and November Term, 1871.

Patton's Executor v. Hassinger.

1. A son over age, and working for himself, made the plaintiff's house his home; he was taken sick, and whilst living with plaintiff, the father declared that whoever would take care of his son should be well paid; this was communicated to plaintiff, who continued to take care of the son; the plaintiff demanded payment from the father who promised to pay; this was sufficient for the jury to infer the acceptance of the offer by the plaintiff.

2. Compliance with a proposition, especially where no notice of acceptance is required, is the most significant evidence of its acceptance.

3. The promise was not one to pay the son's debt, but an independent undertaking of the father, and therefore was not required to be in writing.

4. The original promise and the death of the son, were more than six years before the suit. Within six years of the suit and before six years after the services had expired, the father said that the plaintiff had asked him to pay for the services, specifying them, and that he had told plaintiff as soon as he got so much money he would pay him. This was evidence to take the case out of the statute of limitations.

5. The recognition of a debt or of the instrument or circumstances of indebtedness, accompanied by a promise to pay or such an acknowledgment as is consistent with such promise, when the statute has not run will prevent the bar of the statute in an appropriate case.

6. Yaw v. Kerr, 11 Wright, 333; Suter v. Sheeler, 10 Harris, 308, recognized.

October 5th, 1871. Before Thompson, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Alleghany County: No. 57, to October and November Term, 1870.

Spangler v. Sheffer et al.

1. Foust's goods being levied on under a fi. fa., Spangler bought the judgment and execution, Foust giving his note payable on the return day of the execution, with Sheffer as his surety, as collateral security for the judgment. *Held*, that this did not raise the presumption of an engagement for a stay of execution, till the maturity of the note.

2. By Spangler's conduct the levy was lost. *Held*, that he could not recover from Sheffer on the note.

May 25th, 1871. Before READ, AGNEW, SHARSWOOD and WILLIAMS, JJ. Error to the Court of Common Pleas of York county: No. 87, to May Term, 1871.

The Commonwealth, to the use of Lancaster City, v. Frailey et al.

1. The act of March 21st, 1772, requiring thirty days' notice before bringing suits against justices, does not apply to suits on their official bonds under the 6th section of act of June 21st, 1839.

2. An alderman of Lancaster collected water rents under an ordinance of the city. *Held*, that thirty days' notice before bringing suit on his bond for not paying over, was not necessary.

3. When a demand is made and the money not paid over, the bond is broken.

4. Proceedings against justices under the Acts of 1772, 1839, and March 28th, 1820, compared.

5. Jones v. Hughes, 5 S. & R. 301; Wise v. Wills, 2 Rawle, 208, remarked on.

May 26th, 1871. Before READ, AGNEW, and SHARSWOOD, JJ. Error to the Court of Common Pleas of Lancaster county: No. 93, to May Term, 1871.

Heckert's Appeal.

On the settlement of Lane's account as assignee for the benefit of creditors of Heckert, there was a large balance decreed to be payable to Heckert, which was deposited in a bank then in good credit, to the account of Lane, assignee of Heckert, and Heckert notified to come and receive it. Heckert did not, but made an arrangement with the bank, not communicated to the assignee, that he would not demand the money from the assignee, but that it should remain without change of the account and at interest; he received interest on it for some time, when the bank failed. *Held*, that the assignee was not liable for the loss.

May 26th, 1871. Before READ, AGNEW, SHARSWOOD and WILLIAMS, JJ. Appeal from the decree of the Court of Common Pleas of Lancaster county: In Equity: No. 97, to May Term, 1871, by George Heckert, in the matter of his estate assigned for the benefit of creditors to James B. Lane

Letzkus v. Butler,

1. Letzkus gave his negotiable note to a company. Butler as holder sued him on it. Letzkus gave evidence that the note had been given for stock in the company, at the solicitation of Butler, who was a director and a leading man in the company, and on condition that Letzkus should be superintendent. Stock was transferred to him by Butler, and he was employed as superintendent at $1000 for six months, and discharged in two and a half months, for which time he was paid wages. *Held*, to be no defence to the note.

2. Under the act of May 11th, 1871, the Supreme Court will reduce their opinions to writing only in cases of reversal, and in such cases of affirmance as shall be deemed by a majority of the court sufficiently important.

3. When a judgment is pronounced with an opinion "PER CURIAM," it will imply that elucidation and argument are not required in the particular case.

October 2d, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD, and WILLIAMS, JJ. Error to the District Court of Allegheny county: No. 13, to October and November Term, 1870.

Gamble et al. v. McClure.

1. The title of land being in the wife, an exchange was agreed to be made with W.; he and the husband (with the wife) made deeds of bargain and sale of the same date and for the same amount of consideration, to each other, the wife not *acknowledging* the deed. After the death of the husband and wife, the heirs of the wife recovered her land from D., the grantee of W. *Held*, that the devisee of D. could not, on the ground of failure of title in the land conveyed to W., recover the land conveyed by him.

2. In a technical exchange of lands, the law annexes an actual warranty with a condition of re-entry on the failure of title of the land exchanged; and the party evicted can recover back the land given in exchange.

3. To produce this effect it is absolutely necessary the word "exchange" should be used. No other equivalent word can supply its place.

4. Where an exchange is effected by deeds of bargain and sale, the remedy of the party evicted is for damages on his covenants of warranty.

5. A parol agreement for exchange consummated by deed of bargain and sale, will not establish an exchange, so as to enable one of the parties on eviction to recover back his land.

October 2d, 1872. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD, and WILLIAMS, JJ. Error to the Court of Common Pleas of Allegheny county: No. 136, to October and November Term, 1869.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested:

Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in January, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

Nov. 29, Joseph Jones et al., Executors of ANN M. BAKER, dec'd.
" 29, Francis D. Worley, Administrator of PHŒBE S. WORLEY, dec'd.
Dec. 3, Hartwell Steer, Adm'r of THOMAS S. STEER, dec'd.
" 3, Margaret J. Ritchie, Administratrix of WILLIAM R. RITCHIE, dec'd.
" 3, E. Hunn Hanson, Executor of JOSEPH B. HANSON, dec'd.
" 3, Thomas S. and Joseph Wood, surviving Administrators of JOSEPH WOOD, dec'd.
" 4, Dr. H. A. Salter, Executor of EDWARD SHORE, dec'd.
" 5, Diana Johnson, Administratrix of JOHN R. JOHNSON, dec'd.
" 6, Adam Engard et al., Executors of ABRAHAM WILT, dec'd.
" 7, Charles Pollock, Administrator of ROBERT POLLOCK, dec'd.
" 7, Mary Curry, Adminis'x of HENRY M. CURRY, dec'd.
" 7, Theo. Abbett, Adm'r of SARAH E. SNYDER, dec'd.
" 7, Henry Stevenson, Administrator of WILLIAM COLTON, dec'd.
" 7, Andrew Maurman, Administrator of WILHELM MAURMAN, dec'd.
" 7, Jacob Witmer, Administrator of SAMUEL L. WITMER, dec'd.
" 9, John Fisher, Administrator of CHAS. BAUMANN, dec'd.
" 10, Mary E. Register, Administratrix of MARGARET A. OSKINS, dec'd.
" 10, Elias T. Hall, Adm. d. b. n. c. t. a. of FISHER HALL, dec'd.
" 11, Joseph B. Martin, Administrator of JEMIMA MARTIN, dec'd.
" 11, Robert Soley and Lewis Shallcross, Executors of JOHN SOLEY, dec'd.
" 18, David Webster, Exec'r of STEPHEN MORRIS, dec'd.
" 13, Xavier Joerger, Guardian of GEORGE W. JOERGER, minor.
" 14, Dennis F. Murphy, Administrator of EPHRAIM SINER, dec'd.
" 14, James P. Rossiter, Administrator of BRIDGET McCOSKER, dec'd.
" 14, Passmore Williamson, Executor of THOMAS WILLIAMSON, dec'd.
" 14, James E. Garretson, M. D., Adm'r of CATHARINE GARRETSON, dec'd
" 18, Daniel Rodder, Guardian of ELLEN and CATHARINE KERNEY, minors.
" 18, Francis Edwards, Adm'r of JOHN C. ERICKSON, dec'd.
" 18, The Fidelity Ins. Co., &c., Guardians of JANE E. VAN COTT, minor.
" 18, The Fidelity Ins. Co., &c., Adm'rs of SAMUEL McCOLLUM, dec'd.
" 19, Charles Calhoun, Administrator of ROBERT ARCHER, dec'd.
" 19, Edwin T. Coxe, Administrator c. t. a. of JOHN EVERMAN, dec'd.
" 19, Elizabeth Connell et al., Executors of GEORGE CONNELL, dec'd.
" 20, Alfred Fassitt and James W. Fassitt, Executors, as filed by Alfred Fassitt, surviving Executor, and of James W. Fassitt, acting Executor, as filed by Alfred Fassitt, surviving Executor, and account of Alfred Fassitt, surviving Executor of JAMES FASSITT, deceased.
" 20, Alfred Fassitt, Executor of ROBERT F. FASSITT, dec'd.
" 20. Final account of Samuel Harvey, Jr., Acting Trustee for ELIZABETH HORNER, late GIRTON, and her children, and of Samuel Harvey, Jr., surviving Trustee for MARY LUCRETIA RICHARDSON, (late Rogers), under the will of Charles Rogers, dec'd,
" 20, Charles Chauncey, Executor of MARGARETTA ROBERTSON, dec'd.
" 20, Albert G. Freeland, Executor of MARY ANN WILSON, dec'd.
" 20, Seneca E. Coates, Administrator of NANCY PIDCOCK, dec'd.
" 20, Samuel Harvey, Jr., Acting Trustee of ELIZABETH HORNER, late GORDON, dec'd, under the will of Chas. Rodgers, dec'd.
Dec. 21, J. Henry Hentz et al., Administrators of JACOB HENTZ, dec'd.
" 21, The Fidelity Ins. Co., &c., Guardians of MARY W. COOK, minor.
" 23, George Young, Executor of PHILIP YOUNG, dec'd.
" 23, William Neill, Executor of JOHN H. LUDWIG, dec'd.
" 23, Jane Horn, Administratrix of JOHN HORN, dec'd.
" 23, Charles S. West, Administrator of EDWIN STROUP, dec'd.
" 23, William H. Howell et al., Trustees under the will of ROBT. HOWELL, dec'd.
" 23, William H. Howell et al., Trustees of ELIZABETH LLOYD HOWELL, under the will of Robert Howell, deceased.
" 23, Geo. T. Stokes, Administrator of ELIZA LAMBERSON, dec'd.
" 24, M. Baird, Administrator of WM. H. BAIRD, dec'd.
" 24, Eli K. Price, Trustee of ELIZABETH EVANS, under the will of Joseph Archer, dec'd.
" 24, Eli K. Price, Trustee of MARTHA B. LEE (formerly Rogers), under the will of Joseph Archer, dec'd.
" 24, Eli Keen, Administrator of ALFRED W. ADOLPH, dec'd.
" 24, G. Dawson Coleman, surviving Administrator of DEBORAH BROWN, deceased.
" 24, J. Sergeant Price, Administrator of EDGAR K. SMITH, dec'd.
" 24, Peter C. Hollis, Executor of AMELIA SIMKINS, dec'd.
" 26, Geo. M. Troutman, Administrator c. t. a. of TREVOR N. ECKERT, dec'd.
" 26, Samuel W. Thackara, Executor of ESTHER W. EARNEST, dec'd.
" 26, William S. Vaux, remaining Executor of ANNA ASHMEAD, dec'd.
" 26, J. Woolman Reeves et al., Executors of ELLWOOD REEVES, dec'd.
" 26, William Strong, Administrator d. b. n. c. t. a. of ELIZA MALLERY, dec'd.
" 26, Ellen Keene Mitchell, Executrix of SARAH LUKENS KEENE, dec'd.
" 26, Bridget Conlin, Administratrix of ELIZABETH McMANUS, dec'd.

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dec 27-4t. Register.

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$1,000 Pennsylvania 6 per cent. Loan, 10-15, 1867, Coupons.
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309 Shares Manufact's' National Bank.
102 Shares Northern Bank of Kentucky.
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3212 Montrose street, Two-story Brick House, lot 15 x 50 feet. Twenty-sixth Ward. Orphans' Court Sale.—Estate of Henry McIntyre, dec'd.

2024 Annin street, Two story Brick House, above Twentieth and Federal streets. lot 14 x 50 feet. Orphans' Court Sale.—Estate of Patrick Doyle, deceased.

No. 2137 Granville street, Neat Three-story Brick House and lot 16 x 44 feet, Seventh Ward, Executors' Absolute Sale.—Estate of Patrick McCann, deceased.

602 Green street, Modern Four story Brick rough cast Residence with back buildings and every conveniences lot 18 x 121 feet. Immediate possession. Terms half cash. Sale positive.

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327 East Cumberland street, Three-story Brick Dwelling with back buildings and every convenience. Lot 15½ x 90 feet, Nineteenth Ward. $84 Ground Rent.

1631 Lombard street, 2 Three-story Brick Houses, lot 16 x 73 feet, to Richmond street. $26 Ground Rent. Executors' Absolute Sale. —Estate of Wm. White, deceased.

Orphans' Court Sale. on the Premises. 2 Brick Dwellings, Paschall street, near Lancaster avenue, Twenty-fourth Ward.

On Wednesday afternoon, January 8th, 1872, at 3½ o'clock, will be sold on the premises, 2 three-story Brick Dwellings, on S. E. side of Paschall street, 320 feet S. W. of Lancaster avenue, and near Fiftieth street, in the Twenty-fourth Ward of the city, each lot 16 feet front by 98 feet deep. Will be sold separately. Clear of Incumbrance. Estate of William H. Krider, deceased

Orphans' Court Sale on the Premises Soap Manufactory Building, Fourth street, above Oxford. Personal Property, &c.

On Thursday morning January 9th, 1873, at 10 o'clock, will be sold on the Premises, the Two-story Frame Soap Factory Building lot, 35 x 100 feet to Cadwalader street. After sale of Real Estate, the entire Personal Property, Steam Boilers, Copper Kettles, Boxes, Tallow, Presses, &c., will be sold. Estate of Owen McKinney, dec'd

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Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, JANUARY 10, 1873. No. 2.

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Supreme Court of Pennsylv'a

FOWLER et al v. J. D. SCULLY, in trust for First National Bank of Pittsburgh.

The court below decided that a National bank could enforce by *scire facias* the payment of a mortgage for future advances; upon a writ of error the Supreme Court reversed this decision—*holding*

1. In deciding whether the mortgage for future advances, held by the National bank, is valid or not, Federal laws and Federal precedents must be followed, as the subject is one which arises out of the construction of the National bank act of Congress, of June 3d, 1864.
2. The evident intent of Congress in passing said act, was that National banks should be institutions of commerce, not dealers in real estate, stocks or produce, and that no other security than *personal* should be taken for money lent.
3. A National bank cannot lend money on the security of a mortgage, and its power to take and hold a mortgage is confined to the second case enumerated in the 28th section of said act, viz, "for debts *previously contracted*."
4. The mortgage in question, which contained a recital that the bank "hath agreed to discount for said Fowler an amount in the aggregate not exceeding $100,000, such negotiable paper as he shall offer for that purpose," was made to secure the *future* debts of Fowler whenever they should be incurred by such discounting. Even if the recital be treated as a covenant to lend, still the loans and discounts were to be made in the *future*. Being to secure future advances, the mortgage is therefore void.
5. The distinction between a mortgage to cover future advances at the discretion of the mortgagee, and one to cover advances he is bound to make, recognized in Ter. Hoven v. Kerns, 2 Barr, 99, and other cases, has no bearing on the present question.
6. The mortgage being in direct violation of a positive statute, and therefore void, its payment cannot be enforced. The plaintiff could not open its case without disclosing that it sought the enforcement of an illegal security—its action must therefore fail.

Error to the District Court of Allegheny county.

Opinion of the court by AGNEW, J. Delivered January 6th, 1873.

The First National Bank of Pittsburgh asked the District Court to enforce by *scire facias*, the payment of a mortgage for future advances. The defendant, the owner of the mortgaged land, asserts that the mortgage is forbidden by the act of Congress, which confers upon the bank its charter and all its powers. The simple question is,—Is the mortgage valid or void; and if void will the law enforce it? In deciding this question, we must be guided by the Federal laws and Federal precedents, for the subject is one of Federal origin and Federal control. The plaintiff is a corporation created and governed by the act of Congress, approved the 3d of June, 1864, commonly called the National bank act. What is the Federal rule to be applied to such a corporation? In the Bank of U. S. v. Dandridge, 12 Wheaton, 64. Justice Story lays down this rule: "Whatever may be the implied powers of aggregate corporations by the common law, and the modes by which these powers are to be carried into operation, corporations created by statute must depend, both for their powers and the *mode of exercising them*, upon the construction of the statute *itself*." For this he cites the following language of Chief Justice Marshall, in Head v. Prov. Ins. Co., 2 Cranch, 127: "Without ascribing to this body, which in its corporate capacity is the *mere creature of the act* to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be *precisely what the incorporating act has made it*; to derive all its powers from that act and to be *capable* of exerting its faculties *only* in the *manner* the *act* authorizes." These propositions are repeated by himself in Dartmouth College v. Woodward, 4 Wheaton, 636, and by C. J. Taney, in Bank of Augusta v. Earle, 13 Peters, 587, and Penrise v. Chesapeake & Delaware Canal Co., 9 Howard 184. In our own State, the same doctrine is recognized in the case of a National bank. Justice Strong said: "The bank is a creature of the act, dependent on it for all its powers, and *controlled by all the restrictions* which the act imposes." Venango National Bank v. Taylor, 6 P. F. Smith, 14.

This being the settled rule of interpretation, the question is,—Does the act of Congress authorize or permit a National bank to take a mortgage of lands, to secure the payment of future loans and discounts?

The banking powers of these associations are to be found in the 8th section, and are "to carry on the business of banking by *discounting* and *negotiating* promissory notes, drafts, bills of exchange and other evidences of debt; by buying and selling exchange, coin and bullion; by loaning money on *personal* security; by obtaining, issuing and circulating notes according to the provisions of the act." In view of the rule of interpretation of such charters given to us by the Federal courts, and the maxim *expressio unius est exclusio alterius*, the argument might close with the terms of the power to loan money on *personal* security: for agreeably to this rule and maxim, no other security than personal can be taken for money lent. This is the law of the bank's capacity, and of its control. It accords also with the nature of banking as a business, which is precisely described in the language of the law itself; the *discounting* and *negotiating* of promissory notes, drafts, bills and other evidences of debts (meaning, of course, debts *ejusdem generis*, such as checks, certificates of deposits, &c), the buying and selling of bills of exchange, bullion, and lending of money on personal security. The reasons are manifest. The business of a bank is commercial, not that of dealing in real estate, brokerage, &c. It, therefore, does not buy and sell real estate, groundrents, mortgages, stocks, produce, &c.

It deals in commercial paper, on the security afforded by the personal responsibility of drawers, endorsers and payers, and this because banks are created for the purposes of trade, which require ready access to loans of money, and discounts on business paper made in the course of trade. Experience also has shown, that whenever banks abandon the legitimate practice of loaning or discounting on the well known standing of the parties to commercial paper; to lend money on the hypothecation of stocks, real estate, &c., in lieu of personal security, they enter an uncertain and unknown region of credit. The directors can well know or ascertain the standing of drawers and endorsers as men of capital or means in the community, but the moment they leave this plain field to enter the region of corporation stocks, real estate and liens, they take a leap in the dark, and must resort to outside agents, such as lawyers, brokers, &c. The internal affairs and condition of a corporation are known to few, while the security of a mortgage rests on both title and liens, requiring professional skill to explore them. The evident intent of Congress is, that National banks should be institutions of commerce, not dealers in real estate, stocks or produce.

Another obvious purpose of confining their loans of money to personal security, is to prevent these associations from splitting on the rock which has ruined so many banks, to wit, that of lending too much of their capital to one person or firm. The 29th section provides: "That the total liabilities to any association, of any person, or of any company corporation, or firm, for money borrowed, including in the liabilities of a company or firm, the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in." Thus Congress has prohibited an undue aggregation of its capital in single hands even though each note or bill may be well secured by the names upon it. Then what must we say of large aggregations of capital in the hands of one man, without personal security on the faith of an estimated value of real estate and the risk of title, and conflicting liens? In the present case we see an aggregate of loans to Fowler, the mortgagor, of $76.303.59; the very mortgage reciting, that it was taken to dispense with personal security, and to extend to the sum of $100,000. How much the paid in capital of this bank is, we do not know. That such a transaction is contrary to the first principles of correct banking and to the charter, is obvious.

The intention of Congress is manifested by other features of the act. The 35th section declares: "That no association shall make any loan or discounts on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent *loss* upon any debt *previously contracted in good faith*, and stock so purchased or acquired, shall within six months from the time of its purchase, be sold or disposed of at public or private sale, in default of which a receiver may be appointed to close up the business of the association according to the provisions of this act." What is this, but to repeat to the bank—you must lend money only on personal security. Then comes the 37th section, prohibiting the bank from hypothecating its circulating notes to procure money to pay on its capital, or to be used in its banking operations, or from using its notes so as in any form to increase its capital. These two sections, the 35th and 37th, when viewed together, teach another lesson, that these banks shall not live upon themselves, so that when compelled to wind up, creditors and stockholders shall not then discover that their apparent assets are composed of their own decayed viscera, instead of outside personal security. In this way only can the public be made safe against mismanagement.

Here the argument might rest, that the lending of money on mortgage or real estate security is *ultra vires* and forbidden. But Congress has left nothing to implication, and in the 28th section has said in what cases these banks may hold real estate, and has forbidden all others. The 28th section reads thus: "That it shall be lawful for any such association to purchase, hold and convey real estate as follows:" Then follow four numbered cases.

"*First.* Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be *mortgaged* to it in good faith by way of security for debts *previously contracted*.

Third. Such as shall be conveyed to it in satisfaction of debts *previously contracted* in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, mortgages held by such association, or shall purchase to *secure debts due* to such associations."

Now comes the prohibition against, any other mode, and the appointed time such as shall have been legally acquired, shall be held.

"Such association shall *not* purchase *or* hold real estate in any *other case* or for any *other purpose* than as *specified* in this section, nor shall it hold possession of any real estate under mortgage, or hold the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

Thus the section speaks to the bank in plain language—you shall not purchase *or* hold real estate (besides your banking house) except in good faith to secure debts already contracted, and you shall not hold in mortmain, for a longer period than five years, that which you can legally take. This section is interpreted also by the 35th section, which forbids the bank from taking its own stock in security, except to prevent the loss of a debt *previously contracted in good faith*; and when stock shall be so taken it shall not be held longer than six months. The language of prohibition in the 28th section is quite clear. The bank "shall not purchase *or* hold real estate in *any other case* or for *any other purpose* than as specified in this section." The second specified case in this section is, "such as shall be mortgaged to it in good faith by way of security for debts *previously contracted*." The law therefore says plainly—you shall not hold a mortgage for future loans, for that is another case.

If anything were wanting to make plain that which is clear, it is the amendment of the 2d clause in the 28th section, and the debate on it in the Senate. See Cong. Globe, April 26th 1864. The amendment of the committee proposed to strike out, "for loans made by such association in the usual course of its banking business, or for money due thereto," and to insert "for debts previously contracted," so as to make the clause read, "such as shall be mortgaged to it in good faith by way of security for debts previously contracted." At the call of Senator McDougalls, Senator Sherman explained the amendment of the committee to allow the banks to take a mortgage for a pre-existing debt; but not to loan money on real estate security; "Not to loan money on mortgage?" said Mr. McDougall, Mr. Sherman again replied, "They have no right to loan money upon mortgage; they must take personal security, but after a debt is contracted, they may, in order to secure the debt, take a mortgage upon real estate." The amendment was adopted, and the section now stands so.

It is argued, however, that a mortgage is not real estate, and therefore it cannot be said that the bank holds real estate when it holds a mortgage. The criticism is unsound in forgetting that the law is its own interpreter. A mortgage is one of the four enumerated cases of which the law says the bank may hold real estate as

follows. Then follows the second case. It is also one of the cases referred to when the law says, the bank shall not hold in any other case than as specified in this section. The criticism overlooks the fact also that the act as a Federal law is intended to embrace the various conditions of the law of mortgage as realty or personalty, in the several States. Even in Pennsylvania, where no court of chancery existed, though viewed only as a security for money, mortgages have been regarded as conveyances of real estate in form, and subject to real estate remedies, as by ejectment, and by writ of waste.

The argument founded on the 52d section is unsound. The mortgages therein referred to are of course those which may be lawfully taken for pre-existing debts, which when found among the assets of the bank shall not be so assigned as to create preferences among creditors. The express prohibition of the 28th section cannot be repealed by this reference to mortgages in the 52d section, when so ready a meaning can be found for the latter.

It is a clear and incontrovertible position, therefore, that a National bank cannot lend money on the security of a mortgage, and that its power to take and hold a mortgage is confined to the second case in the 28th section, for debts previously contracted.

It is argued that the mortgage before us is not a mortgage for future advances of money, because of the recital that the bank "hath agreed to discount for said Fowler an amount in the aggregate not exceeding $100,000, such negotiable paper as he shall offer for that purpose." It is said this is a covenant or obligation on part of the bank to loan that sum, and, therefore, the money to be lent is not a future loan. But this confounds distinctions and ignores facts. Treat the recital as a covenant to lend, still the loans and discounts to be made are future. The bank did not owe Fowler $100,000, and if it did, it had a security without a mortgage. The mortgage before us is not to secure a debt from the bank to Fowler, but a debt from Fowler to the bank, not exceeding $100,000, which is to consist of negotiable business paper discounted for him without the necessity of procuring the additional endorsement for said paper by a third party. If the bank is bound to make the discounts, the breach of the covenant would be followed by such damages only as Fowler could show. So much is drawn from the instrument itself. Then the fact is, as it appears in the schedule of discounts, that though the mortgage bears date the 21st October, 1869, acknowledged and recorded on the same day, the first discount claimed under it was on the 11th April, 1870, after which come twenty-two others, down to September 26th, 1870. These are Fowler's debts to the bank, and they are all future to the mortgage. It would be an unmitigated fraud upon the act of Congress if a bank could first covenant to lend the money, and then found upon its own covenant a mortgage to cover a line of future loans and discounts.

The distinction between a mortgage to cover future advances at the discretion of the mortgagee, and one to cover advances he is bound to make, recognized in Ter Hoven v. Kerns, 2 Barr, 99, and other cases, has no bearing on the present question. That distinction was taken to regulate the rights and equities of lien creditors among themselves, but does not change the nature of the advance itself. The advance in either case is future, but the effect upon the lien is different, just as the creditor was bound or not bound to make the advance.

It is further argued that to prevent injustice, equity will regard the mortgage as delivered anew, on each discount or advance. This will do *inter partes*, to prevent wrong; but such a fiction cannot confer a power upon a corporation, withheld from it by its charter. The error is in forgetting that this is a question of statute power and public policy, not of mere equity between the parties. Any want of corporate power might be supplied by this means, and the mere interests of parties be made to override the law.

Whether Vankirk, the voluntary assignee of Fowler, can set up the defence here, depends not on his character as a volunteer, but on the question whether the law will aid the plaintiff's recovery. If it will not, it is clear that Vankirk, as the owner of the estate by assignment, and under bond to administer his trust according to law, may, and ought to defend for the interest of the creditors. This brings us to the second question stated in the outset of this opinion. The mortgage being void, will the law enforce it? All the authorities, English, Federal and State, say no. Mr. Powell, in his work on Contracts, p. 166, says, that all contracts repugnant to the welfare of the State, or against some maxim or rule in law, or in contradiction to some positive statute, are void. Then follow numerous instances. Mr. Comyn, in his work on Contracts, p. 59 to 67, enumerates many statutes upon which contracts have been declared by the courts to be void as *mala prohibia*, and it is not essential that the statute life set should declare the contract to be void.

The doctrine that a contract in violation of the provisions of a statute, though not expressly made void by it, is null, and will not be enforced by the courts, is very distinctly stated and sustained by authorities in the case of the Bank of the U. S. v. Owens, 2 Peters, 538. Johnson, J., said, "No court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal." The same principles are recognized in Coppell v. Hall, 7 Wallace, 558. Justice Swayne, commenting on the instruction of the court below, that the illegality had been waived by the act of the defendant, says "In such cases there can be no waiver. The defence is allowed not for the sake of the defendant, but of the law itself." Again, "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Where the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded on its own violation." See also Bank v. Lanier, 11 Howard, 369. And in Bank of Augusta v. Earle, 13 Peters, 587, C. J. Taney says: "It may be safely assumed that a corporation can make no contracts and do no acts within or without the State which creates it, except such as are authorized by its charter."

Coming now to our own State, a long line of decisions testifies that our courts will not lend their aid to enforce illegal contracts. In Mitchell v. Smith, 1 Binney, 110, a case of the sale and purchase of a Connecticut title to Pennsylvania lands, Shippen, C. J., says: "The contract is illegal, being founded on the breach of the law, and of consequence is a void contract and cannot be enforced in a court of law." In Siedenbender v. Charles, administrator, 4 S. & R., it was held there could be no recovery upon a ticket in an illegal lottery. Tilghman, C. J., said: "I consider it perfectly settled that an action cannot be sustained, founded on a transaction prohibited by statute, although it is not expressly declared that the contract is void;" p. 160. Yeates, J., said: "The principle of public policy is, that no court will lend its aid to a man who grounds his action upon an immoral or illegal act. Justice as between these individuals would require either payment of the money or a re-conveyance of the property, but principles of public convenience demand that the justice of the case shall yield to higher considerations, the operation of the precedent on public morals and the public interest. It is for these reasons courts of justice will not assist an illegal transaction in any respect." In Biddis v. James, 6 Binney 329, a case of lottery ticket also, C. J. Tilghman states the same doctrine in fewer words. There is, therefore, no room for equitable presumptions, or estoppels, in cases of illegal contracts. Without protracting the statement too much, I may refer to the following cases of illegal contracts, which the court have refused to aid by a recovery: Maybin v. Coulson, 4 Dallas, 298; Duncanson v. McLare, Ibid, 308; Badgely v. Beale, 3 Watts, 263; Kepner v. Keefer, 6 Watts, 231; Wagonseller v. Snyder, 7 Watts, 343; Clippenger v. Hepbaugh, 5 W. & S. 315; Wilson v. Hines, 5 Barr, 452; Columbia Bank & Bridge Co. v. Haldeman, 7 W. & S. 233; App v. Corryell, 3 Pennsylvania, 494; Edgell v. McGlaughlin, 6 Wharton, 176; Bruce's Appeal, 5 Smith, 295. Two of these cases may be noticed particularly on the ground that the contracts were collateral to the illegal act, and that the court refused its aid. Badgely v. Beale was for wages as a marker at an illicit billiard table; and Columbia Bank, &c., v. Haldeman, was on a bond of indemnity to a stakeholder for paying over money won on a wager on an election. Here the bank, as plaintiff, asks to recover on an alleged mortgage; and it follows, from the doctrine stated, that the court will not assist the illegal act; and that the argument in regard to the State, being the only party to avail herself of the illegal forfeiture, has no place here. The defendant has the right to avail himself of the defence, and prevent a recovery. The doctrine of League v. Hillegas, 7 S. & R. 313, and cases following in its track, is founded on the law of Pennsylvania as to corporations, that though they may *take* real estate, except for superstitious uses, yet they cannot hold it in consequence of the statutes of mortmain, but as the title has passed into the corporation, it must rest there, till the State enforces the forfeiture. This is very clearly shown by C. J. Tilghman in that case. But in the case now before us, as we have seen, the act of Congress forbids the taking of a mortgage, except as a security for debts previously contracted. The disability attaches therefore to the *acquisition*, and not to the retaining of the mortgage. The transaction is without authority and illegal from the start, and the law will not enforce it. The defendant may, therefore, defend against it, not because of his own merit, but because the law will not suffer itself to be prostituted. This being the rule, it only remains to state the test adopted. "The test (says Judge Duncan, in Swan v. Scott, 11 S. & R. 164) whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant." This test has been repeated in the following cases: Thomas v. Brady, 10 Barr, 170; Scott v. Duffy, 2 Harris, 20; Evans v. Deavo, 12 Harris, 65. The mortgage of Fowler to the plainaiff is, on its face, a security for future advances, and the schedule of the debts claimed under it shows also their subsequent character. The plaintiff could not open its case, therefore, without disclosing that it sought the enforcement of an illegal security—one forbidden by the law. The action must, therefore, fail. Judgment reversed.

KING v. BLACKMORE.

Where a landlord distrains for rent, and the tenant replevies, the landlord, pending the replevin is not barred from instituting a suit against a surety for the payment of the rent.

Error to the Court of Common Pleas of Allegheny County.

Opinion of the court by AGNEW, J. Delivered January 6th, 1873.

This was an action in the court below against the defendant as surety, upon a distinct, several and independent covenant, as bail absolute to pay the rent of William Lynn, a tenant, in consideration of the letting, and for a valuable consideration, it said also. The instant the rent fell due and was unpaid by Lynn, a cause of action arose against Blackmore, the surety. There cannot be a doubt that King could have sued the tenant for the rent, and brought an action also against the surety, and prosecuted both suits concurrently until he obtained satisfaction from one of them. As the plaintiff's right of action against the surety was immediate, independent and concurrent, it is plain that the distress merely of the goods of the principal was not *ipso facto* a bar or a suspension of the plaintiff's remedy against the surety. The true question, therefore, is, whether the distress upon the tenant's goods, followed immediately by a replevin by the tenant, and a return to the writ by the sheriff that he had executed the writ by delivering the goods to the plaintiff in the replevin, is such an extinguishment or satisfaction in law, as will discharge the surety from his separate covenant. On principle, clearly it is not; for the goods were not sold, but went back into the possession and custody of the tenant as his own property, and by his own act; and the landlord had in lieu of the distress only the replevin bond, and the liability of the sheriff for the solvency of the sureties in the bond, both of which were mere *choses in action*, and not satisfaction *per se*. Even in the case of a levy upon execution, the levy is not a satisfaction when the goods remain in the hands of the defendant in the writ, or are restored to him at his own instance. Cummins' Appeal, 9 W. & S. 73; Lytle v. Mehaffey, 8 Watts, 275, Davids v. Harris, 9 Barr, 501; Cathcart's Appeal, 1 Harris, 421. The replevin bond and sheriff's liability, are but a means of producing ultimate satisfaction, but are not in themselves payment of a precedent and absolute debt, as the surety's debt here was. They are neither money nor goods. The very ground upon which the sheriff's ultimate liability stands, was rested by Shippen, President, in the leading case, upon the hardship of the case of the landlord. "For," says he, "by the replevin he is divested of the immediate security of his tenant's goods, and yet has no right to interfere in the choice of sureties that undertake to see them returned when he has established his demand." Oxley v. Cowperthwaite, 1 Dallas, 349, 350.

The court below founded its decision on the supposed authority of Quinn v. Wallace, 6 Wheaton, 452. But that case is no precedent for this. That case decides that a landlord who has made a distress on goods of his tenant, cannot make a second distress on the goods of an undertenant, without showing that the distress upon the goods of the tenant was insufficient, or rendered unproductive by the act of God, or of the tenant himself; and that the burthen of the proof of the insufficiency or unproductiveness of the distress, lay on the landlord, who, having taken the goods into possession, is presumed to have put them to sale, as he is bound to do under the act of 1772, and consequently has it in his power to show the result of the sale. But the present case is clearly distinguishable from that, on the very ground that the record of replevin and sheriff's return show that the goods were made unproductive by the act of the tenant himself, who has had them returned into his own possession, and the liability of the bond and of the sheriff substituted. The record of the replevin and return, therefore, show that the distress was no satisfaction, and, consequently, no bar to the independent action against the surety on his several covenant as bail absolute for the rent. Nor can the surety or bail complain of this. His liability is original, concurrent, and prior to the distress. If he has to pay, he will be entitled by subrogation to the security of the replevin bond. See Burns v. Huntingdon Bank, 1 Penna. Rep. 395; Pott v. Nathans, 1 W. & S. 155; Armstrong's

Appeal, 5 W. & S. 352. He can prosecute the action of replevin to final judgment, and avail himself of the security of the replevin bond. In the meantime, he can protect himself against the risk of mispayment by a notice to the tenant as his principal to defend the suit of the landlord against himself, on his covenant as surety for the rent. Why then should the landlord be deprived of his concurrent remedy against the surety, by a replevin which itself accounts for the distress, and shows that it was made unavoidable by the tenant's own act? The consequence flows from the very form which the contract was made to take by the mutual acts of the parties; that is to say, two separate and independent agreements for the debt, like the several liabilities of drawer and endorser, the remedy against each is complete and independent, and can be pursued concurrently with the other to judgment and execution, and can be ended only by actual payment, or a legal extinguishment which satisfies the debt. The distress and replevin were not a bar to the plaintiff's action, and the court erred, therefore, in entering judgment for the defendant *non obstante veredicto*.

The judgment is reversed, and judgment is now entered for the plaintiff on the verdict, with interest since the rendition thereof, and costs.

E. McFADDEN v. H. C. JOHNSON.

Damages for the entry of a railroad company upon land are personal, and do not pass by a conveyance of the land, unless specially mentioned.

Error to the Court of Common Pleas of Allegheny county.

Opinion of the court by AGNEW, J. Delivered January 6th, 1873.

The court below charged the jury that on all the evidence the plaintiff was not entitled to recover, except for the admitted balance of purchase money unpaid by the defendant. This was an error, the plaintiff having shown that she was the owner of the farm when the railroad company entered upon it, and made the cutting and filling for the railroad track, for which she claimed damages; and that this injury was done by the Pittsburgh and Erie Railroad Company, before the road passed into the hands of the Atlantic and Great Western Railroad Company. The facts are clearly proved by a number of witnesses; among them was Mr. Mumford, a land surveyor, and a director of the Atlantic and Great Western Company, who, as a member of a committee to settle for damages and the right of way, had examined the ground. He testifies distinctly to the profile of the road through the cut and fill, the former thirty feet deep, and the latter twenty-five feet high, at their lowest and highest points respectively. This profile he testified showed the condition of the farm after the grading was done, and that it was the condition in which the Atlantic and Great Western Company took the road. The proof is equally clear, that Johnson, the defendant, settled with the company and received the damages, and this settlement comprised all that had been done upon this farm. The cause seems to have been tried and decided upon the principle, that unless Mrs. McFadden *reserved* her right to the damages, they passed by her sale of the farm to John Scott, who testifies that she did not reserve her right at the time of her sale to him, and that he also did not reserve the right at the time of his sale to Johnson. This was a manifest error; the reverse being true, that the damages did not pass either by the article or the deed, unless expressly conveyed. The damages for the injury done to the land while Mrs. McFadden was the owner, were clearly a personal claim, which did not run with the land. If the company entered unlawfully, the entry and work done upon the land were a trespass, and the right to recover damages could be enforced by a common law action. If the entry were lawful, the company acquired a right, for which the damages (so called) are a compensation, enforceable in the statutory mode given to assess it. McClinton v. R. R. Co., 16 P. F. Smith, 409. In either case *qua amque via data* therefore the right is personal, belonging to the owner of the land when the entry and injury took place, and could pass only by her assignment. In Schuylkill Navigation Co. v. Decket, 2 Wall. 343, the very point is decided, that the damages do not pass by the deed. Chief Justice Gibson saying: "To the parties proposed to be made defendants, it is a decisive objection that they have not title to the damages, which being in compensation of an injury in the nature of a trespass, could not pass by a conveyance of the land." The same principle will be found to be asserted and sustained in the following cases; Hart v. Hucker, 5 S. & R. 1; Commonwealth v. Stephens, 3 Penna. R. 509; Reese v. Adams, 16 S. & R. 40. Instead, therefore, of holding Mrs. McFadden to proof of a reservation of her claim to the damages, the defendant, Johnson, was bound to show that she had parted with her rights, which had become vested in him. Neither the articles with Scott, nor the deed to Johnson is exhibited; but it is to be presumed, if either contained a transfer, it would have been noticed.

Judgment reversed and a *venire facias de novo* awarded.

MARY MURRAYS' EXEC'RS v. JOS. SHARP.

Where executors, and others suing or being sued in a representative capacity, take out a rule of reference, they may appeal from the award without the payment of costs and entering into a recognizance.

Error to Court of Common Pleas of Beaver county.

Opinion of the court by AGNEW, J. Delivered January 6th, 1873.

The plaintiffs below took out a rule of reference in this case, and an award having been made against them, appealed therefrom without the payment of costs and entering into recognizance; and in consequence, the court below set aside the appeal. The 31st section of the act of 16th June, 1836, relating to arbitration, provided, "'that in all cases in which executors, administrators or other persons suing or being sued in a representative character, or minors, shall be the party appellant from an award, the appeal shall be good without the payment of costs or entering into recognizance as aforesaid, if such appellant shall not have taken out the rule of reference." The question is, whether the qualification that the appellant had not taken out the rule of reference still exists in view of the subsequent legislation in regard to executors and administrators. The abolishment of imprisonment for debt, carried with it the bail known as special bail, conditioned for the surrender of the body, and led to the passage of the act of 20th March, 1845, P. L. 188, the first section of which enacted that, "In lieu of the bail heretofore required by law in the cases herein mentioned, the bail in cases of appeal from the judgments of aldermen and justices of the peace, and from the award of arbitrators, shall be bail absolute, in double the probable amount of costs accrued and likely to accrue in such cases with one or more sufficient sureties conditioned for the payment of all costs accrued, or that may be legally recovered in such cases against the appellants." (Brightly, 57, pl. 41.) The words "costs accrued and likely to accrue," led to the impression that no costs were to be paid under the general act of 1836, as a condition of obtaining an appeal. It was decided differently, however in Merritt v. Smith, 2 Barr, 161, and the Legislature with a view to a remedy, passed the act of 13th April, 1846, P. L. 303, validating appeals made without the payment of costs, and declaring in the second section that "the first section of the act entitled 'an act concerning bail and attachments' shall be so construed as to require the payment by the appellant to the prothonotary, of all costs which have previously accrued, whenever an appeal is entered from an award of arbitrators, excepting where executors, administrators, guardians or trustees are appellants." It will be noticed that the exception as to executors, &c., fails to repeat the qualification of the act of 1836, § 31, "if such appellant shall not have taken out the rule of reference." This act was followed by the 12th section of the act of 25th April, 1850, P. L. 571, which declared that "so much of the 1st section of the act passed on the 20th day of March, 1845, entitled an act concerning bail and attachments," as pertains to appeals from the awards of arbitrators, shall from henceforth be construed to extend to all such appeals whether made by persons natural or artificial." This section was evidently intended to embrace corporations, but the generality of its expression, natural as well as artificial, led in its turn to the passage of the act of 3d May, 1852, § 1, P. L. 541, in order to prevent its taking effect upon persons suing or being sued in a representative capacity. It provided that "the 12th section of the act of 25th April, 1850, relating to appeals from the awards of arbitrators, shall not be construed so as to embrace executors, administrators or other natural persons suing or being sued in a representative character." Here again the Legislature omitted the before stated qualification contained in the 31st section of the act of 16th June, 1836. This double failure to re-enact the qualification cannot go for nothing. We must presume that the Legislature was aware that the act of 1836, excepted from the 31st section the case of an appellant taking out the rule of reference, and consequently intended to abolish the exception. Such is the plain effect of the act, of 1846 and 1852. These laws were intended to preserve to executors and others suing or being sued in a representative capacity, the benefit of the act of 1836, of appealing without payment of costs and giving a recognizance, and if they intended to preserve the exception as to taking out the rule of reference, it was more natural they should have stated it. The intention to omit the exception accords also with the views of this court in the case of the Penna. Ins. Co. v. Hawes, 5 Binney, 508, and the practice under the arbitration act of 1810, as to executors and administrators. The impolicy of compelling them to pay costs which may come out of their own pocket, is there strongly asserted by Tilghman, C. J. It is in consonance also with the decision in Musser et al. v. Good, 11 S. & R. 247, that an executor is not liable for costs *de bonis proprius*, except when some fault is personally imputable to him. The liability of an executor or administrator for costs was again examined very elaborately in Callender's Adm'r v. The Keystone Ins. Co., 11 Harris, 471, and his non-liability reasserted, except where he is defeated in a wanton or vexatious suit. The same distinction is again maintained in Pennypacker's Appeal, 7 P. F. Smith, 114. In view of that legislation since 1836, and the current of decisions upon the non-liability of executors and administrators *personally* for costs, we are of opinion that the Legislature did not intend to revive the qualification as to the party taking out the rule of reference, in the 31st section of the act of 1836. An opposite intention would often compel the executor or administrator to pay the costs out of his own pocket, or else to sacrifice the interests of his trust, by refusing to appeal. The order of the court below quashing the appeal is therefore reversed, the appeal ordered to be restored, and a *procedendo* awarded.

LEGAL GAZETTE.

Friday, January 10, 1873.

JOHN H. CAMPBELL,
EDITOR.
THEODORE F. JENKINS,
ASSOCIATE EDITOR.

SUPREME COURT OF PENNSYL'A.

Upon Monday last, the Supreme Court of Pennsylvania commenced its regular January term in Philadelphia. Chief Justice Read, and Justices Agnew, Williams, and Mercur being present, Justice Sharswood being absent at Nisi Prius. A number of decisions were rendered in Western District cases, several of which we publish in our columns to-day, and we were glad to observe that the judges in announcing their decisions, merely stated the substance of them, and did not read all their written opinions through. Where there are so many decisions rendered at one time in our court of last resort, it is unnecessary to consume valuable time in reading them, and the judges showed their good sense in this instance, in not doing so.

After rendering these decisions, several young gentlemen (whose names we will give next week) were upon motion admitted to practice as attorneys of the court. The Philadelphia list of cases for argument was then called, occupying the remainder of the day. The court room was crowded with members of the city bar, and we noticed also the presence of several members of the Constitutional Convention, now in session in this city; among others Hons. Saml. A. Purviance, Chas. A. Black, and Senator Purman. The court is now engaged in hearing the arguments in Philadelphia cases.

The Constitutional Convention resumed its sessions upon Tuesday, 7th inst., in this city, and will probably remain for several months. Nearly one hundred out of the whole one hundred and thirty-three members are lawyers, and we have no doubt their professional brethren in this city will do all in their power to make them feel at home. The hall of the convention is very neatly fitted up, and has met with general approbation from both the members and the outside public. The Convention will be watched by the people with great interest, as many reforms are expected from its action.

Owing to the pressure upon our columns to-day in publishing the Supreme Court opinions, we are compelled to omit much interesting matter, including decisions of the U. S. Supreme Court, head notes of recent decisions of the Supreme Court of Wisconsin, several decisions of judges of the interior districts of Pennsylvania another letter from our correspondent, Pericles, book notices and other items, which we hope to present in our next issue.

We call especial attention to the important opinions of the Supreme Court of Pennsylvania, which we publish to-day. Fowler et al. v. Scully, decides that mortgages taken by national banks to secure future advances, are void, and their payment cannot be enforced. Chartiers & Robinson Township Turnpike Co. v. Budge et al. decides that an unstamped instrument cannot be admitted *in evidence in a State court.*

Supreme Court of Pennsylv'a

THE CHARTIERS AND ROBINSON TOWNSHIP TURNPIKE ROAD COMPANY v. BUDGE & McNAMARA.

1. No instrument of writing within the act of Congress of June 30th, 1864, can, unless properly stamped, be admitted in evidence in any State or Federal court.
2. The 30th section of the act of Congress, of 1866, is not a rule for the mere regulation of evidence, but disqualifies the document from fulfilling its purpose as an instrument of evidence.
3. The act is within the powers of Congress.

Error to the District Court of Allegheny County.

Opinion of the court by AGNEW, J. Delivered January 6th, 1873.

It appears in the bill of exceptions in this case, that the defendants offered in evidence a special written contract, dated April 24th, 1868, for the performance of the work done by the plaintiff. Objection to its reception in evidence was made "because the paper is not stamped as required by the act of Congress." The paper being not stamped, the court rejected the evidence. The single question is whether the act of Congress justified the court in rejecting the paper as evidence. Under this bill, no question arises upon the validity of the written contract. Had the paper gone in evidence, that point could have been fairly open to discussion, under the 9th section of the act of Congress of July 13th, 1866, amendatory of the 158th section of the act of June 30th, 1864, declaring a paper not stamped "with intent to evade the provisions of the act," "invalid and of no effect." Laws U. S., 1866, p. 303-4; Ibid. 1864, p. 148. The inquiry under this bill is, therefore, confined to the amendment of the 163d section of the act of 1864, contained in the 9th section of the act of 1866 (p. 149), in these words: "That hereafter no deed, instrument, document, writing, or paper required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted, or used in evidence in any court, until a legal stamp or stamps, denoting the amount of the tax, shall have been affixed thereto as prescribed by law." This provision gives rise to two questions, the first upon the meaning of the enactment; the second, upon the power of Congress to make it.

It has been held in Massachusetts and Michigan, that the provision applies only to the Federal and not to the State courts. Carpenter v. Snelling, 97 Mass. 452; Lawrence v. Halloway, 21 Michigan, 162. It seems to us this interpretation of the act of Congress was not well considered, and is contrary to the language and the design of the act. The words are, "or used in evidence in *any* court." Language could not be broader, and no exception or qualification is to be found in the act, while the design of Congress makes the meaning perfectly clear. The paper is not to be admitted or used in evidence. "until a legal stamp, or stamps, denoting the amount of the tax, shall have been affixed thereto, as prescribed by law." Thus the purpose is plain to prevent the use of the unstamped paper, so long as it remains without payment of the tax or duty upon it. This is simply a disqualification of the instrument in the hands of the delinquent, to prevent its use, until he pays the tax. If "any court," mean only the Federal courts, the design of Congress is totally frustrated, as will be seen at once upon referring to schedule B, containing the subjects of the stamp tax, numbering over forty classes of "deeds, instruments, documents, writings, and papers, used in ordinary business. They will be found to comprehend all those numerous writings of every kind, which enter into the domestic affairs of the people, and the business of every-day life, in the very bosom of the State—a few for example: agreements, checks, orders, bills, bonds, certificates, deeds, mortgages, policies of insurance, leases, powers of attorney, protests, receipts, and legal documents. Now, for one such paper which can be sued upon in the Federal court, by reason of ex-territorial citizenship or other ground of Federal jurisdiction, nine hundred and ninety-nine others can never reach a Federal court, and must be prosecuted in the courts of the State, where they were made, and where the parties reside. This law is a revenue law, and of what use is the disqualification of the paper until the stamp duty is paid, as a means of enforcing payment, unless "any court" means State courts, as well as Federal? Other portions of the section confirm this interpretation. The United States have no offices for the recording of deeds, mortages, powers of attorney, and other documents, yet the paper is forbidden to be *recorded* till the proper stamp tax be paid. The word "recorded" cannot be separated from its immediate context, the words following it, viz., "or admitted, or used, in evidence in any court," both run together, are part of the same sentence, and interpret each other. If "recorded" applies, as it must, to State offices of record, "any court" applies with equal force to State courts. Then, also, the words "until a legal stamp or stamps denoting the amount of tax, shall have been affixed thereto, *prescribed by law,*" refer to all the different kinds and amounts of stamps in schedule B, just as clearly as the words "deeds, instruments, documents, writings, and papers," refer to their various kinds in that schedule, and thus bring us back a second time to the entire body of writings and papers in use among the people within the State. How can it be said, in view of all these provisions, the subjects of the tax, and the evident design of Congress, that the words "any court," thus used in the broadest form and fullest sense, without qualification or exception, are to be limited to the Federal courts, and thereby to defeat the enforcement of the payment of the tax, the only real purpose of the provision? When it is said, as in Carpenter v. Snelling, *supra*, that Congress cannot pass laws regulating the competency of evidence in the trial of causes in the several States, the purpose of this provision is incorrectly stated. The abstract proposition is true, but it is misapplied. The purpose of Congress was not to make rules of evidence, but to stamp the instrument of evidence with a disqualification, which will prevent its use as evidence until the delinquent has paid his tax. If, then, in legislating upon proper subjects of Federal power, so as to enforce the execution of the rightful power of Congress, it be said Congress cannot affix to the subject of the exercise of its clearly granted powers, qualities which must be recognized by State courts, I deny the assertion, and oppose to it the second section of the sixth article of the Federal Constitution, which makes such a law the supreme law of the land, binding on the judges in every State. If in legislating on a proper subject of Federal power, Congress declare a forfeiture, for instance of smuggled goods, with intent to evade payment of the duties on them, the State courts are clearly bound to recognize the title acquired by forfeiture in whosoever hands the goods may be. When the subject of a law is fairly within a Federal power given in the Constitution, Congress has express power to pass all laws necessary and proper to carry the given power into execution. This is the test of the competency of this evidence. The instrument being a proper subject of the Federal power to tax, it is just as clearly competent for Congress to affix a disability to the unstamped paper that will compel the payment of the tax. The propriety, as well as the necessity, of the disability in this case, is so obvious, it does not admit of a serious question. The writing is a thing done between private persons, unseen by the eyes of revenue officers. Neither party has a motiv to reveal it for taxation, for the tax enhances the price of an article of sale, and the expense of every pecuniary transaction evidenced by a writing. Neither is interested in inflicting the penalty upon the other. The very touchstone of the value of the writing to the party who claims under it, is his ability to put it in evidence. It is just here the law touches the writing with its power, and makes it useless to the party until he performs his duty, by paying the tax upon it. What can be more proper, and, indeed, more just? He makes his contract under the law and subject to it. He knows, or is presumed to know, his duty, and should perform it. If he fail from real ignorance, or for reasons which show that he did not intend to defraud the revenue, the instrument is not invalid, and he has but to procure the writing to be stamped, and can then use it in evidence. Then on what principles of reason, or of sound constitutional law, can a State court, subordinate in this respect by the Federal Constitution, disregard the act of Congress, and receive the disqualified paper in evidence, when the prohibition concerns the rights of the superior government, and is essential to its power to collect the tax? The taxing power being a clear Federal grant of power, and the disqualification affixed to the writing as an instrument of evidence, being clearly proper to compel payment of the tax, the case falls directly under that provision of the Federal Constitution which makes the law supreme, "and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

We come next to the question of power, if, indeed, there can be any question in a matter so plain. But courts in other States have denied the power, and their decisions have been cited to us. I shall, therefore, state our views briefly. I heartily concede the doctrine of State rights in all those things wherein State rights have been withheld from the Federal Government, and are by the Constitution itself reserved to the States, or the people thereof. In all that concerns the personal happiness and freedom of the citizen, the State is his natural protector, and I would cling to her, therefore, in whatever belongs to her reserved and ungranted powers. I have said, heretofore, that the doctrine of State rights, pushed to excess, culminated in civil war, while the rebound, caused by the success of the Federal arms, threatens a consolidation equally serious; and, therefore, that the landmarks of the Constitution, as planted by Chief Justice Marshall and his associates, on the solid ground of reason, and a due regard to the rights of the States and of the Union, constitute the only safe guides of decision. Craig v. Kline, 15 P. F. Smith, 399. But when, as here, a clear case of Federal power comes before us, the paramount duty we owe, as State judges, to the Federal Constitution, requires that we should uphold the exercise of the Federal powers, as a matter of duty and conscience.

The power of Congress "to lay and collect taxes, duties, imposts, and excises," is the first great power conferred in the enumeration of powers found in the eighth section of the first article of the Constitution of the United States, and immediately precedes, as its true purpose and end, the power "to pay the debts and provide for the common defence and general welfare of the United States." The nineteenth clause in the same enumeration, declares that Congress shall have power "to make all laws which shall be necessary and proper for carrying into effect the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof."

At a very early day, Congress, under the taxing power, passed a stamp tax act, on the 6th of July, 1797, entitled, "An act laying duties on stamped vellum, parchment, and paper." 1 U. S. Stat. at Large, p. 527. The thirteenth section contains this clause—"and no such deed, instrument, or writing, shall be pleaded or given in evidence in any court, or admitted in any court to be available in law or equity, until it shall be stamped as aforesaid." Next came the act of 2d August, 1813, entitled, "An act laying duties on notes of banks, bankers and certain companies;

on notes, bonds, and obligations discounted by banks, bankers, and certain companies; and on bills of exchange of certain descriptions.". 3 U. S. Stat. at Large, p. 77. The seventh section begins with this provision: "That no instrument or writing whatsoever, charged by this act with the payment of a duty as aforesaid, shall be pleaded, or given in evidence in any court, or admitted in any court to be available in law or equity, unless the same shall be stamped or marked as aforesaid." This section contained a further provision, enabling the party, in cases of omission, to pay the stamp duty to the collector, and thereby to establish the efficacy of the instrument. Similar provisions are made in existing laws. Thus, it appears that the exercise of the power in question, in its most rigid form, is an old practice of the government, sanctioned by those contemporary with the formation of the Constitution, and familiar with the relations between the States and the Federal Government. Added to this, is the analagous legislation exercised from the first year of the organization of the government. Thus the act of July 31st, 1789, to regulate the collection of duties, in the twelfth section, provides that goods, wares and merchandise, landed without the collector's permit, shall be forfeited, and may be seized by the officers of the customs; and if of the value of $400, the vessel, tackle, and furniture, shall be subject to like forfeiture and seizure. 1 U. S. Stat. at Large, p. 29. The act of June 4th, 1794, for the collection of the internal revenue upon distilled spirits, stills, wines and teas, in the second section, provides for the forfeiture of the spirits distilled, and of the still itself. 1 U. S. Stat. at Large, p. 379. Then there are the numerous statutes relating to the coasting trade, tonnage duties, the embargo, &c., forfeiting both vessel and cargo; and various statutes on the subject of the internal revenue, forfeiting the subjects of taxation, for nonpayment of the taxes and excises; and decisions thereupon without number. See Brightly's Federal Digest, pp. 127–8, 278, 487, 736, 803. This power to forfeit the subject of the tax, duty, impost or excise, as a consequence of evasion or non-payment, is undeniable; for the reason that, being in the exercise of the express powers of the Constitution, and the lawful means of carrying these powers into effect, they are within the clearly defined powers granted to the Federal Government. Now, it is perfectly obvious, that the evidence of the title is not more sacred than the very thing itself. If the latter can be forfeited for delinquency, on what principle can it be affirmed that the former cannot be reached to compel payment? Certainly, the paper evidencing the owner's right to money or other property, is quite as much within the power of regulation to secure payment, as the thing itself is, of which it is the mere type. The argument which affirms that it cannot be so regulated, places the incident on higher ground than its principal, and makes the shadow more sacred than the substance.

It is said, in some of the cited cases, that the exercise of this power enters within the domain of the State, and interferes with its internal affairs. Granted; but what logical consequence follows? Certainly, not that the act of Congress is unconstitutional and invalid. From the very nature of the power to lay taxes and excises, its exercise comes right into the heart of the State, and visits its citizens in all their most private relations, estates and property. It is more searching in its operation than the power to establish a uniform system of bankruptcy, to return fugitives from justice and labor, to call out the militia, to regulate the value of money, and fix a standard of weights and measures, and to establish post offices and post roads; yet all these, admittedly, enter within the State, and touch most intimately its business and people. Like the taxing power, these are among the express powers of Congress, and their rightful exercise within the States is, therefore, undoubted. A notable instance of the exercise of Federal power within the bosom of the State, is that discussed in the United States v. Fisher, 2 Cranch, 358, under the act of Congress, giving priority in payment to the claims of the United States, out of the estates of decedents. C. J. Marshall there discussed and settled the interpretation of the nineteenth clause of the eighth section of the first article, conferring the power to pass necessary and proper laws to carry the main powers into effect. In that case, from the duty of the United States to pay their debts, is inferred the power of preserving their own claims as a means of paying debts; and from this was inferred the further power of declaring the claims of the United States first liens on the estates of decedents, thereby entering into the most sacred trusts of the State herself, in which she holds the property of the dead, and changing the order of distribution of that property, placed upon it by State legislation. This right of priority of the United States, has been conferred upon the sureties of debtors by way of subrogation.

Without extending the argument unnecessarily, the license tax cases reported in 5 Wallace's U. S. Rep. 462, bear more directly upon the question of power in this case, and, in effect, settles it. It seems to us very clear that the provision of the act of 1866, which excludes an unstamped writing or paper from record, and as evidence in any court until the tax be paid, is not a rule for the mere regulation of evidence, but is a disqualification attached to the document, making it incompetent to fulfil its purpose as an instrument of evidence, until the stamp duty is paid; that it is a provision to enforce the payment of the tax of the most necessary kind, and binding on all courts; and that it falls clearly within the express powers of Congress to levy taxes, duties, imposts, and excises, and to make all laws necessary and proper to carry the taxing power into execution.

The judgment is therefore affirmed.

Thompson, C. J., dissented, upon the ground that the legislation alters a rule of evidence belonging to the State tribunals.

Sharswood, J., dissents.

AT NISI PRIUS. IN EQUITY.

RAILROAD CO. v. ASHTON.

An averment in a bill that a contract was made for the account and use of the plaintiff, clearly alleges his right to the benefit of the contract.

Demurrer to bill.

Opinion of the court by MERCUR, J. Delivered January 3d, 1873.

The defendant has assigned four causes for demurrer.

The whole ground, however, is substantially covered by this one, to wit:

"1st. Because plaintiffs show no title in the bill to enable them to bring their suit against this defendant."

The bill charges *inter alia* that one S. P. Kase entered into two written contracts, under seal, with the defendant; one dated August 16th, 1870, the other February 18th, 1871; by which said defendant agreed to purchase of said Kase the notes of one Thomas Woods, to the amount of $30,000, at a discount at the rate of 12 per cent. per annum, secured by the bonds of the plaintiff in double the amount of the said notes, as collateral; Kase agreeing to guarantee the payment of said notes at maturity; that the defendant further agreed that upon the payment of said notes, he would deliver up to said Kase the bonds of the said plaintiff; that the notes and bonds were delivered to said defendant under said contracts; that said contracts were made by said Kase, for the account and use of said plaintiffs; and upon the 23d, of August, 1871, before the filing of this bill, said Kase, in behalf of the plaintiffs, notified the defendant that the $30,000 loan made to him, was for the plaintiffs, and that they held their bonds to the amount of $60,000 as collateral security; that they are ready and willing to pay whatever may be due on said notes, and otherwise fulfil the contract made by said Kase; and that they have demanded the said notes and bonds, but that the defendant has refused to give them up, &c., and asking for a decree that they shall be delivered up upon the payment of whatever may be found to be due on account of said notes, &c.

The transaction was substantially a loan of $30,000, by the defendant, at 12 per cent.; the payment of it was secured by placing in his hands as collateral security, the notes against Wood, and the bonds against the plaintiff.

The question then is, do the plaintiffs aver a right of property in the notes and bonds in language sufficiently definite to enable them to file a bill therefor?

It is wholly unimportant whether the plaintiffs have a legal or an equitable interest in the notes and bonds claimed; Story's Eq., Pl. § 137; Brightly's Eq. Jurisp, § 537; but every bill must show clearly that the plaintiff has a right to the thing demanded. Dan'l Chan, Prac. 322. It must be an actual existing interest. Idem, 323; and that he has a proper title to institute a suit concerning it. Idem, 324.

It is very true, as urged by the counsel for the defendant, the bill does not aver any transfer or assignment of the contracts by said Kase, to said plaintiff; but what is the fair and natural import of the averment, "that the said contracts were made by said Kase, for the account and use of said plaintiffs." I understand it to be, that Kase, at the time of the making of the contracts, was acting in behalf of the plaintiffs, and for their use and benefit, and not for himself or his benefit; that the notes and bonds placed in the defendant's hands were the property of the plaintiff's at that time, and not his own. It is not averred that he communicated these facts to the defendant at the time of making the contracts, nor is it necessary that it should have been either done or averred. It is averred that prior to the filing of this bill, the defendant did have notice, and that the same was demanded in the name and on behalf of the plaintiffs. I think, therefore, the bill does allege clearly; the plaintiffs' right to the property demanded.

The demurrer is overruled.

District Court of Philada.

CALLAHAN v. ACKLEY.

A note given to one creditor contrary to the terms of a composition agreement, is either in fraud of the other creditors, or a *nudum pactum*, and will not support an action.

Rule for a new trial.

Opinion by BRIGGS, J. Delivered January 4th, 1873.

Whether we regard the arrangement between the plaintiff and defendant, resulting in the giving of the note in suit to the plaintiff, as fraudulent to the defendant's other creditors, or as one made between the plaintiff and defendant immediately after the creditors signed the composition release, it is alike fatal to the plaintiff's right of recovery.

If the former, it is void because of the fraud upon the other creditors, who certainly would not have signed the release for fifty per cent. of their claims had they known the plaintiff was to be paid his in full. Stewart & Bro. v. Blum, 4 C. 225; Mann v. Darlington, 3 H. 310.

If the latter, there was no consideration to sustain a recovery upon the note, it being admitted that it was given for the balance of the plaintiff's claim, released but two hours before. The claim being thus released, there was nothing left to serve as the consideration for the note. Snivly v. Read, 9 W. 396.

The cases where moral obligation has been held to operate as a consideration to sustain a promise, have arisen where the promisor had been discharged by his own act, as in bankruptcy; or by operation of law, as by the statute of limitations, and not as in this case, by the act of the creditor himself.

Here the plaintiff, of his own accord, joined the other creditors in executing the composition release, and by that act he so effectually remitted to the defendant his entire claim, that no court would enforce it in view of the release. The claim then being entirely gone, how can he recover upon the note, the only consideration for which is the balance of the released claims, coupled, it is true, with the defendant's promise to pay? But we have already shown, that a promise growing out of a fraudulent arrangement can be of no avail. Indeed, such a promise is void even as between the parties, on the ground of policy. Courts of justice are always closed against parties to a fraud. Mr. Kent, in vol 2 of his Commentaries, p. 466, upon this point, uses the following expressive language: 'Contracts are illegal when founded on a consideration *contra bonos mores*, or against the principles of sound policy, or founded in fraud, or in contravention of the positive provisions of some statute law. If the contract grows immediately out of, or is connected with, an illegal or immoral act, a court of justice will not enforce it. * * * * The courts of justice will allow the objection that the consideration of the contract was immoral or illegal, to be made even by the guilty party to the contract, for the allowance is not for the sake of the party who raises the question, but is grounded on general principles of policy."

It hence follows, that the rule for the new trial must be made absolute.

Rule absolute.

HAMILTON v. LYLE.

As to residents of the county, the sheriff is bound to serve a writ, he being presumed to know the resident's dwelling house; but as to strangers, he is not presumed to know them nor where they live, and is only bound to act according to the information given him.

Rule to take off nonsuit.

Opinion by BRIGGS, J. Delivered January 4th, 1873.

Both Stetson and Roberts, his agent were residents of the State of Massachusetts. The former being manager of various places of amusement, rented for a few weeks the Walnut street theatre in this city, and sent Roberts, his agent, here in advance, to prepare for the engagement soon to come off. While Roberts, was alleged to be here, the plaintiff sued Stetson, and placed the summons in the defendant's hands as sheriff, for service, with the information that the defendant, or his agent was then at the Walnut street theatre. The sheriff accordingly proceeded to the theatre to make the service, but could find neither Stetson nor his agent, and so reported to the plaintiff's agent, who left the foregoing instructions as to where and how the service could be made. No further information was given, and the sheriff made no further efforts to serve the summons. Neither Stetson nor Roberts had other residences or place of business here than at the theatre. These facts were disclosed by the plaintiff's own witnesses. He now brings this suit against the sheriff for failing to serve the summons. Upon the foregoing facts a non-

suit was directed, and in this the plaintiff alleges there is error.

The modes of serving a summons in this State, are clearly defined by statute: On residents within the county, personally, or by leaving a copy at the defendant's residence, with an adult member of his family. On a non-resident, doing business in the State, by service on his clerk or agent, at his usual place of business or residence. The sheriff should be held to the strictest accountability for service upon a resident defendant, because he is presumed to know, or may ascertain upon inquiry, the residence of every person in his county. While such is the law as to resident defendants, surely a more relaxed rule prevails as to non-resident strangers, temporarily sojourning in the county. Being strangers, the law does not presume the sheriff knows them, or where they may be found. If pointed out, of course he is bound to make the service. But if not pointed out except by designation of place, is he bound to do more than go to the place appointed and make a reasonable effort to effect the service, and if he do not find the defendant there, does the law presume he may find him elsewhere in the county?

Failing to find Stetson or his agent at the theatre, as per information given the sheriff when the writ was left with him, was not the sheriff remitted to the same uncertainty as to their whereabouts as he would have experienced had no information been given him at all. And in such case, surely, no court would hold him answerable for non-service. But should the sheriff have gone to the theatre a second time? Why should he, unless informed by the plaintiff that Stetson or his agent had returned? They were not residents, and the law does not presume that they would return. When the sheriff had obeyed the instructions given him, we think it was the plaintiff's duty to again locate Stetson or his agent, before seeking to hold the sheriff responsible; and, not having done so, we are of the opinion that he has no cause to complain, especially as his own testimony shows that the sheriff made an effort to serve the summons in accordance with the instructions given him when he received the writ.

Rule discharged.

Recent Decisions.

SUPREME COURT UNITED STATES.

CARLTON v. BOKER.

The court disapproves of attempts to expand, by re-issue, a simple invention of a distinct device into an all-embracing claim, calculated by its wide generalizations and ambiguous language to discourage further invention in the same department of industry, and to cover antecedent inventions. Such a claim cannot stand the test of sober consideration.

While a repetition of substantially the same claim in different words does not necessarily vitiate a patent, yet, when a specification, by ambiguity and a needless multiplication of nebulous claims, is calculated to deceive and mislead the public, the patent is void.

One void claim does not vitiate the entire patent, if made by mistake or inadvertence, and without any wilful default or intent to defraud and mislead the public.

Orphans' Court of Philada.

McCARTHY'S ESTATE.

1. The relationship of sister-in-law, will not rebut the presumption that a housekeeper was to be paid for her services even though no demand of payment be made by her.
2. In this State there is no presumption that a servant is paid either weekly or monthly.

Sur exceptions to report of auditor.

Opinion by FINLETTER, J. Delivered January 4th, 1873.

The claimant was the sister-in-law of decedent. She performed all the duties of housekeeper and servant, and in addition did the washing and marketing. In this she had no assistance and needed none, as the family consisted only of the decedent and his grown up daughter.

Her services continued, to the death of her brother-in-law, and covered a period of fourteen months, for which she claimed pay at the rate of $3 per week. The evidence which has been reported to us does not show an express contract, nor does it warrant the finding of the auditor that it was the case of an asylum rendered to the claimant in consideration of her services, rather than a contract to pay therefor.

There is evidence that "he was to pay her," which, although unsatisfactory, throws some light upon the relations in which the parties stood in regard to the services which were rendered. If it be considered merely as the opinion or surmise of the witness, it is still of some weight as showing that appearances, at least, indicated that the claimant occupied the position of servant for pay, rather than the position of one living upon the charity of another.

However this may be, that she performed all the duties of housekeeper and servant is undisputed. From this alone the contract could and should be inferred, unless the circumstances of the case be inconsistent with the relation of employer and employee.

The only circumstances upon which the auditor relies in rejecting her claim, are, that "she was the sister-in-law of the deceased; that there was no evidence of any demand for wages, and that she kept no accounts."

The relationship which had existed made it more desirable that she should keep house for him; but it is not inconsistent with the fact that she rendered these services for wages. What obligation did it impose upon her to render gratuitously services for which she might elsewhere have been well paid? What obligation was there upon him to give her an "asylum?"

When we consider that one party is dead, and the other is not permitted to testify, it may very well be that no evidence of a demand of wages could be produced. Servants, even if capable, seldom keep accounts. It would be hard ruling to hold that a servant, or any one else, must *prove* demand for payment, or show accounts before recovery could be had.

The claimant had no need for her wages. She was amply supplied by her husband. Might not a disposition to accommodate her relative, and a desire to keep her earnings together until her husband's return from the war, be sufficient reasons for not demanding them? If they were not, might not respect for the feelings of her relative prevent her from making her demand public.

The auditor finds that there is a legal presumption that servants are paid either weekly or monthly. If this be so in England, or elsewhere, it is not so here. It is not the practice to pay either weekly or monthly, or at any stated times, and there is nothing in the contract or services from which it may be legally inferred. The act in relation to decedents' estates, which makes the wages of servants for *one year* preferred claims, is inconsistent with such a presumption.

It is not the fault of the claimant that the estate, has not been settled sooner, and the argument of staleness is, therefore, fallacious. Exceptions sustained.

John G. Johnson, Esq., for exceptants.
E. C. Quin, Esq., contra.

ELEVENTH JUDICIAL DISTRICT.

Court of Common Pleas of Luzerne County.

LACKAWANNA IRON AND COAL CO. v. FALES.

1. When referees return findings of law, they should embody in their reports, at least, a brief reference to the authorities on which such findings are predicated.
2. The legislative purpose in enacting the "referee law," was the erection of a new tribunal before which civil cases could be tried. It was designed to be as potent as any other statutory tribunal in the commonwealth, erected for any other specific purpose. It was not a tribunal imposed on suitors by positive mandate, on the contrary, it was one which they must mutually seek, and seeking it, they must waive their right to trial by jury. It dispensed with both court and jury, and put in their stead a referee.
3. The supplement to the act applicable to this county, took away none of the powers of the referee as originally delegated. It only constituted this court an intervening step on the road to a higher review.
4. As to all questions purely of fact, the findings of a referee are as conclusive as those of a jury in a case tried before the court.
5. If a plain mistake or a palpable abuse of power appears on the face of the report, or, if either be shown by affirmative evidence *aliunde*, the court may set the proceedings aside; or, if his findings of law are erroneous, we may correct them, or commit the report again to him; or, if his findings of fact are unsupported by testimony, a record of which comes up with the report, we may reverse them, and send the report back, or enter such judgment in the case as we may deem proper.
6. Where, however, his findings of fact are based upon testimony actually in the case, no matter how conflicting it may be, the court will not disturb them, no more than we would the verdict of a jury because of a mere conflict in the testimony submitted.
7. With respect to findings of fact, the referee stands where the statute places him, namely, in the place of a jury. It would be an invasion of his province in the administration of justice to override this doctrine.
8. Where the court are satisfied that testimony material to the issue, and upon which a referee has based an important finding of fact, was submitted at the trial, but through some mistake or inadvertence it has been omitted from the record of testimony sent up, an exception to such finding on the ground that the report contains no evidence to support it, will not prevail, but the court will, under such circumstances, send the case back for further hearing.

Exceptions to report of referee.

Opinion by HARDING, P. J. Delivered at Wilkesbarre, January 6th, 1873.

Before proceeding to a consideration of the matters which give rise to the exceptions in this case, we beg to call the attention of the bar to a feature connected with reports of this character, which has already become quite too general, and which if not changed will in a great measure defeat one of the prominent purposes in view when the "referee act" was engrafted into and became an incident of the practice in the Court of Common Pleas of this county. That purpose was nothing more or less than to speed the administration of justice within our borders.

In reference to the results reached under the act, we said on a former occasion, "that the delays which are inseparable from the court, and which spring sometimes from a crowded trial list, and sometimes from the difficulty of securing, and the impossibility of enforcing the attendance of absent and important witnesses; and, in truth, from a catalogue of legitimate reasons well understood by the profession and by the court, are, by the operation of this law, largely escaped, and justice is attained and administered, not only with greater dispatch, but often with entire satisfaction to suitors on both sides."

While the act does not in terms provide that references of causes shall be made exclusively to gentlemen learned in the law—a legislative oversight, perhaps—still the practice here has been almost uniform so to refer them. And very often in the cases so referred, questions of law arise which are of great nicety and importance, and which, in the hurry of a jury trial, it would be scarcely possible for the court to examine and pass upon advisedly, or with the care which the principle involved, or the issue itself might demand. Such questions, when raised before a referee, are usually unattended with any circumstances demanding haste of disposition. On the contrary, there is an opportunity for argument by counsel *in extenso;* the authorities referred to may be subsequently examined, and their force and pertinence ascertained and properly accredited; a decision may be thus reached, which besides being grounded upon the law as it actually is, shall have the force to work out as between the litigants the true purpose of a judicial tribunal, namely, the administration of justice.

But while there is this advantageous feature growing out of the "referee act," referees themselves forget that the discharge of their functions is not always followed by an *ending* of the cases referred to them. By the terms of the supplement to the act, exceptions may be sealed to their findings both of law and of fact, and also to their admission or rejection of testimony. It then becomes the duty of the court to hear and decide upon the exceptions so sealed, and ultimately to enter such judgment in the particular case as shall seem proper. Now, as we have remarked, these exceptions may, and they do, ordinarily give rise to intricate and important questions of law, which, though they may have been properly ruled by the referee himself, nevertheless constitute the very basis of exception; and thus the whole case, perhaps with a volume of testimony attached, is brought before us on review. Under such circumstances, while the labors of the referee may have ceased, those of the court have just had a beginning. And further, although the counsel in the case may have furnished the referee with elaborate briefs, covering perhaps all the precedents as well as authorities applicable to the matter in hand, yet when it is brought before the court with a view to more certain or satisfactory adjudication, such briefs rarely ever appear. In accordance with a practice long ago chronic with the members of this bar, at least to a large number of them, the "papers" are simply "handed up;" no reference either to precedent or authority is vouchsafed; often no argument is proffered on either side, or, at best, but a general statement of the principles or questions alleged to be involved, is made; the court is left to wade through the findings and through a mass of testimony in manuscript, often shabby in chirography and almost interminable in length; the law applicable to the questions involved, we are generously privileged to "hunt up;" in fact nothing is further heard from counsel, except *always* an early inquiry as to the probable time of final decision, accompanied by an intimation, delicately put of course, that the interests of clients are seriously jeopardized by delay.

The cure in part for this state of things lies with the referees. If in making up their reports they would append to their findings of law even a brief reference to the authorities on which they are predicated, it would be of substantial service to the court. It would relieve us of a labor of research necessarily occasioning that very delay which seems to fill counsel with those troublesome apprehensions concerning the interests of their clients.

The report before us, and in fact most of the surroundings connected with the case, furnish no exceptions to the general features as herein already referred to. The referee reports five findings of fact, and five of law; and to the whole of them the plaintiff excepts. The exceptions, though very general, nevertheless, in effect, cover all the findings both of law and of fact. But, as we shall commit the report again to the referee, it will not be necessary to examine at this time any of the exceptions with a view to their present disposition. We shall only refer to them, with one exception perhaps, in so far as they indicate a mistaken view of the province of a referee.

The legislative purpose in enacting what is commonly known as the "referee law," was the erection of a new tribunal before which civil causes could be tried; and for that specific purpose, it was designed to be as potent as any other statutory tribunal in the commonwealth erected for any other specific purpose. It was a tribunal not imposed upon suitors by positive legislative mandate, nor

against their wishes, nor even against the wishes of either one of them; but, on the contrary, one which they must mutually seek, and seeking it thus, must waive their right to trial by jury. It was new to practice, and new to the statute law, dispensing as it did with both court and jury, and putting in their stead a referee. It was a statutory creation outright; but, to the extent prescribed, it was, nevertheless, adequate for the purpose contemplated. The referee was clothed with certain well defined powers. The manner of conducting trials before him was indicated—it was to be the same as before the "court with a jury." His decision was to "stand as the decision of the court."

Under the statute as originally enacted, the referee, after he had been selected, or appointed, as the case might have been, was independent of the Court of Common Pleas altogether. No exception to his decision could be heard in that court; no review of his proceedings could be had elsewhere than in the Supreme Court; writs of error were issued, and his proceedings went up for a review precisely as they did from the Court of Common Pleas.

By the provisions of the supplement of June 23d, 1871, applicable to this county, this feature of the act was somewhat changed. The proceedings of the referee may now be reviewed in this court, but only to the extent provided by the supplement. He is shorn of none of the powers delegated to him by the original act. His province is still as wide as ever. The Court of Common Pleas, though technically the tribunal to which the writ of error issues, really constitutes but an intervening step on the road to a higher review.

If a plain mistake appears on the face of the proceedings of a referee, or a palpable abuse of power; or, if the existence of either be shown by affirmative evidence, *aliunde*, we may set the proceedings aside; if his findings of law are erroneous, we may correct them, or commit the report again to him for correction; and still further, if his findings of fact are unsupported by the testimony, we may reverse them. But it must not be overlooked, that if the findings of fact are based upon testimony actually in the case, however conflicting it may be they are binding upon us. The referee stands where the statute put him, namely, in the place of the court and jury, and his decision, so far as the facts are concerned, amounts to the same—no less, no more—as the verdict of a jury in a case tried before the court. And a verdict we would not disturb merely because there was a conflict in the testimony submitted, no matter how great it might be. The credibility for witnesses is for the jury, not for the court. It would be an invasion of their province in the administration of justice, to override this doctrine.

Such being also the province of a referee, and the tribunal, as we have shown, being one not of necessity but of choice on the part of suitors, how long must it be before they, as well as their counsel, will learn that in selecting it, they must abide by all its legitimate incidents? It is, indeed, supremely idle, after an issue has been fairly *chanced* in this way, for the parties, or either of them, to come before us complaining that the facts have not been found as they desired or requested. In charity, perhaps, we ought to presume that they misconceive the plain provisions of the statute which they had invoked, and are unmindful too of the necessary effect of their choice under it. Certain it is, however, that their complaint is not complimentary to their understanding, nor creditable to their recollection.

But to recur again to this report. The referee in the first part of his third conclusion of fact, finds that "previous to the sale for taxes in 1854, for the taxes of 1852 and 1853, the tract had been assessed in the seated list to George Fales, viz.: in 1850 and 1851; and so far as appears from the testimony, it was removed to the unseated list, without notice to him, and without his knowledge or consent," &c.

Upon this finding, which, under his view of the case, was of material, if not of controlling importance, his decision of the issue seems to have been chiefly predicated. The exception which reaches this, though not at all direct but circuitous almost to the last degree, is, that "he should have found as requested by the plaintiff in the written memorandum hereto attached."

Now, by an examination of the "written memorandum," which consists of *fourteen* "requests" long drawn out, we find one in the following words: "From the evidence, the Mary Wright tract was divided into two parts; one known as the John Myers tract, and so assessed; the other being the balance of the Mary Wright tract proper, and not improved." We find another, also, in these words: That upon the whole evidence, the plaintiffs are entitled to recover the land described in the writ, &c.

Clearly, therefore, under the views as already laid down herein, if the finding of fact before quoted, be founded upon testimony actually submitted to the referee, albeit there was other testimony in conflict with it, we should overrule the exception at once; but if the finding of the particular fact mentioned, be without any testimony whatever to support it, then the report should be set aside, or if in the opinion of the court justice requires it, the report should be committed again to the referee.

And herein is raised, under the statute, a question exclusively for our determination. Ordinarily we should look no further in disposing of it, than the record of the testimony which comes up with the report. The law requires that this should contain "the whole testimony taken."

In the present case, however, there are peculiar circumstances connected with the report, which deserve at least a passing reference.

In the brief and rather conversational argument which was had before us, at chambers, the counsel for defendant alluded to testimony contained in the report relative to the alleged fact, that the whole of the Mary Wright tract, during the years 1850 and 1851, was taxed in the seated list to George Fales, and that he paid the taxes assessed thereon for those years; and further, that in the years 1852 and 1853, it was transferred to the unseated list without notice to the owner. The plaintiff's counsel did not controvert the existence of such testimony, or something like it, but contended rather that, coming from the source it did, whatever it might have been, it was not legal or competent evidence, and therefore could have no bearing in the case.

At that time, it is true, the report was before us, but we did not refer to it, nor was our attention specially drawn to it further in this particular. We took it for granted, however, that the record attached contained some sort of testimony upon the subject. Besides, it is hardly to be presumed that a referee would return to the court an important finding of fact, or one at least that he regarded as important, unless there was some testimony in the case on which to found it.

But, taking the record as we have it, we are obliged to adjudge that it does not contain any testimony on which to base so sweeping a finding of fact as the one heretofore quoted. Whether it was offered in evidence, and thus became a proper foundation for the finding but was omitted from the record through mistake or inadvertence of any kind; or, whether having been offered, it was not competent, and therefore entitled to no weight or bearing in the case, we cannot determine as the case now stands. We can only say, that if it was adduced before the referee, but from some unexplained oversight he did not get it upon his record, not only is the defendant entitled to have the omission supplied, but the referee himself should be allowed to show that his finding was founded on authority.

By the terms of the statute there is reserved to the "court the power of committing the report again to the referee, should justice require it." We think the present case comes within that provision clearly. The effect of the exercise of that power is the same as granting a new trial, had the case been tried before a court and jury.

The report is hereby committed again to the referee.

See also as to referees and their findings, Fall Creek Coal & Iron Co. v. Smith, 4 Legal Gazette. 193, and Enterprise Insurance Co. v. Thornton, 4 Legal Gazette, 34—ED. GAZETTE.

SHERIFF'S SALES.

The following are the prices obtained for the properties sold at Sheriff's sale on Monday last.

Sam'l Minner. No. 1, $1,025. No. 2, 1,025. No. 3, 1,025. No. 4, 1,025
Chas. L. Morgan. 50
Samuel Birney 3,100
Michael Gibbons. No. 1, $4,050. No. 2, 1,050
Wm. Todd, 550
Alex. Linton. 2,200
Samuel Hill. 1,200
Jos. R. Betterton. 1,350
Jos. R. Betterton. 1,100
Unknown and Kirtop & Streeper 425
Unknown. 250
John McDowell. 150
John Lamplue. 300
Wm. Wiley. No. 1, $50. No. 2, 275
Edward Langley. 100
Jas. Hallowell. No. 1, $175. No. 2, 1,000
Geo. F. Power. 47,000
John L. Thomas & John Kinnicutt. No. 1, $2,075. No. 2, 2,100. No. 3, 2,225. No. 4, 2,100. No. 5, 2,075. No. 6, 2,075. No. 7, 1,900. No. 8, 1,900. No. 9, 1,900. No. 10, 200. No. 11, 200. No. 12, 500. No. 13, 600. No. 14, 700. No. 15, 900. No. 16, 800. No. 17, 1,000. No. 18, 900. No. 19, 900. No. 20, 1,800. No. 21, 500. No. 22, 300. No. 23, 300
Chas. F. Smilkey. 3,300
Owen Morris. 1,700
Isaac Heister. No. 1, $450. No. 2, 350. No. 3, 450
Robert C. Bulmer. 1,100
Michael Gibbons. 2,500
Michael Schaffer. 300
Michael Schaffer. 250
Jos. G. Hibbs. 1,200
Andrew Hartel, Adm'r. 75
Wm. Hayward. 4,550
Thos. Kennedy, dec'd 925
Chas. C. Haines. No. 1, $1,400. No. 2, 1,400
Wm. J. Rickards. 500
Louis Voight, dec'd 30
Robert H. Jones. No. 1, $30. No. 2, 35. No. 3, 30. No. 4. 40. No. 5, 50. No. 6, 65. No. 7, 65. No. 8, 55. No. 9. 65. No. 10, 75. No. 11, 85. No. 12, 85. No. 13, 75. No. 14, 105
Isaac Heister. 2,600
William Crawford. No. 1, $400. No. 2, 400
Jos. Craig Smith. 110
Peter J. Wagner. 900
Henry L. Sultzback, 1,200
John W. Cade. $350
Chas. F. Gebler. 8,500
Mary Sweatman. 200
M. Sammon. 300
Levis Passmore. 1,700
Harmon Osler, Jr. 1,600
Jas. McDevitt. 1,400
Wm. H. Richards, dec'd. 1,100
Shadrach Lees. 1,000
Dennis Morrin. 90
Thomas Pollock. 575
John Schaffer. 1,000
Geo. W. Haines 4,550
Maria Matilda Kitchen. 2,000
Geo. Fred'k Greul. 2,000
Geo. Fred'k Greul. 2,100
Joseph N. Pope. 350
John M. Mole. 2,000
Emanuel Peters and Geo. M. Williams. No. 1, $100. No. 2, 125. No. 3, 150. No. 4, 250. No. 5, 200
Wm. R. Bald and Wife. 2,750
Hartman Grau. No. 1, $9,000. No. 2, 1,000. No. 3, 6,100
Geo. W. Knorr. 65
Geo. M. Brill. 30
B. J. Matthias and Eliz'h Mathias. 75
Thomas Woods. No. 1, $36,000. No. 2. 20,000
Wm. Jackson, and Bernard Reel and Wife. 1,375
Thomas Collins. No. 1, $300. No. 2. 300. No. 3, 900
Michael Megonegal, dec'd. 300
John G. Pierie. 350
Jas. McDonnell. 55
Sam'l P. Pine and Wife. 300
Jos. Keen. 400
Martin Hammer. 12,400
Geo. Wunder. 1,100
John S. Smith. 2,100
Wm. J. Rickards. 3,050
Thomas B. Bishop. 2,200
Geo. L. Francis. 2,800
John S. Malloch. 27,000
Jos. Johnson Ray and Wife. 2,600
Thomas Woods. 23,500
Saml. Spang. 5,900
Jos. M. Price. 800
John A. Gendell, Dan'l. D. Badger and Chas. Reed. 1,000
Combs & Slack. No. 1, $100. No. 2, 100. No. 3, 100. No. 4, 100. No. 6, 10. No. 7, 10. No. 8. 10. No. 9, 10. No. 10, 10
Samuel H. Orwig. 2,025
Jas. McCaulley. 120
Andrew W. Turner. 105
Thomas Hampson. $150
Unknown. 100
Unknown. 50
Unknown. 80
Alex. H. Ziegler. 3,350
John G. Pierie. 100
Jos. Hocker. 125
Margaret B. Miller, owner, Annie E. Miller, registered owner. 160
Wm. Kelly, owner, Cornelius Sweeny, registered owner. 125
John H. Taylor. 375
Horam & Son. 150
Gregg W. Reynolds. 75
Christian Grau. 550
Joseph Fally. 600
Wm. S. Allen and Wife. 50
Zebedee Dobbins. 2,000
John Haas. 11.300
John S. Greenwalt. 125
Jos. H. Williams. 75
Thomas E. Combs. $3,500
Patrick Carroll. No. 1, $1,000. No. 2, 1,050
Patrick Carroll. 500
Sarah Mooney. 400
Hugh McCrosson. 1,100
A. C. Miller. 475
Peter Hanley. 100
John Smith. 100
Susanna Wade. No. 1, $1,000. No. 2, 2,000
Oliver P. Arment. 6 000
Lewis Wirth. No. 1, $1,500. No. 2, 2,000. No. 3, 1,000. No. 4. 850
Martin Hammer. 100
Wm. Sweeny. 1,800
Wm. J. Rickards. 3,500
Katherine E. Ryan, Guardian. 9,100
John Morin & Wife. 3,400
Wm. Sweeny. 2,150
John Springer. 650

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested:

Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in January, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

Nov. 29, Joseph Jones et al., Executors of ANN M. BAKER, dec'd.
" 29, Francis D. Worley, Administrator of PHŒBE S. WORLEY, dec'd.
Dec. 3, Hartwell Steer, Adm'r of THOMAS S. STEER, dec'd.
" 3, Margaret J. Ritchie, Administratrix of WILLIAM R. RITCHIE, dec'd.
" 3, E. Hunn Hanson, Executor of JOSEPH B. HANSON, dec'd.
" 3, Thomas S. and Joseph Wood, surviving Administrators of JOSEPH WOOD, dec'd.
" 4, Dr. H. A. Salter, Executor of EDWARD SHORE, dec'd.
" 5, Diana Johnson, Administratrix of JOHN R. JOHNSON, dec'd.
" 6, Adam Engard et al., Executors of ABRAHAM WILT, dec'd.
" 7, Charles Pollock, Administrator of ROBERT POLLOCK, dec'd.
" 7, Mary Curry, Administ'x of HENRY M. CURRY, dec'd.
" 7, Theo. Abbett, Adm'r of SARAH E. SNYDER, dec'd.
" 7, Henry Stevenson, Administrator of WILLIAM COLTON, dec'd.
" 7, Andrew Maurman, Administrator of WILHELM MAURMAN, dec'd.
" 7, Jacob Witmer, Administrator of SAMUEL L. WITMER, dec'd.
" 9, John Fisher, Administrator of CHAS. BAUMANN, dec'd.
" 10, Mary E. Register, Administratrix of MARGARET A. OSKINS, dec'd.
" 10, Elias T. Hall, Adm. d. b. n. c. t. a. of FISHER HALL, dec'd.
" 11, Joseph B. Martin, Administrator of JEMIMA MARTIN, dec'd.
" 11, Robert Soley and Lewis Shallcross, Executors of JOHN SOLEY, dec'd.
" 13, David Webster, Exec'r of STEPHEN MORRIS, dec'd.
" 13, Xavier Joerger, Guardian of GEORGE W. JOERGER, minor.
" 14, Dennis F. Murphy, Administrator of EPHRAIM SINER, dec'd.
" 14, James P. Rossiter, Administrator of BRIDGET McCOSKER, dec'd.
" 14, Passmore Williamson, Executor of THOMAS WILLIAMSON, dec'd.
" 14, James E. Garretson, M. D., Adm'r of CATHARINE GARRETSON, dec'd
" 18, Daniel Rodden, Guardian of ELLEN and CATHARINE KERNEY, minors.
" 18, Francis Edwards, Adm'r of JOHN C. ERICKSON, dec'd.
" 18, The Fidelity Ins. Co., &c., Guardians of JANE E. VAN COTT, minor.
" 18, The Fidelity Ins. Co., &c., Adm'rs of SAMUEL McCOLLUM, dec'd.
" 19, Charles Calhoun, Administrator of ROBERT ARCHER, dec'd.
" 19, Edwin T. Coxe, Administrator c. t. a. of JOHN EVERMAN, dec'd.
" 19, Elizabeth Connell et al., Executors of GEORGE CONNELL, dec'd.
" 20, Alfred Fassitt and James W. Fassitt, Executors, as filed by Alfred Fassitt, surviving Executor, and of James W. Fassitt, acting Executor, as filed by Alfred Fassitt, surviving Executor, and account of Alfred Fassitt, surviving Executor of JAMES FASSITT, deceased.
" 20, Alfred Fassitt, Executor of ROBERT F. FASSITT, dec'd.
" 20, Final account of Samuel Harvey, Jr., Acting Trustee for ELIZABETH HORNER, late GIRTON, and her children, and of Samuel Harvey, Jr., surviving Trustee for MARY LUCRETIA RICHARDSON, (late Rogers), under the will of Charles Rogers, dec'd,
" 20, Charles Chauncey, Executor of MARGARETTA ROBERTSON, dec'd.
" 20, Albert G. Freeland, Executor of MARY ANN WILSON, dec'd.
" 20, Seneca E. Coates, Administrator of NANCY PIDCOCK, dec'd.
" 20, Samuel Harvey, Jr., Acting Trustee of ELIZABETH HORNER, late GORDON, dec'd, under the will of Chas. Rodgers, dec'd.
Dec. 21, J. Henry Hentz et al., Administrators of JACOB HENTZ, dec'd.
" 21, The Fidelity Ins. Co., &c., Guardians of MARY W. COOK, minor.
" 23, George Young, Executor of PHILIP YOUNG, dec'd.
" 23, William Neill, Executor of JOHN H. LUDWIG, dec'd.
" 23, Jane Horn, Administratrix of JOHN HORN, dec'd.
" 23, Charles S. West, Administrator of EDWIN STROUP, dec'd.
" 23, William H. Howell et al., Trustees under the will of ROBT. HOWELL, dec'd.
" 23, William H. Howell et al., Trustees of ELIZABETH LLOYD HOWELL, under the will of Robert Howell, deceased.
" 23, Geo. T. Stokes, Administrator of ELIZA LAMBERSON, dec'd.
" 24, M. Baird, Administrator of WM. H. BAIRD, dec'd.
" 24, Eli K. Price, Trustee of ELIZABETH EVANS, under the will of Joseph Archer, dec'd.
" 24, Eli K. Price, Trustee of MARTHA B. LEE (formerly Rogers), under the will of Joseph Archer, dec'd.
" 24, Eli Keen, Administrator of ALFRED W. ADOLPH, dec'd.
" 24, G. Dawson Coleman, surviving Administrator of DEBORAH BROWN, deceased.
" 24, J. Sergeant Price, Administrator of EDGAR K. SMITH, dec'd.
" 24, Peter C. Hollis, Executor of AMELIA SIMKINS, dec'd.
" 26, Geo. M. Troutman, Administrator c. t. a. of TREVOR N. ECKERT, dec'd.
" 26, Samuel W. Thackara, Executor of ESTHER W. EARNEST, dec'd.
" 26, William S. Vaux, remaining Executor of ANNA ASHMEAD, dec'd.
" 26, J. Woolman Reeves et al., Executors of ELLWOOD REEVES, dec'd.
" 26, William Strong, Administrator d. b. n. c. t. a. of ELIZA MALLERY, dec'd.
" 26, Ellen Keene Mitchell, Executrix of SARAH LUKENS KEENE, dec'd.
" 26, Bridget Conlin, Administratrix of ELIZABETH McMANUS, dec'd.

WILLIAM M. BUNN,
dec 27-4t. Register.

THE JUROR: BEING A GUIDE TO citizens summoned to serve as jurors. Containing information as to the manner of drawing and selecting jurors; their rights, privileges, liabilities, and duties; reasons for exemption from service, and mode of arriving at and rendering verdicts. By Andrew Jackson Reilly, officer of the District Court for the city and county of Philadelphia. Revised by E. Cooper Shapley, Esq., of the Philadelphia Bar, and secretary of the Board for Selecting and Drawing Jurors for the city of Philadelphia. Philadelphia: John Campbell & Son, Law Booksellers and Publishers, 740 Sansom Street, 1873.

In connection with "THE JUROR" it is proposed to have an appendix containing a directory of the principal practising attorneys of the State of Pennsylvania, as information needed by jurors when favorably impressed with the learning, skill or eloquence of those before them. The circulation of this work is already assured to the extent of five thousand copies the ensuing year, in different parts of the State. Members of the Bar will please Address

A. J. REILLY,
Room No. 23, 727 Walnut Street.
dec 27-tf.

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West and Hartman, N. W. Corner—Camden, N. J.—Three-story Brick Factory Building. Same Account.

Second, (North,) No. 2553—Business Stand—Three-story Brick Store and Dwelling.

Fifteenth and Washington Avenue, S. W. Corner—2 Coal Yards, 94 feet front, 110 feet deep—3 fronts.

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REAL ESTATE SALE, JANUARY 21.

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Callowhill, No. 904—Business Stand—Two-and-a-half-story Brick Store and Dwelling. Orphans' Court Sale—Estate of Christopher H. Loudenslager, dec'd.

Ashton Road, 23d Ward, 1¼ miles north of Holmesburg—Very Desirable Farm, 69 Acres. Executors' Sale—Estate of Jacob Taylor, dec'd.

REAL ESTATE SALE, FEBRUARY 5.

Will include—

Fourth, (North,) No. 1334—Business Stand—Two-Story Brick Tavern and Dwelling. Executors' Sale—Estate of Hugh Barr, dec'd.

TRUSTEE'S SALE.

In pursuance of the authority contained in a certain mortgage made the 28th day of Second month (February), A. D. 1868, by the Toby Creek and Philadelphia Coal and Oil Company, in favor of William H. Bachman, as Trustee, and recorded in the Recorder's office of Elk county, Pa., 29th day of Second month (February), 1868, in Mortgage Book B, page 182, &c.:

Notice is hereby given that I, William H. Bachman, Trustee under said mortgage, will, on the 28th day of First month (January), A. D. 1873, at noon, through M. Thomas & Sons, at the Philadelphia Exchange, expose at Public Sale, all the Real and Personal Estate of the said Toby Creek and Philadelphia Coal and Oil Company, as referred to in said mortgage or instrument before recited.

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Sale by order of Court of Common Pleas.—233 N. Fifth street, Three-story Brick Dwelling, with back buildings, lot 16½ x 87½ feet. Sale Positive.

Peremptory Sale.—1635 Vine street, modern Three-story Brick Residence, with Three-story brick back buildings and conveniences, and 2 Three-story Brick Houses in the rear on Pearl street, lot 18 x 125 feet, being 30 feet wide on the rear.

Peremptory Sale.—1609 N. Seventeenth street, modern Three-story Brick Dwelling, with back buildings and conveniences, lot 19 x 100 feet, above Oxford street. $4,500 may remain. Immediate possession.

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Legal Gazette.

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FIFTEENTH JUDICIAL DISTRICT.

Court of Common Pleas of Chester County.

IN EQUITY.

McVAUGH v. McVAUGH.

When persons married in Delaware become residents of Pennsylvania, the married woman's act of 1848 applies to them, the wife's choses in action remain her property, and a subsequent purchase of real estate here in the husband's name with such choses, creates a trust in her favor which a court of equity will enforce.

STATEMENT OF CASE.

The plaintiff and defendant were married in Delaware. The plaintiff, at the date of the marriage, owned a judgment and mortgage. Without reducing the property to possession or exercising any control over it, the husband removed with his wife to Pennsylvania. The wife here contracted for the conveyance to herself, of valuable real estate, to be paid for by means of the money secured by the judgment and mortgage. When the time arrived for carrying the contract into execution, the husband refused to unite in satisfying the records in Delaware, unless the conveyance was made to himself. The wife, being unable to obtain the money without, yielded to this demand, the conveyance was so made. Subsequently, difficulties arising between the parties, and the defendant leaving the plaintiff, without provision for her support, and threatening to encumber the property, as she alleges, she applied by bill to have the defendant compelled to convey the property to her, or in trust for her, and restrained from encumbering it in the meantime. The master found the facts to be as alleged in the bill.

Opinion by BUTLER, P. J. Delivered January, 1873.

It is conceded that the statute of Delaware, relating to husband and wife, does not apply to this case; and that the marital rights of the parties, while domiciled in that State, depended upon the common law.

What then are the rights of the husband under the common law, in his wife's *choses in action?* In answering this question, the distinction drawn between her chattels in possession and her *choses in action*, must be kept in mind. The former vests in the husband immediately on marriage, while the latter remain in the wife, subject to a power in the husband to transfer them to himself by reduction to possession. It is optional with him whether he will or will not exercise the power; if he do not, his death revokes it, and the right of the wife again becomes absolute. Even reduction to possession will not under all circumstances transfer the property to the husband; it must be in the assertion of his marital rights, and if it appear that it was not, the property will continue in her.

Such was the common law of England, as it has always been understood and administered in this State. 2 Black. Com. p. 433; Siter's Case, 4 R. 263; Skinner's Appeal, 5 Barr, 262; Dennison v. Nigh, 2 W. 90; Robinson v. Woelpper, 1 Wh. 179; Willinger v. Bausman, 9 Wr. 522.

The husband, it is thus seen, has no *vested*, fixed *interest* in the *property* involved in such *choses*. His right is simply a power to divest his wife—a power liable to be revoked by his death, or by statute, and to be waived or forfeited by his acts. And the Supreme Court, therefore, held that our statute of 1848 had this effect—to revoke the power wherever it had not previously been exercised. Millinger v. Bausman, 9 Wr. 522. In Mississippi, the Court of Appeals decided in the same way, upon the question arising thereunder a similar statute. Clark v. McCreary, S. & M. 347. The Legislature cannot take away *vested rights in property*, and give to the wife what the law had previously transferred to the husband. But while fully recognizing this, the courts in the instance cited, denied that the husband had such vested rights in the property of his wife's *choses in action*.

Applying these principles to the question before us, its solution does not seem difficult. The defendant, in Delaware, possessed a power to transfer the choses here involved, to himself. He did not, however, exercise it, but removed with his wife to this State, and fixed their domicile here. The situs of their personalty accompanied them; and the effect was the same as if they had brought the property along. Thereafter, it as well as themselves were subject to the laws of this State. The Legislature might revoke the power, and it did so, by means of the act of 1848. The moment the parties and the property were made subject to its jurisdiction. The right of the wife again became absolute, as it had been before the marriage. That the power accrued to the husband while domiciled in *another State*, is unimportant; it is no more sacred than such a power arising under the common law here.

But it is argued for the defendant, that the common law (relating to the *choses in action* of the wife) is differently understood and administered in Delaware; that there the *property* in such choses *vests* in the husband *on marriage*. If this is so, the plaintiff has no case; for marriage being a civil contract, whatever property accrued to the husband upon his marriage there, will continue to be his wherever he may go. But we have not found anything to justify the assertion that the common law is so understood and administered in Delaware. It is true, creditors are there admitted to the rights of the husband, by means of attachment, and allowed to exercise his power of reducing the *choses* of the wife to possession. And in this, it is also true, that they have differed from us; Robinson v. Woelpper, 1 Wh. 179; Dennison v. Nigh, 2 W. 90; still they have but followed the rule in bankruptcy—a rule always difficult to reconcile with reason and justice—of which Ch. J. Gibson, says (in Siter's Case, 4 R. 480): "The spirit of the bankrupt law is not justice. The object being to encourage trade by procuring payment of mercantile debts out of any fund within the bankrupt's control, without regard to the interests of others; those laws are deaf to the claim of his family in respect to interests which he has even a naked power to control. Notwithstanding the assignment is not the act of the husband, but of third persons, it was held to be *ipso facto* a divestiture of the wife's title, as if it were the husband's own act, and a spontaneous exercise of his power. On abstract principles it might have seemed that though the power is a valuable one, yet the exercise of it pertains by its nature and origin to his individual volition, and not to the volition of his creditors or their representatives, who have no moral or expressly legal right to require him to despoil his wife for their benefit. The palpable injustice of these decisions induced Sir Wm. Grant, in Mitford v. Mitford, to depart from them to a certain extent; not, however to take his stand upon principle, and entirely protect the title of the wife, as it seems to me he should have done, but to take a middle course, and allow the assignment to pass the incidental right of reduction into possession, as the husband had it, subject to the same limitation as to time in the exercise of it." It is this rule that the court in Delaware has followed in Johnson v. Fleetwood, 3 Harrington. The language used by the judge is very broad,—as that "the rights of the wife by contract, immediately become the rights of the husband;" her choses in action *vests* in him on marriage;" "he at once acquires a qualified property in her choses," &c. But the citations of authority show quite plainly, we think, that nothing more was intended to be expressed by these general terms than has been decided in bankruptcy; and the case required nothing more. Some reference, it is true, is made to the cases in *outlawry*. But the part played by the crown in outlawry, never arose much above that of a robber; and these cases have never been cited as precedents for anything but the rule in bankruptcy. If it were true that the *property* in the wife's choses, *vests* in the husband on marriage, it would necessarily go to his legal representatives on his death. It could not survive to the wife, unless, indeed, his death be held to *divest* it, and the common law knew nothing of the kind. Such a view overlooks the distinction which has always existed between the wife's *choses in action* and her chattels in possession; and if carried out would obliterate it.

It does not follow, therefore, from what has been decided in Delaware, that the courts of that State will hold the husband's rights in his wife's *choses*, to be beyond the reach of statutory provision—that they constitute *vested property*, of which he cannot thus be deprived.

The consideration paid for the land was, therefore, the wife's, and the conveyance must be treated as in trust for her.

Supreme Court of Pennsylv'a.

SAM'L McKELVY v. THOS. S. BLAIR.

1. **An assignment for the benefit of creditors by a partnership, works a dissolution of the firm.**
2. **The statute of limitations as between partners, runs from the dissolution.**
3. **An agreement by one partner to pay the other interest on an excess of capital put in by him, is for the purpose of making an equal division of profits, and does not create a loan.**

Appeal from the District Court of Allegheny County.

Opinion of the Court by AGNEW, J. Delivered January 6th, 1873.

The partnership between Samuel McKelvy and John C. and Thomas S. Blair began by agreement under seal dated January 1st, 1853, and was to continue seven years. The plaintiff, McKelvy, sets forth in the second paragraph of his bill, that on the 17th of May, 1854, by reason of pecuniary losses and embarrassments, the firm of McKelvy & Blairs made a voluntary assignment of *all* their effects for the benefit of their creditors. No averment is made in the bill that the partnership continued in business after the assignment. A contrary inference is to be drawn from the third paragraph, which avers that since the assignment McKelvy had repeatedly called on Thomas S. Blair for a final settlement of accounts, which he had refused. The second paragraph of the amended bill avers that by the terms of the partnership agreement, Thomas S. Blair was the financial agent and manager of the firm, and as such is the trustee of the other partners. This has reference to his duty under the agreement, but contains no averment that Thomas S. Blair became the liquidating partner after dissolution. The averment that "as such (financial agent and manager of the firm) he acted, and does still act, up to the final settlement of the partnership accounts," is evidently only a legal conclusion from the agreement, and not an averment of the fact itself as existing since the dissolution. As a legal inference, it is not true that Thomas S. Blair became the liquidating partner after dissolution. Therefore, the next clause in the amended bill must not be construed to mean that the sums alleged to be received by him were received in the capacity of liquidating partner. The question of the dissolution of the partnership stands wholly upon the effect of the assignment for the benefit of creditors in 1854, unaided by any averments of fact to show a continuance of the partnership relation, or that Thomas S. Blair became the liquidating partner, bound to render an account of the affairs of the firm.

That an assignment by an insolvent firm of *all* its assets for creditors necessarily works a dissolution of the partnership, when no provision to continue the business is made by the partners, seems to be very plain. It is so stated by Sergeant, J., in Brown v. Agnew, 6 W. & S. 238. Bankruptcy is an admitted cause of dissolution. Collyer on Part. 59. It is not easy to distinguish from bankruptcy the case of a voluntary assignment by an insolvent firm, which strips the partnership of all its means of continuing business, followed by an actual relinquishment of the business.

The partnership being dissolved in 1854, and Thomas S. Blair not being a liquidating partner, the statute of limitations is a bar to the plaintiff's demand for an account, unless the case fall within some exception. Collyer on Part. 207–8; Hamilton v. Hamilton, 6 Harris, 20.

It was, no doubt, to establish an exception that the plaintiff introduced the fourth paragraph into his amended bill, alleging that the plaintiff had within the last three years paid a considerable sum of money in the partnership accounts, for which, with sums previously paid, Thomas S. Blair is alleged to be equally liable. But this, at most, can operate only as a demand for contribution. Certainly, a partner may be compelled to contribute to the payment of a partnership debt for which the partners continued jointly liable, but this does not imply, of necessity, a settlement of the whole partnership account, unless the account is still open and current. This is ruled in Brown v. Agnew, 6 W. & S. 238. "The partnership (said Sergeant, J.) had been dissolved by a general assignment by the partners for the payment of their

debts in August, 1832, more than six years having elapsed from the dissolution till the payment of the claim and institution of the suit. These circumstances, we think, raise a fair presumption that the partnership account had been settled or terminated in some way, till it is overthrown by some evidence on the part of the defendant, that the general partnership accounts yet continued open and current."

The next exception is, that the account between McKelvy and the Blairs is one concerning the trade of merchandise, between merchant and merchant, and therefore it takes the case out of the statute. Whether every partnership whatever, or a partnership such as this, for manufacturing steel in all its varieties, is a transaction of merchandise within the meaning of the exception as to merchants' accounts, we need not decide. There are two cases in which this subject has been examined very fully. Coster v. Murray, 5 Johnson Chan. Rep. 522, decided by Chancellor Kent; and Spring v. Gray's Ex'r, 6 Peters, 151, decided by C. J. Marshall, in both of which stress was laid on the fact that the action was not founded on an account concerning the trade of merchandise between merchant and merchant, their factors or servants, and therefore not within the exception of the statute. There is, on the other hand, a class of cases in our own reports, called cases of *mutual* accounts, carried down within six years, where the statute of limitations does not apply to the items beyond the six years. Van Swearingen v. Harris, 1 W. & S. 356; Thompson v. Hopper, Ibid, 467; Chambers v. Marks, 1 Casey, 296; Hay v. Kramer, 2 W. & S. 139. These cases rest on the implied acknowledgment arising from the mutual charge and credit between the parties, and not on the exception in regard to merchants' accounts. Supposing the case of the plaintiff might fall within the exception as to merchants' accounts, yet he has not brought himself within the exception. The defendant pleaded the statute of limitations to the bill, and demurred to that part of it which had charged the loan of $12,000. To the plea of the statute the plaintiff demurred, and joined in the defendant's demurrer as to the alleged loan, and set the cause down for argument on the bill, amended bill, plea and demurrers. The plaintiff did not reply to the plea of the statute that the account was between merchants, and that no account had been settled. On this part of the case the quotation of the language of Judge Sergeant, in Brown v. Agnew, *supra*, may be continued. After stating that the presumption of settlement lasts till overthrown by evidence that the partnership accounts remained open and current, he says: "This burden lies on him who seeks to avoid the plea of the statute of limitations to an action of account render, or assumpsit, by the replication that it was an account between merchant and merchant; for the replication to such a plea must go further, and state that no account of said merchants was ever adjusted or settled" (citing Godfrey v. Saunders, 3 Wilson, 79, 80; William's Saunders, 127, note); see also Bevan v. Cullen, 7 Barr, 286. "By analogy, therefore (he continues), after the lapse of six years it lies on the party settling up an account to aver that it remains *open and current*." That the account must be one not closed by striking a balance between the partners, or by the delivery of a stated account unobjected to, and is still open and running between the partners, is the clear result of the authorities, as may be seen in the following cases: Barber v. Barber, 18 Vesey, Jr., 286; Norton v. Hodgson, 19 Vesey, Jr., 180; Jones v. Penque, 6 Vesey, Jr., 580, note C; Spring et al. v. Gray, 6 Peters, 166—169; Toland v. Sprague, 12 Peters, 333; Bevan v. Cullen, 7 Barr, 281. And in reason and justice, why should not the statute close upon partners, who, for six years after dissolution, take no steps to ascertain the balance between them? On what principle should such an account remain open for all time? As soon as dissolution takes place, they stand no longer in any relation of trust or confidence to each other — the implied authority given by each to the other ceases, and they are no longer agents one for the other; and the objects of their association having come to an end, the time for a settlement has arrived. Six years is a fair time to allow for closing their affairs, and is a reasonable time for demanding a settlement in analogous cases. Thus, in the case of moneys collected by attorneys. Campbell v. Boggs, 12 Wright, 524; Rhines v. Evans, 16 P. F. Smith, 192. And a subscription to shares of railroad stock, even without a call for instalments. Pitts. & Conn. R. R. v. Byers, 8 Casey, 22; see also Morrison v. Mullen, 10 Casey, 12; Barton v. Dickens, 12 Wright, 518. The case of Stiles v. Donaldson, 2 Dallas, 264, and 2 Yeates, 105, is no exception, for there the offer of set-off expressly set forth that the accounts were made beyond sea, bringing the case within one of the provisos of the statute.

In regard to the alleged loan of $12,000, little need be said. No such loan, in fact, appears in the article of copartnership, and this is all that is before us on this point. The sum of money put in by each partner as capital is distinctly set forth. It is expressly stated McKelvy has put into the concern $31,615.20; J. C. Blair has put in $19,548.14, and Thomas S. Blair has put in $7,481.08. The agreement of T. S. Blair to pay McKelvy interest on $12,067.08, the excess paid in by McKelvy over an equal share of the capital, and that this makes all the shares equal, is evidently for the purpose of making an equal division of profits, not to create a loan. It would be a singular omission, if intended to be a loan, that no provision in the article was made for its repayment. As a loan, it would be an individual transaction between McKelvy and T. S. Blair, inconsistent with the fact that $31,615 20 were put in by McKelvy as *capital*. There was a reason, also, that it should be part of the capital, and not a mere advance to T. S. Blair, as thereby the assets of the firm would be a security to McKelvy, instead of the private responsibility of T. S. Blair. Finding no error in the record, the decree of the District Court is affirmed, with costs, to be paid by the appellant.

EZRA COOPER v. E. H. BUSHLEY.

C., a purchaser at a tax sale in 1860, of the lands of D., allowed the taxes to become in arrear, and the land was again sold for taxes in 1862, at which last sale C. was also the purchaser. C. then conveyed to B., after which C. accepted from D. the redemption money for the sale of 1862. B. then brought suit against C., alleging the acceptance of the redemption money to be a fraud on him, *Held:* The title to C. under the sale of 1860, having become indefeasible, D. was a stranger, and the acceptance of the redemption money by C. could not divest B's title, either as a parol sale, trust, or by way of estoppel.

Error to the Court of Common Pleas of Erie county.

Opinion of the court by AGNEW, J. Delivered January 6th, 1873.

Without referring in detail to the errors as assigned, we may say there are two errors in the charge of the court below necessary to be noticed. One was in submitting to the jury the finding of a material fact, on which the case in a great measure turned, without instructing them upon the bearing this fact was to have upon the verdict. The other was in holding that the receipt of Cooper of the redemption money under the treasurer's sale of 1862, estopped him and his assignee from claiming title under the treasurer's sale of 1860. The action was in case, and the declaration set forth the fraudulent concealment by Cooper of the redemption of the sale of 1862, as the gist of the action. Rescission of the purchase on the ground of fraud in the sale, was clearly the basis of the suit for which the plaintiff claimed his damages. Had there been no treasurer's deed but that of 1862, and the assignment had been specially upon it, the case would have been a clear one. But there was evidence tending to show that Bushley purchased Cooper's interest in both the deeds of 1860 and 1862; that both were handed over by Cooper to Bushley; that it was a question between the parties, whether both deeds should be assigned to carry the title; and that Cooper thought as he had both deeds, the assignment carried all his title. The court was, therefore, right in submitting the question of fact to the jury, as to what the real bargain of the parties was, which they intended to consummate by the assignment, endorsed upon the deed of 1862. But this fact was of no moment unaccompanied by any instruction as to its effect upon the case. If the real bargain was a sale of the entire interest of Cooper under both deeds, and the assignment was made upon that of 1862 only, under a mistaken belief that it would convey all his interest in the land under both sales; it was a case of mistake in the very transaction itself, and at the time of it, which could be reformed. The submission was, therefore, not of a question of law, as the plaintiff in error asserts under the first assignment of error, but of a question of fact, out of which arose a question of law, and here it was the court erred in failing to instruct the jury upon the legal consequence of the finding. For if the bargain was for the entire title of Cooper under both deeds, then the redemption of the sale in 1862 did not affect his title under the sale of 1860, and the plaintiff's purchase had not failed. In this event this action could not be maintained, for he lost nothing by the concealed redemption of the sale of 1862, and the alleged fraud did him no injury, unless Cooper was estopped from claiming title under the sale of 1860 by his receipt of the redemption money under the sale of 1862, as the court held. This leads us to consider the question of estoppel. There was no evidence to show that the land was seated, or that the taxes for which the land was sold in 1860 were paid before the sale, or that the sale of 1860 had been avoided by a redemption. Cooper's title under the sale of 1860, was therefore absolute and indefeasible. When the sale took place in 1862, Cooper was both the owner of the estate sold and the purchaser at treasurer's sale. His was the hand to pay as well as to receive the redemption money. The most that can be said of that sale is, that it did not divest his title under the sale of 1860, but was simply the means of coercing the payment of his own taxes, with costs, as a penalty for his neglect. Then what was the effect of the payment of the taxes, costs, and twenty-five per cent., constituting the redemption money, by one who had been an owner of the land, but whose title was extinguished by the sale of 1860? In the first place, there is no evidence that his payment was in the slightest degree induced by Cooper. His payment was, therefore, wholly voluntary, and uninfluenced by Cooper. In the next place, he had not even a *scintilla juris* remaining in him after the sale of 1860 became absolute, to which his payment could attach, in order to create a title in equity. He was, therefore, a mere stranger making a voluntary payment. In the last place, the money he paid did not represent the value of the land, or even a price put upon it by Cooper; but was merely the public charge upon the land, with the costs and percentage incurred by the non-payment of that charge. The sum thus paid, therefore, did not represent a price or consideration given for the land to constitute either a trust or a purchase of it. The payment then being voluntary, and induced by no act of Cooper, and the sum received by him not representing the value of the land or any price put upon it by Cooper, on what principle in law or equity can it be said that Cooper's title under the sale of 1860, passed by his receipt of the money paid to redeem the sale of 1862? Clearly, the most that can be founded upon his receipt of the money paid under the circumstances stated, voluntary by a stranger to the title, would be an implied parol sale of Cooper's title, if such an implication could arise, by reason of the payment of a sum not representing the value or price of the land. But to such a parol sale, were it implied, the statute of frauds and perjuries would be a complete bar. The consequence would be the same, if a trust were implied instead of a sale. The court erred, therefore, in holding that either Cooper or his assignee were estopped by the receipt of the redemption money paid upon the sale of 1862, from setting up title under the deed of 1860.

On the other hand, if the facts found were that Cooper sold only his title under the treasurer's deed of 1862, and so specially assigned it to Bushley, the concealment by Cooper of the redemption of that sale, in which he had acquiesced by taking the money, would be such a fraud on Bushley as would enable the latter to rescind, and to recover from Cooper the money paid and interest, and any special expense to which he was put in making the purchase. How far Cooper's sale of the title under the deed of 1862, would convert him into a trustee of the title under the deed of 1860, for Bushley, is a question not raised in the case, and depends upon the true facts of the sale as to the title intended to be bargained for. Nothing can be said, therefore, on that question.

In regard to the question of tender before suit, if the fraud were found by the jury to entitle the plaintiff to rescind, there can be no difficulty as the case was presented. The sale of 1862 being wholly inoperative, if that were the only title intended to be conveyed, or which would legally pass by the assignment of that treasurer's deed, nothing passed by the assignment of Cooper to Bushley. There was nothing, therefore, to be reconveyed, unless Cooper might require it, *ex majore cautela*, and if he did, this could be provided for in the verdict at the time of trial. Such is the doctrine of Babcock v. Case, 11 P. F. Smith, 427. If any interest or estate had passed from Cooper to Bushley by the sale, even though an imperfect or a defeasible interest, a reconveyance would be necessary, and that according to the doctrine of Pearsall v. Chapin, 8 Wright, 9, would require the reconveyance to be tendered before suit brought. The purchaser cannot hold what he has actually obtained, and yet ask a return of the price he has paid.

Judgment reversed and a *venire facias de novo* awarded.

FRANK SCHLAUDECKER v. JAMES C. MARSHALL et al., Board of Licensees of the City of Erie.

Under the general laws relating to the granting of licenses for the sale of liquors, it is the duty of the court to act upon a sound legal discretion, and to hear and determine each case on its evidence and facts; to ascertain the fitness of the applicant, the necessity of his house for the public accommodation as a hotel, or as an eating house, and to see that the applicant has fully complied with the law.

Error to the Court of Common Pleas of Erie County.

Opinion by AGNEW, J. Delivered January 6th, 1873.

In the court below this case was a rule for a *mandamus* to compel the board of licensers of the city of Erie to grant a license to the plaintiff in error, to keep an eating house.

The rule was discharged, and hence this writ of error. The real question in the case is upon the nature and extent of the discretion to be exercised by the board of licensers in granting or refusing licenses for eating houses. It arises under the act of 10th May, 1871, P. L. 728, giving to the board "the same power and authority to grant lincenses in the said city of Erie, as the Court of Quarter Sessions by law *now* has." The requirements of the application for the license are governed by the 8th section of the act of 31st March, 1856, P. L. 201. See section 2d, act 10th May, 1871. But the power and au-

thority of the board in acting on the application are to be ascertained by the state of the law as to the Court of Quarter Sessions, at the date of the act of 1871. This involves an attentive examination of the legislation of the State for a series of years, a subject of no small difficulty, owing to the fluctuations in the Legislature as the temperance or liquor interests prevailed.

The initial point of modern legislation on the subject of licenses, may very properly be said to be the act of 11th March, 1834, P. L. 117, reported by the revisers of the code as the result of all the then existing laws, together with their own modifications and amendments. The discretion conferred upon the Court of Quarter Sessions by this act will be stated hereafter, when we come to the reviving act of 14th April, 1859, P. L. 653. For twenty-one years the act of 1834 remained without material change. In 1855, the temperance reform movement prevailing in the Legislature, the act of 14th April, 1855, entitled "An act to *restrain* the sale of intoxicating liquors," was passed. P. L., p. 255. This act was nearly prohibitory in its terms, and in derision was called the "Jug Law." It lasted but a year, and was overthrown by the act of 31st March, 1856, P. L. 200, entitled "An act to *regulate* the sale of intoxicating liquors," an act passed through the influence of what was then known as the "Liquor League." The act of 1856 was considerably modified by the act of 20th April, 1858, P. L. 365, and the two, with a few alterations since adopted, form the basis of the present system of licenses for the sale of intoxicating liquors.

Under the act of 1856, the discretion of the court in granting licenses differed somewhat, but not greatly, from that given by the act of 1834, and was regulated by the sixth section, which required the court to fix by rule or standing order, a time at which applications for licenses should be heard, and when all persons applying or making objections might be heard by *evidence, petition, remonstrance, or counsel*. This provision was essentially changed by the sixth section of the act of 1858, which made the granting of the license mandatory "to citizens of the United States of temperate habits and good moral character, whenever the requirements of the laws on the subject are complied with by any such applicant, to sell the liquor aforesaid, for one entire year from the date of his license: *Provided*, That nothing herein contained shall prohibit the court from hearing other evidence than that presented by the applicant for license: *And provided further*, That after hearing the evidence as aforesaid, the court, board of licensers, or commissioners, *shall* grant or refuse a license to such applicant, *in accordance with the evidence*."

This act took away the discretion which the courts had exercised under the acts of 1834 and 1856, and made it a matter of legal judgment on the evidence. The temperance movement rallying again, effectuated the passage of the act of 14th April, 1859, P. L. 653, in these words: "That it shall be lawful for the several courts of Quarter Sessions of this commonwealth to hear petitions, in addition to that of the applicant, in favor of, and remonstrance against, the application of any person applying to either of them for a license to keep a hotel, inn, or tavern, and thereupon to *refuse* the same, whenever, in the opinion of said court, such inn, hotel, or tavern, is not necessary for the accommodation of the public, and entertainment of strangers and travellers. And so much of the sixth section of the act of Assembly relating to the sale of intoxicating liquors, passed the 20th day of April, A. D. 1858, as is inconsistent herewith is hereby repealed: *Provided*, That the several courts of Quarter Sessions empowered to grant licenses, shall have and exercise such discretion, and no other, in regard to the necessity of inns and taverns, as is given to said courts by the act relative to inns and taverns, approved 11th March, 1834."

Thus the discretion of the courts upon the necessity of inns and taverns was turned back upon the act of 1834, the first section of which merely empowered the court to grant such licenses. The third section provided that "no court shall license any inn or tavern which shall not be necessary to accommodate the public, and entertain strangers and travellers." The fifth section further enacted that "no court shall license any person to keep an inn or tavern, unless from the petitions and certificate, or from their own knowledge, or upon evidence sought for and obtained, they shall be satisfied of the fitness of the person applying, and the sufficiency of the accommodations as aforesaid." The fourth section had provided that no court shall grant a license, unless upon a certificate of twelve citizens, setting forth the necessity of the inn or tavern to accommodate the public and entertain strangers and travellers, and the good reputation of the applicant for honesty and temperance, and his being well provided with house room and convenience for the accommodation of strangers and travellers. The bearing of the act of 1834 upon the discretion of the court, is noticeable in the negative character of its provisions to prevent granting unnecessary licenses. The nature of this discretion will be discussed after noticing the legislation on the subject of eating houses, or restaurants as they are termed. They were provided for in the act of 10th April, 1849, P. L. 570, the 20th section of which forbade them from being kept without a license first obtained from the county treasurer, and provided for classifying and rating them. By the act of 1856, the mode of granting licenses to eating houses was changed, and given to the Court of Quarter Sessions, as may be seen in the 6th, 7th, 8th and 14th sections. The act of 1858, again changed the manner of granting them, dispensing with the certificate required by the 8th section of the act of 1856, and returning the power of granting the license to the county treasurer. See sect. 10, act 1858, P. L. 367. Under this section the treasurer exercised no discretion, except to see that the applicant had complied with the requisites of the law. This was changed afterwards as to the counties of Erie, Warren and Clinton, by the act of 11th April, 1866, P. L. 560, which adopted the provision for the borough of Warren, contained in the act of 22d April, 1863, P. L. 534, enacting "that all licenses for the keeping of eating houses, which shall authorize the sale of domestic wines and malt and brewed liquors within the borough of Warren, Warren county, shall hereafter be granted only by the Court of Quarter Sessions of said county, in the same manner and subject to the same restrictions as licenses to hotels, inns and taverns are now granted, except that said eating houses shall be classified and rated as provided by existing laws." This local act was superseded by the general act of 22d March, 1867, P. L. 40. The first section put the hearing of all applications for licenses to sell intoxicating drinks on the same footing, directing that it should be lawful for said court to hear petitions in addition to that of the applicant, in favor of, and remonstrance against, the application for such licenses; and, in *all cases*, to refuse the same whenever, in the opinion of the said court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public, and entertainment of strangers and travellers; and upon sufficient cause shown, to revoke any license granted by them. The second section expressly directs that applications for license to keep an eating house or restaurant, shall be made in the same manner and to the same authority as applications for license to keep a hotel, excepting that the regulation as to bed-rooms shall not apply; and, also, repeals expressly the authority in the 10th section of the act of 1858, conferred on the county treasurer to grant licenses to eating houses and retail breweries. In conclusion, therefore, we find that the granting of licenses to hotels, inns, eating houses and restaurants, all stand on the same footing as to the authority to which the power is confided, and it now remains only to inquire into the nature and true character of the discretion to be exercised by the Court of Quarter Sessions in granting these licenses.

No subject has been productive of more difference of opinion and practice than this, in the different judicial districts of the State. Some judges holding it to be obligatory on the court to grant every license where the applicant has brought himself within the provisions of the law, as to the terms of his application; and others holding that they are not bound to grant any licenses whatsoever. Clearly neither opinion is right; the discretion which the court exercises being a sound discretion upon the circumstances of each case, as it is presented to the court, and not a general opinion upon the propriety or impropriety of granting licenses.

Whether any or all licenses should be granted, is a legislative, not a judicial question. Courts sit to administer the law fairly, as it is given to them, and not to make or repeal it. The law of the land has determined that licenses shall exist, and has imposed upon the court the duty of ascertaining the proper instances in which the license shall be granted, and therefore has given it to the court to decide upon each case as it arises in due course of law. The act of deciding is judicial, and not arbitrary or wilful. The discretion vested in the court is, therefore, a sound judicial discretion; and to be a rightful judgment, it must be exercised in the particular case and upon the facts and circumstances before the court, after they have been heard and duly considered; in other words, to be exercised upon the merits of each case, according to the rule given by the act of Assembly. To say that I will grant no license to any one, or that I will grant it to every one, is not to decide judicially on the merits of the case, but to determine beforehand, without a hearing, or else to disregard what has been heard. It is to be determined not according to law, but outside of law, and it is not a legal judgment, but the exercise of an arbitrary will. Discretion is thus described: "Where anything is left to any person to be done according to his discretion, the law intends it must be done with a *sound* discretion and *according to law*, and the Court of King's Bench hath a power to redress things that are *otherwise* done, notwithstanding they are left to the discretion of those that do them." Tomlin's Law Dict., vol. 1, Title, "Discretion." "And though there be a latitude of discretion given to one, yet he is circumscribed, that what he does be necessary and convenient, without which no liberty can defend it." Ibid. It is the duty of the court, therefore, to hear and determine each case on its evidence and facts; to ascertain the fitness of the applicant, the necessity of his house for the public accommodation as a hotel, or as an eating house (and this involves the number of each in the particular locality), and to see that the applicant has fully complied with the law, before his license can be granted. This is a large discretion, and is to be exercised primarily for the public good, and secondarily for the private interest; and this being the power and authority of the Court of Quarter Sessions, is the measure, also, of the duty of the board of licensers. It is an error to suppose, as argued by the plaintiff in error, that the sole duty of the board is confined to the inquiry whether the applicant is a citizen of the United States, and is a man of good moral character and temperate habits. The *mandamus* was properly refused, and the order of the court below is affirmed.

LEGAL GAZETTE.

Friday, January 17, 1873.

JOHN H. CAMPBELL, EDITOR.

THEODORE F. JENKINS, ASSOCIATE EDITOR.

AN EFFICIENT OFFICER.

There is one thing that can be said of the Philadelphia Bar—it appreciates the courtesy and efficiency of the officers of the courts with whom it has dealings, whenever by good luck those officers are possessed of the qualities mentioned. A signal instance of this appreciation occurred on the 9th inst., when a number of gentlemen of the bar assembled for the purpose of presenting a testimonial to Alfred J. Fortin, the deputy prothonotary of the Orphans' Court of this county, "as an expression of their appreciation of his uniform efficiency and courtesy," during his fifteen years' continuance in his present position.

The testimonial consisted of a gold watch, hunting case, fresh from the "American Waltham Company," stem-winder, purchased from John E. Caldwell & Co., of this city, with a double gold chain, ending in a "good luck" medal, the latter being presented as a Christmas gift to Mr. Fortin, by a friend (Mr. Geo. Junkin), and containing a neatly-engraved reproduction of "Our Lord's Prayer."

The inscription on the inner side of the watch was: "Presented to Alfred J. Fortin by members of the Philadelphia Bar, and others, as an expression of their appreciation of his uniform efficiency and courtesy as deputy clerk of the Orphans' Court, January 1st, 1873."

Daniel Dougherty, Esq., delivered the presentation speech which was responded to by Alex. R. Cutler, Esq., on the part of Mr. Fortin.

This closed the proceedings, pleasant throughout, after which Mr. Fortin received the congratulations of his numerous friends there assembled.

We regret that we have not space to insert the full speeches of Mr. Dougherty and Mr. Cutler, as there is no officer in the city of Philadelphia more deserving of the respect of the members of the Philadelphia Bar than Mr. Fortin. He, like his brother deputy of the District Court, Mr. Fletcher, is so well known and well liked for his kindness, courtesy, efficiency, and a host of other excellent qualities, that we feel that we but echo the universal sentiment of the bar in wishing him plenty of luck and happiness to wear his testimonial, and a long continuance in his office, as a standing proof of its being well-deserved.

ELECTORAL REFORM.

Now that a Constitutional Convention is in session in this State, many and varied are the projects of reform offered for its consideration. From all sections of the State, and even from places without our borders, come suggestions and propositions, as to what the convention should do to remedy the great evils from which the body politic is suffering. These suggestions are good, bad, and indifferent, as their authors have or have not studied their subjects, and they all agree but in one thing, that there must be a change of some sort in the existing condition of things. Among the evils which attract the greatest attention, as, perhaps, the most familiar to all classes of the people, is the evil of corruption at elections, and it is astonishing to note the number of propositions for electoral reform which have already been offered to do away with this evil. We have already briefly noticed Senator Buckalew's work upon the free vote, and our attention has been again specially drawn to the subject, by having sent to us a little pamphlet entitled "The Commonwealth Reconstructed," by C. C. P. Clark, of Oswego, New York. Mr. Clark offers a panacea for all the ills of elections, in a scheme which is to take away from the professional politician his opportunity to work upon "fixed and geographical boundaries," which enable him to canvass them minutely, "distribute his forces, make his combinations, lay his pipes, and roll his logs." By removing these boundaries of election districts, all our evils are to vanish. In order to effect this, "the constituency of the elector must be established *by lot*. For this purpose let the voters in a town or ward be registered. Let their names be publicly drawn by the proper authorities, as the names of jurors are now drawn from the panel, till the whole are divided by fifties, or hundreds or other suitable number, into as many lists as the register will fill. Let each such list constitute a *primary electoral constituency*. Let this constituency be assembled as soon as convenient after the drawing, and after notice to its members, and proceed, retired by itself like a jury, to choose its representative elector. Let this establishment of constituencies and choice of representative electors be repeated every two years, or as often as may be judged expedient. Let citizens be forbidden to decline the office of elector.

This constituency should not be limited in its choice to its own members, but should have the range of the town or ward of which it might form a part. In voting, the roll should be called, and voting should be by ballot or *viva voce* as each voter might prefer. It might be well to provide that in case of insuperable disagreement in a constituency, it should be represented, in due proportion, by the two who had received the largest number of votes. It is believed, however, that under this system party feeling and other distracting and illegitimate influences would, after a little time, so disappear from the public mind that unison of sentiment would not be difficult to obtain. Undoubtedly, this plan will work better and better with the progress of time and experience.

Let the body of representatives so chosen in any ward or town constitute a college of electors for such ward or town, and appoint, in public session and *viva voce*, its supervisor, its justices of the peace, its town agent, its alderman and all its other functionaries.

Let them also appoint one or more electors of a higher class to represent them, and the people for whom they act, in a higher college for the selection of county officers, members of Assembly and State senators. The electors so chosen in an Assembly district should appoint its member of Assembly, those chosen in a senatorial district, its senator, and so on."

Notwithstanding the glowing enthusiasm with which Mr. Clark dilates on the good which is to result from it in his estimation, it strikes us that this plan is not such a novel one after all. The idea is certainly as old as the days of the Athenian Dikasteries, if not, indeed, much earlier. Historians tell us that the citizens of Athens were divided, for judicial purposes, into panels of jurors or dikasts, "six thousand of whom were annually drawn *by lot*, and sworn, and then distributed into ten panels of five hundred each, the remainder forming a supplement in case of vacancies." These panels decided the different cases; "which of the ten he (the magistrate) should take, was determined by lot, so that no one knew beforehand what dikastery would try any particular cause." Hallam and Sismondi tell us that the magistrates of several of the Italian republics of the middle ages, were chosen by lot. The following description (Hallam's Middle Ages, vol. 1, p. 457) of an electoral system once adopted in Venice, was recalled to our mind upon reading Mr. Clark's pamphlet.

"As a further security, they devised a remarkably complicated mode of supplying the vacancies of his office (the doge). Election by open suffrage is always liable to tumult or corruption, nor does the method of secret ballot, while it prevents the one, afford, in practice, any adequate security against the other. Election by lot incurs the risk of placing incapable persons in situations of arduous trust. The Venetian scheme was intended to combine the two modes without their evils, by leaving the absolute choice of their doge to the electors by lot. It was presumed that, among a competent number of persons, though taken promiscuously, good sense and right principles would gain such an ascendency as to prevent any flagrantly improper nomination, if undue influence could be excluded. For this purpose the ballot was rendered exceedingly complicated, that no possible ingenuity or stratagem might ascertain the electoral body before the last moment. A single lottery, if fairly conducted, is certainly sufficient for this end. At Venice, as many balls as there were members of the great council present were placed in an urn. Thirty of these were gilt. The holders of gilt balls were reduced by a second ballot to nine. The nine elected forty, whom lot reduced to twelve. The twelve chose twenty-five, by separate nomination. The twenty-five were reduced by lot to nine; and each of the nine chose five. These forty-five were reduced to eleven as before; the eleven elected forty-one, who were the ultimate voters for a doge."

Now we do not wish to accuse Mr. Clark of plagiarism in his scheme for choosing electors by lot, but we would merely direct his attention to the fact that various projects of a similar nature have been already tried, and have not accomplished the great results intended by them. The difficulty of avoiding corruption in *casting* the citizens into their respective constituencies, and the greater difficulty in preventing the wholesale corruption of those *selected* by these constituencies, are great objections to the introduction of a system such as is proposed by the author of this pamphlet. The necessity of narrowing "primary constituencies to the limits of ordinary acquaintanceship," though not in the way suggested, is, after all, the real way of accomplishing electoral reform, as our correspondent "Pericles" points out in a letter, which, as we stated last week was then crowded out of our columns, but which we publish in this issue, and has long been recognized to be so by many of those who have made electoral reform a study. This reform would certainly not be accomplished by the system proposed by Mr. Clark, if the effect of that system be, as he indicates in the following passage, to throw political power into the hands of the wealthy and privileged classes (who are not the *honest* class which he seems to think they are). "More than this—far more than this, in the purification of the polls—would result from the speedy disappearance therefrom, under this system, of that large body of electors, who now come there from no good motive, but who yet weigh equal with the best of us. The thousands of indifferent and ignorant foreigners who are naturalized and brought to the polls at the expense and instigation, and for the use of parties and candidates; the thousands who come there to sell their votes; the millions who have no stake in public affairs, or who feel little or no intelligent interest in them, but who are moved by ignorant prejudice, by sympathy, by excitement, by personal ill will or good will, and other illogical and illegitimate influences, all these in a brief time would drop from the registration, or would never appear there, and the government of the country would be left where it belongs, in the hands of the intelligent, the honest, the interested. This class, on the other hand, will come to this reformed and purified caucus in full force, because now for the first time, their votes and their influence will have their lawful weight."

We call special attention to the opinions of the Supreme Court of Pennsylvania, which we publish to-day.

On our inside columns will be found the decisions of the Supreme Court, rendered upon Monday, January 6th, also an opinion by Judge Walker of Schuylkill county.

THE CONSTITUTIONAL CONVENTION.

We have reserved a portion of our space for articles upon the Constitutional Convention, and the subjects which will probably come before that body for consideration. All communications intended for publication in this department, should be addressed to the Editor of the Legal Gazette, and must in all cases be accompanied by the name and address of the writer. Correspondents will please state under what names they wish their communications to appear.

LETTERS OF PERICLES.

V.

TO THE EDITOR OF THE LEGAL GAZETTE:

In this letter I propose to give the remaining sections of the Declaration of Rights, and as many of the sections upon the subjects of elections, suffrage and representation as I can conveniently include, without trespassing too much upon your space.

ART. I. DECLARATION OF RIGHTS.

SECT. 27. *That private property shall not be taken or damaged for public use without just compensation being made. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of lands taken for railroad tracks, without the consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken.*

The provision in the existing constitution of Pennsylvania, in reference to the taking of private property for public use, is contained in section 10 of the Declaration of Rights, and is as follows: "Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being made." As I stated in my third letter, published in the Gazette of December 27th ult., I have preferred to make a separate section for this important subject. The section I have adopted is almost identical with the section of the Illinois Constitution of 1870, upon the subject. I would still further restrict the right of seizing private property in this article of the proposed constitution, but that the article upon legislation, which I will give hereafter, contains a prohibition upon the passage by the Legislature of special acts authorizing the taking of private property. All the constitutions of the different States recognize the principle of compensation for the taking of private property, though they differ in the method of expressing it. Some of them, such as those of Alabama, Indiana, Iowa, Kansas, Michigan, Minnesota, Ohio and other States, contain provisions that the damages shall be *first* paid or secured before such taking; but I think that the section I have proposed is sufficient for the present, as it must be remembered, that *too much* detail in a constitution makes it resemble an act of Assembly, and the less likely to be acceptable to the people.

SECT. 28. *That married women shall have the same rights and powers over their separate property as if they were not married, and no woman, merely on account of her sex, shall ever be debarred from entering into or engaging in any lawful pursuit or calling. There shall be no tenancy by the curtesy in this State.*

This goes farther than any of the State constitutions in protecting women in their powers and rights over their separate property, but I think it is but fair, and in accordance with the enlarged views which have of late years been entertained by prominent writers and legislators upon the subject. The old and absurd doctrines of the English Common Law, as regards the control, or rather want of control, of a married woman, over property owned by her before marriage, or coming to her after marriage, are fast being exploded, and new doctrines are taking their place. The constitutions of Alabama, Arkansas, California, Nevada, South Carolina, Georgia, North Carolina, Florida, Kansas, Mary-

land, Mississippi, Oregon, Michigan and Texas, provide that the separate property of married women shall not be liable for the husband's debts, and some of them contain the further provision, that it may be devised by them. In Pennsylvania, and we believe most, if not all the other States, the same exemption and the same power of devising are provided for by law. The tendency of all recent legislation in this country, in reference to the separate property of married women, is to give more and more liberty to the owner, and to do away with the restrictions imposed under the old laws. It is notably so in Pennsylvania. There is a series of acts of Assembly, which have gradually extended the powers of married women over their separate earnings and property, and which, though not yet going far enough, have accomplished much good. The recent revised code adopted in California, made a step forward, in that it provided for the separate conveyance by married women, under certain regular forms, of their property. A very recent act of the territorial Legislature of Utah, enacted that the marriage relation should not affect in any way the acquisition, control or disposition of the property of either husband or wife, though as an offset it abolished dower entirely. I have limited the section above proposed to the lifetime of the parties, except that that "relic of barbarism," tenancy by the curtesy, is done away with. This, I believe, will place husband and wife, as they should be, upon an equal footing as regards their separate property.

The part of the section opening to women all the lawful trades, callings, pursuits or professions, from which they are now debarred, is but *simple justice*. The arguments in the case of the right of women to practice as doctors, are to a certain extent applicable to all other pursuits as well as that of medicine. As they must be very familiar to all intelligent readers, I will not waste time by repeating them. There is no reason why a woman should not be a doctor or a lawyer, as well as a man, and her right to be so should be clearly enunciated in the Declaration. The case of Mrs. Myra Bradwell, who applied for admission to the bar in Chicago, and was refused on account of her sex, led to the passage of laws by the Illinois Legislature, permitting women to practice as attorneys in that State. I want to see the matter fixed so certainly that such laws will be unnecessary in this State.

ART. II. SUFFRAGE AND ELECTIONS.

The subject of suffrage and elections naturally comes next after the Delaration of Rights in a constitution, and I have accordingly so placed it among the articles of the poposed constitution of Pennsylvania. This is following the example of New York, California, Kentucky, Indiana, West Virginia and many of the other States.

SECT. 1. *In elections by the citizens, every male person of the age of twenty-one years or upwards, having resided in this State one year, in the county three months, and in the election district where he offers to vote, one month, immediately preceding such election, and every male person of foreign birth, having declared his intention to become a citizen of the United States, conformably to the laws of the United States on the subject of naturalization, and being otherwise qualified as to age and residence, shall enjoy the rights of an elector; but any person who had previously been a qualified voter of this State, and removed therefrom and returned, and who shall have resided in the election district as aforesaid, shall be entitled to vote after residing in the State six months.*

If it were not my desire to retain as much as possible of the language of the present constitution, I would alter this section considerably, but as it stands, it expresses the ideas I wish to convey, though not in the precise language I would wish. The corresponding section of the present constitution is as follows:

"In elections by the citizens, every white freeman of the age of twenty-one years, having resided in this State one year, and in the election district where he offers to vote, ten days immediately preceding such election, and within two years paid a State or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector; but a citizen of the United States, who had previously been a qualified voter of this State, and removed therefrom and returned, and who shall have resided in the election district and paid taxes as aforesaid, shall be entitled to vote after residing in the State six months: *Provided* That white freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in the State one year, and in the election district ten days, as aforesaid, shall be entitled to vote, although they shall not have paid taxes."

In the section proposed by me, everything in reference to a tax as a prerequisite for voting is stricken out, in accordance with the views expressed in my last letter under section 10 of the Declaration of Rights. In Philadelphia, where the election frauds, complained of by honest citizens are of the most stupendous character, the imposition of the tax (50 cents) under the old constitution, has always been the means of committing great frauds. *It is a notorious fact*, that the unprincipled men who have controlled the political organizations in that city, of both the great parties, *have been cognizant of and have actually connived at and procured* the issue of thousands of fraudulent tax receipts for voters, and have in many cases authorized the issue of large quantities of blank receipts, *to which the names of tax collectors were afterwards forged.* As a means of dignifying the elective franchise, the tax qualification is a humbug; rich men laugh at it; *poor men think it a hardship upon them.* As a means of identifying the voter, it is a farce, as it is well known that gangs of "colonizers" and "repeaters" have voted, *all of them being furnished with tax receipts and other vouchers*, by the desperate and unprincipled scoundrels of both parties, who help to perpetrate election frauds. Pennsylvania, Delaware, Rhode Island and Massachusetts, are the only States in the Union that have such a provision in their constitutions; and in the name of common justice to the poor citizen, and as taking away one of the incentives to fraud, abolish an absurd provision, that exists only because it has been handed down to us from our previous constitutions!

The residence of three months in the county is added, to prevent the evils complained of in many sections of the State, resulting from large numbers of men being brought, in times of congressional or senatorial elections from one county to another, "to work on railroads," etc., with the intent to influence the result in particular districts. Provisions of this kind exist in many of the State constitutions, Texas, Florida, Oregon, and Maryland, require a county residence of six months; Kentucky, one year; New Jersey, five months; New York, four months; Virginia and Alabama, three months; Illinois, ninety days; Missouri, Iowa, Tennessee, and West Virginia (Constitution of 1872), sixty days; California, Delaware, Georgia, Nevada, and North Carolina, thirty days; Mississippi, one month; and Louisiana, ten days. Connecticut, Massachusetts, Rhode Island, and Virginia, require a residence of six months in the city or town. Pennsylvania also needs a county residence. A proposition offered in the Constitutional Convention by Mr. McMurray, of Jefferson county, proposed a residence of six months, but this, in consideration of the thirty days' residence in the election district, is too long.

The residence in the immediate election district is extended from ten to thirty days in the section above proposed. Were it not that I have provided elsewhere for *very small election districts*, which obviate the necessity of a great length of residence, I would extend the time still further, as one of the reforms which seem to be pretty generally demanded by the people, is an extension of the time of residence in an election district to the longest possible limit consistent with justice to the poorer classes of the people. In the Convention, Messrs. Harvey, of Lehigh, McMurray, of Jefferson, Brodhead, of Northampton, Broomall, of Delaware, Lamberton, of Dauphin, and Runk, of Lehigh, severally offered propositions to extend such time, and there seems to be a general disposition to make a change of this kind. In Maine, three months' residence in the district is required; in Michigan, six months; in Kentucky, sixty days; in California, Delaware, Illinois, Kansas, and Nevada, thirty days; in Louisiana, Michigan, Minnesota, and Pennsylvania, ten days; in most of the other States there is no constitutional provision upon the subject. Now, with small election districts, I think thirty days are quite sufficient to secure the recognition of the voter and prevent the numerous frauds perpetrated under the present election system.

I have retained the provision about qualified voters removing from the State and returning, more because it is already in the constitution than for any other reason.

I have provided that foreign born persons who have declared their intentions to become citizens of the United States, shall vote after a year's residence in the State. This, I think, is but just to the *thousands* of foreign born persons who have settled and others who will settle, in this State, and eventually become citizens of the United States. Our institutions and our people invite them here; they are offered homes and the means of subsistence, and once they have fully declared their intentions to become citizens, being otherwise qualified, they should be given the right of suffrage, that they may protect themselves in their lives and occupations. Pennsylvania, though older than some of her western sisters, is yet but scarcely two hundred years old, and the mere pride of American birth should not prevent us from giving the rights of State citizens to those who, like our fathers and grandfathers did before them, are helping to build the country up. Pennsylvania does not fear the interference of foreign powers, as none such are contiguous to her borders. If we were not separated from the eastern continent by such a great distance, or had we Canada or Mexico immediately upon our borders, we might stop before extending the suffrage in the manner proposed, but being an inland State, removed from any possibility of foreign control, it is but fair to make our suffrage laws as liberal as possible. This extension of the suffrage is not without precedent. Indiana, Kansas, Alabama, Arkansas, Florida, Georgia, Michigan, Minnesota, Missouri, Nebraska, Texas and Wisconsin, have similar provisions, and I would like to see Pennsylvania, even though she does not need the influx of population like many of the States named, go with them.

SECT. 2. *For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence, while employed in the service of the United States, or of this State; nor while engaged in the navigation of the waters of this State, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse, or other asylum, at public expense; nor while confined in any prison.*

This section is new in Pennsylvania, though substantially the same provisions are to be found in the constitutions of California, Kansas, Michigan, Missouri, Nevada, New York, Oregon, Maine, Minnesota, and some other States. In the Allentown election case, decided by the Supreme Court of Pennsylvania last year (Fry's Appeal, reported in 4 Leg. Gaz.), it was held that students at a college could not vote in the election district in which the college was situated, even though they did not intend to return to the homes from which they had come to enter the college. As the word *resided*, in the present constitution, as will be seen in reading that case, is somewhat doubtful in its meaning, I have thought it best to add this section.

SECT. 3. *Whenever any of the qualified electors of this commonwealth shall be in any actual military service, under a requisition from the President of the United States, or by authority of this commonwealth, such electors may exercise the right of suffrage in all elections by the citizens, under such regulations as are, or shall be, prescribed by law, as fully as if they were present at their usual places of election.*

I do not like the wording of this section, which is taken from the present constitution, but I have retained it on account of the opposition that would likely be made to a change. While I do not object to soldiers or sailors voting, yet the exercise of that power should be guarded strictly, so that no abuses could creep in.

SECT. 4. *Every person who shall hereafter be convicted of bribery, or perjury, at an election, or of wilful fraud either in giving or receiving votes, or in counting or returning the same, or of fraudulently tampering with, altering, mutilating or destroying any election returns, certificates or records, shall be disqualified from voting at any election thereafter, and from holding any office of honor or profit in this State. No idiot or insane person, or person convicted of treason or felony in this State, shall hold any office or vote at any election therein.*

This section is new in Pennsylvania, though there is a general feeling that something like it must be adopted in order to prevent the numerous frauds perpetrated at every election. Nearly all the States of the Union specify certain crimes and offences which disqualify the persons committing them from voting, though they do not go as far as this section in reference to election frauds. The phrase "or of wilful fraud either in giving or receiving votes, or in counting or returning the same," was suggested by a proposition of Mr. Simpson, a member of the Constitutional Convention, on this subject; and it is but fair that I should give him credit for his own words, which no doubt his large experience as counsel in contested election cases has enabled him to frame so happily.

SECT. 5. *Electors shall in all cases, except treason, felony and breach or surety of the peace, be privileged from arrest during their attendance on elections, and in going to and returning from the same; and no elector shall be obliged to do military duty on the day of election, except in time of war or public danger.*

The first part of this section is taken from the present constitution; the second part, in reference to the performance of military duty, is added. A similar provision being in the constitutions of Iowa, Illinois, Maine, Michigan, Oregon, Virginia, and West Virginia. The reason for it is obvious.

SECT. 6. *Wherever in an election district, over one hundred electors cast their votes at any two successive elections, such election district shall be divided into two distinct election districts of contiguous and compact territory; and whenever in any two or more contiguous election districts, less than one hundred electors cast their votes at any two successive elections, such election districts shall be consolidated into one.*

The length of my letter admonishes me that I must conclude. I will give the advantages of the election system indicated in this section, in my next letter.

January 13, 1872. PERICLES.

PUBLICATIONS RECEIVED.

THE AMERICAN LAW REVIEW, January, 1873.
THE SOUTHERN LAW REVIEW, January, 1873.
THE UNITED STATES JURIST, January, 1873.
LA REVUE CRITIQUE, January, 1873.

The JUROR, by A. Jackson Reilly.

This excellent little publication we will notice at length in a future issue.

MESSAGE of John W. Geary, Governor of Pennsylvania.

TWENTY-FIRST JUDICIAL DIST.
Court of Common Pleas of Schuylkill County.

THE CITY OF PHILADELPHIA v. PATRICK DONAHEW, Supervisor of Mahanoy township.

Where the title of an act was "A Supplement to an act entitled an act authorizing the supervisor of New Castle township, Schuylkill county, to make, repair, and keep in good order and condition the public roads, bridges, and culvert, in said township;" and the supplement extended the provisions of the New Castle act to Mahanoy township, without mentioning Mahanoy township in the title: *Held*, that the title did not clearly express the subject, and was in conflict with section 8th, of article 11th, of the constitution of Pennsylvania, adopted in 1864.

Petition for a mandamus.

Opinion by WALKER, J. Delivered January 6th, 1872.

The petition of the plaintiff for a mandamus (among other things) sets forth that the supervisor of Mahanoy township is acting in disregard and violation of the provisions of the act of Assembly, approved the 19th January, 1860, P. L. 4, requiring him to sell the making and repairing of the public roads, in Mahanoy township, Schuylkill county, at public outcry, to the lowest and best bidder; that he alleges, in justification of his neglect, that the act aforesaid was repealed by an act approved the 29th March, 1872 (P. Laws, 651), and that this act (the act of 29th March, 1872) is in violation of the 8th section of the 11th article of the constitution of Pennsylvania, adopted in 1864, which provides that "No bill shall be passed by the Legislature containing more than one subject—*which shall be clearly expressed in the title*—except appropriation bills."

To this petition the defendant has, in substance, demurred.

The constitutionality of the last mentioned act is, therefore, raised.

The title of the act is "A Supplement to an act entitled an act authorizing the supervisor of New Castle township, Schuylkill county, to make, repair and keep in good order and condition, the public roads, bridges, and culverts in said township."

The original act was approved 6th May, 1871 (P. L. 583), and relates to the roads in New Castle; and by this supplement, the provisions of the act of 1871 are extended to the township of Mahanoy in the act *itself*, though not mentioned in the title.

Hence the constitutional objection.

The wisdom of this amendment must be apparent to every one acquainted with the crude, hasty and improper legislation not inappropriately called "omnibus" bills, for years before its adoption.

This evil the amendment was intended to remedy. Its object was to guard against the passage of acts of a different nature from that expressed in the title, and to give the public notice of their true purport and design.

And the courts, therefore, should give the amendment a construction (if there be room for the construction of such plain and intelligible words), to accomplish the purposes intended.

Amendments similar to this have been embodied into the constitutions of New York, New Jersey, Maryland, Indiana, Iowa, and other States.

Does the title, then, in the case before us, "*clearly express the subject?*" If it be imperfectly or ambiguously expressed, the act is null and void.

But the subject is not expressed at all, and the title, therefore, tends to mislead.

No one reading the title can say that the act had reference to any other township than that of New Castle.

No amount of intelligence in any person would lead him to suppose that the supplement referred to Mahanoy township, any more than any other township in the State—without reading the act itself.

But he is not required to read the act—he may stop after reading the title—*and a subject not therein contained is expressly and by positive words excluded.*

But this question has been settled by the Supreme Court in the appeals of the Union Passenger Railway Company, reported in the Legal Intelligencer of the 29th November, 1872, in which Justice Agnew holds, "that a title of a bill which tends to mislead, stands upon a different footing from one that is merely general in its terms." "When the title (he says) conveys the belief that one subject is the purpose of the bill, while another and a different one is its real subject, it is evident that it tends to mislead, by diverting the attention from the true object of the legislation."

Neither does the case of Blood v. Mercelliott, 9 P. F. Smith, 391, conflict with these views.

Judge Agnew has fully shown that it does not, in the appeals of Dorsey & McMakin, and Donnelly & Co., in an opinion delivered 4th November, 1872, and reported in the same paper. Blood v. Mercelliott was a case "*standing on the border of the constitution,*" as he appropriately says.

Judge Pierce, on these appeals, rules the case of the Commonwealth v. Dickinson, and which is published in the Legal Gazette of 20th December, 1872.

These authorities are conclusive, and fully warrant the court in declaring the act in question unconstitutional, and in granting the alternate mandamus as prayed for by the petitioner.

Alternate mandamus *granted.*

Hon. Edward O. Parry and *James Ellis, Esq.*, for petitioner.

Charles D. Hipple, Esq., for respondent.

Supreme Court of Pennsylv'a.

The following decisions were rendered upon Monday, January 13th, 1873.

PER CURIAM.

Cresson et al. v. Dickey et al. January Term, 1868. No. 35. The appeals in this case are dismissed, and the decree of the Court of Nisi Prius is affirmed by a divided court. W. L. Hirst, Wm. A. Porter and Geo. Junkin, for Dickey's appeal and against Cresson's appeal; Thos. Greenbank, Geo. W. Biddle and A. V. Parsons, for Cresson's appeal and against Dickey's appeal.

Murray's Appeal. July Term, 1873. No. 40. Sur rule to show cause why the appeal and the certiorari therein issued should not be quashed. Rule made absolute, and appeal and certiorari quashed.

O'Neill & Patton v. Wilt. January Term, 1873. No. 160. Sur motion to quash writ of error. Motion refused.

Same v. Same. Sur rule to show cause why leave should not be granted to amend the proceedings by adding the name of Alexander Foster, whose name has been omitted by mistake. Rule made absolute, and the name of Alexander Foster added as a plaintiff.

Brown et al. v. Lebanon Cemetery of Philadelphia et al. July Term, 1869. No. 8. And now, January 13th, 1873, the decree of the Court of Nisi Prius is affirmed. J. Cooke Longstreth, for appellants; Geo. Junkin, contra.

John J. Ridgway v. Charles C. Melvin, Treasurer of McKean county. Appeal of defendant from decree of Court of Common Pleas of McKean county, in Equity, granting a special injunction. And now, January 13th, 1873, the decree of the court below is reversed and the injunction dissolved.

Beine v. Norris et al. January Term, 1869. No. 15. And now, January 13th, 1873, the appeals in this case are dismissed. The report of the master, Mr. Olmsted, is confirmed, and the decree of the Court of Nisi Prius is affirmed. Theo. Cuyler, for Beine's appeal, Edward Waln, contra; J. Parker Norris and Edward Waln, for Norris' appeal, Theo. Cuyler, contra.

WM. T. KOUNTZ v. J. KIRKPATRICK and J. LYON, use of FISHER & BROTHERS.

1. The assignee of a chose in action is not affected by collateral transactions, secret trusts, or acts of the assignor unconnected with the subject of the contract.
2. When the market price is unnaturally inflated or depressed by unlawful and fraudulent practices, it is not the true means of ascertaining what is the measure of compensation for a breach of contract. Such price is not the legal market value.

Error to the Court of Common Pleas of Allegheny County.

Opinion of the court by AGNEW, J. Delivered January 6th, 1873.

The second, third, fifth, sixth, seventh, eighth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth errors, are not well assigned, for all the answers of the court to the points were omitted. When a court simply refuses a point, the error is well assigned by reciting the point, and stating that it was refused. But when the judge answers specially, in order to introduce a qualification he deems necessary to make his instruction correct, the answer must be recited as well as the point. We shall not decline considering, however, all the important questions; and in order to discuss them, we may state succinctly the nature of the case. On the 7th of June, 1869, Kountz sold to Kirkpatrick & Lyon, two thousand barrels of crude petroleum, to be delivered at his option, at any time from the date, until the 31st December, 1869, for cash on delivery, at thirteen and a half cents a gallon. On the 24th of June, 1869, Kirkpatrick & Lyons assigned this contract to Fisher & Brothers. Kountz failed to deliver the oil. He defends on the ground that Kirkpatrick & Lyon, and others holding like contracts for delivery of oil, entered into a combination to raise the price, by buying up large quantities of oil, and holding it till the expiration of the year 1869, and thus to compel the sellers of oil on option contracts, to pay a heavy difference for non-delivery. Fisher & Brothers, the assignees of Kountz's contract, were not in the combination, and the principal questions are whether they are affected by the acts of Kirkpatrick & Lyon, subsequent to the assignment; whether notice of the assignment to Kountz was necessary to protect them, and what is the true measure of damages. The court below held that Fisher & Brothers, as assignees of the contract, were not affected by the acts of Kirkpatrick & Lyon, as members of the combination in the following October, and subsequently, and that notice in this case was not essential to the protection of Kountz.

The common law rule as to the assignability of choses in action no longer prevails, but in equity the assignee is looked upon as the true owner of the chose. He may set off the demand as his own. Morgan v. Bank of North America, 8 S. & R. 73; Ramsay's Appeal, 2 Watts, 228. The assignee takes the chose subject to the existing equities between the original parties before assignment, and also to payment and other defences to the instrument itself, after the assignment and before notice of it; but he cannot be affected by collateral transactions, secret trusts, or acts unconnected with the subject of the contract. Davis v. Barr, 9 S. & R. 137; Beckly v. Eckert, 3 Barr, 292; Mott v. Clark, 9 Barr, 399; Taylor v. Gitt, 10 Barr, 428; Northampton Bank v. Balliott, 8 W. & S. 318; Corsen v. Craig, 1 Wash. C. C. R. 424; 1 Parsons on Cont. 193, 196; 2 Story on Cont., § 396, n.

The act of Kirkpatrick & Lyon, complained of as members of an unlawful combination to raise the price of oil, was long subsequent to their assignment of Kountz's contract, and was a mere tort. The contract was affected only by its results as an independent act. It does not seem just, therefore, to visit this effect upon Fisher & Brothers, the antecedent assignees. The act is wholly collateral to the ownership of the chose itself, and there is nothing to link it to the chose, so as to bind the assignors and assignees together. After the assignment, there being no guaranty, the assignors had no interest in the performance of this particular contract, and no motive, therefore, arising out of it to raise the price on Kountz. The acts of Kirkpatrick & Lyon seem, therefore, to have no greater or other bearing on this contract than the acts of any other members of the combination, who were strangers to the contract.

In regard to notice of the assignment to Kountz, it is argued, that having had no notice of it, if he knew of the conspiracy to raise the price of oil, and thus to affect his contract, and that Kirkpatrick & Lyon were parties to it, he might have relied on that fact as a defence, and refused to deliver the oil, and claimed on the trial a verdict for merely nominal damages for his breach of his contract. Possibly in such a special case, want of notice might have constituted an equity, but the answer to this case is, that no such point was made in the court below, and there does not seem to be any evidence that Kountz knew of the conspiracy, and Kirkpatrick & Lyon's privity, and relying on these facts, desisted from purchasing oil to fulfil his contract with them. As the case stood before the court below, we discover no error in the answers of the learned judge on this part of the case.

The next question is upon the proper measure of damages. In the sale of chattels, the general rule is, that the measure is the difference between the contract price and the market value of the article at the time and place of delivery under the contract. It is unnecessary to cite authority for this well established rule, but as this case raises a novel and extraordinary question between the true market value of the article, and a stimulated market price, created by artificial and fraudulent practices, it is necessary to fix the true meaning of the rule itself, before we can approach the real question. Ordinarily, when an article of sale is in the market, and has a market value, there is no difference between its value and the market price, and the law adopts the latter as the proper evidence of the value. This is not, however, because value and price are really convertible terms, but only because they are ordinarily so in a fair market. The primary meaning of value is worth, and this worth is made up of the useful or estimable qualities of the thing. See Webster's and Worcester's Dictionaries. *Price*, on the other hand, is the sum in money or other equivalent set upon an article by a seller, which he demands for it. *Ibid, Ibid.* Value and price are, therefore, not synonymes, or the necessary equivalents of each other, though commonly, market value and market price are legal equivalents. When we examine the authorities, we find also that the most accurate writers use the phrase market *value*, not market price. Mr. Sedgwick, in his standard work on the measure of damages, 4th ed., p. 260, says: "Where contracts for the value of chattels are broken by the vendor's failing to deliver property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the measure of damages is the difference between the contract *price* and the market *value* of the article at the time it should be delivered upon the ground; that this is the plaintiff's real loss, and that with this sum, he can go into the market and supply himself with the same article from another vendor." Judge Rogers uses the same term in Smethhurst v. Woolston, 5 W. & S. 109: "The *value* of the article at or about the time it is to be delivered, is the measure of damages in a suit by the vendee against the vendor for a breach of the contract." So said C. J. Tilghman, in Girard v. Taggert, 5 S. & R. 32. Judge Sergeant, also, in O'Conner v. Foster, 10 Watts, 422, and in Mott v. Danforth, 6 Watts. 308. But as even accurate writers do not always use words in a precise sense, it would be unsatisfactory to rely on the common use of a word only, in making a nice distinction between terms. It is therefore proper to inquire into the true legal idea of dama-

ges in order to determine the proper definition of the term value. Except in those cases where oppression, fraud, malice, or negligence enter into the question," the declared object (says Mr. Sedgwick, in his work on damages) is to give *compensation* to the party injured for the actual loss sustained," 4th ed., pp. 28, 29; also, pp. 36, 37. Among the many authorities he gives, he quotes the language of C. J. Shippen, in Bussey v. Donaldson, 4 Dallas, 206. "As to the assessment of damages (said he), it is a rational and legal principle, that the compensation should be equivalent to the injury." "The rule," said C. J. Gibson, "is to give actual compensation, by graduating the amount of the damages exactly to the extent of the loss." "The measure is the actual, not the speculative loss." Forsyth v. Palmer, 2 Harris, 97. Thus, compensation being the true purpose of the law, it is obvious that the means employed, in other words, the evidence to ascertain compensation, must be such as truly reaches this end. It is equally obvious, when we consider its true nature, that as evidence, the market price of an article is only a means of arriving at compensation; it is not itself the value of the article, but is the evidence of value. The law adopts it as a natural inference of fact, but not as a conclusive legal presumption. It stands as a criterion of value, because it is a common test of the ability to purchase the thing. But to assert that the price asked in the market for an article is the true and only test of value, is to abandon the proper object of damages, viz., compensation, in all those cases where the market evidently does not afford the true measure of value. This thought is well expressed by Lewis, C. J., in Bank of Montgomery v. Reese, 2 Casey, 146: "The paramount rule in assessing damages (he says), is that every person unjustly deprived of his rights, should at least be fully compensated for the injury he sustained. Where articles have a determinate value and an unlimited production, the general rule is to give their value at the time the owner was deprived of them, with interest to the time of verdict. This rule has been adopted because of its convenience, and because it in general answers the object of the law, which is to compensate for the injury. In relation to such articles, the supply usually keeps pace with the demand, and the fluctuations in the value are so inconsiderable as to justify the courts in disregarding them for the sake of convenience and uniformity. In these cases, the reason why the value at the time of conversion, with interest, generally reaches the justice of the case, is that when the owner is deprived of the articles, he may purchase others at that price. But it is manifest that this would not remunerate him where the article could not be obtained elsewhere, or where from restrictions on its production, or other causes, its price is necessarily subject to considerable fluctuation." This shows that the market price is not an invariable standard, and that the converse of the case then before Judge Lewis is equally true—that is to say—when the market price is unnaturally inflated by unlawful and fraudulent practices, it cannot be the true means of ascertaining what is just compensation. It is as unjust to the seller to give the purchaser more than just compensation, as it is to the purchaser to give him less. Right upon this point, we have the language of this court in the case of a refusal by a purchaser to accept. Andrews v. Hoover, 8 Watts, 240. It is said: "The jury is bound by a measure of damages where there is one, but not always by a particular means for its ascertainment. Now the measure in a case like the present, is the difference between the price contracted to be paid and the value of the thing when it ought to have been accepted; and though a re-sale is a convenient and often satisfactory means, it does not follow that it is, nor was it said in Girard v. Taggert, to be the only one. On the contrary, the propriety of the direction there, that the jury were not bound by it, if they could find another more in accordance with the justice of the case, seems to have been admitted; the very thing complained of here." Judge Strong took the same view in Trout v. Kennedy, 11 Wright, 393. That was the case of a trespasser, and the jury had been told that the plaintiff was entitled to the just and full value of the property, and if at the time of the trespass the market was depressed, too much importance was not to be given to that fact. "If (says Judge Strong) at any particular time, there be no market demand for an article, it is not of course on that account of no value. What a thing will bring in the market at a given time, is perhaps the measure of its value then; but it is not the only one." These cases plainly teach that value and market price are not always convertible terms; and certainly there can be no difference in justice or law, in an unnatural depression and an unnatural exaltation in the market price neither is the true and only measure of value. These general principles in the doctrine of damages and authorities, prove that an inflated speculative market price, not the result of natural causes, but of artificial means to stimulate prices by unlawful combinations for the purposes of gain, cannot be a legitimate means of estimating just compensation. It gives to the purchaser more than he ought to have, and compels the seller to pay more than he ought to give, and it is therefore not a just criterion. There is a case in our own State, bearing strongly on this point. Blyanburg et al v. Welsh et al., Baldwin's Rep. 331. Judge Baldwin had charged the jury in these words: "If you are satisfied from the evidence, that there was on that day a *fixed* price in the market, you must be governed by it; if the evidence is doubtful as to the price, and witnesses vary in their statements, you must adopt that which you think best accords with the proof in the case." In granting a new trial, Judge Hopkinson said: "It is the price—the market price of the article that is to furnish the measure of damages. Now what is the price of a thing, particularly the market price? We consider it to be the *value*, the rate at which the thing is sold. To make a market, there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that the value? Further, the holders of an article, flour, for instance, under a false rumor, which, if true, would augment its value, may suspend their sales, or put a price upon it, not according to its value in the actual state of the market, but according to what in their opinion will be its market price or value, provided the rumor shall prove to be true. In such a case, it is clear, that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as the rule of damages, is to make the defendant pay what in truth never was the value of the article, and to give to the plaintiff a profit by a breach of the contract, which he never would have made by its performance." The case of suspended sales upon a rumor tending to enhance the price, put by Judge Hopkinson, bears no comparison to the case alleged here, where a combination is intentionally formed to buy up oil, hold it till the year is out, and thus force the market price up purposely to affect existing contracts, and compel the sellers to pay heavy damages for non-fufilment of their bargains. In the same case, Judge Hopkinson further said: "We did not intend that they (the jury) should go out of the limits of the market price, nor to *take as that price* whatever the holders of the coffee might choose to ask for it; substituting a fictitious, unreal value, which nobody would give, for that at which the article might be bought or sold." "In determining (says an eminent writer on contracts) what is the market value of property, at any particular time, the jury may sometimes take a wide range; for this is not always ascertainable by precise facts, but must sometimes rest on opinion; and it would seem that neither party ought to gain or lose by a mere fancy price, or an inflated and accidental value, suddenly put in force by some speculative movement, and as suddenly passing away. The question of damages by a market value, is peculiarly one for a jury." Parsons on Contracts, vol. 2, page 482, ed. 1857. In Smith v. Griffith, 3 Hill, 337–8, C. J. Nelson said: "I admit that a mere speculating price of the article, got up by the contrivance of a few interested dealers, is not the true test. The law in regulating the measure of damages, contemplates a range of the entire market, and the average of prices as thus found, running through a reasonable period of time. Neither a sudden and transient inflation, nor a depression of prices, should control the question. These are often accidental, promoted by interested and illegitimate combinations, for temporary, special and selfish objects, independent of the objects of lawful commerce; a forced and violent perversion of the laws of trade, not within the contemplation of the regular dealer, and not deserving to be regarded as a proper basis upon which to determine the value, when the fact becomes material in the administration of justice." I may close these sayings of eminent jurists with the language of Chief Justice Gibson upon stock-jobbing contracts. Wilson v. Davis, 5 W. & S. 523. "To have stipulated (says he) for a right to recruit on separate account, would have given to the agreement an appearance of trick, like those of stock-jobbing contracts, to deliver a given number of shares at a certain day, in which the seller's performance has been forestalled by what is called cornering, in other words, buying up all the floating shares in the market. These contracts, like other stock-jobbing transactions, in which parties deal upon honor, are seldom subjected to the test of judicial experiment, but they would necessarily be declared fraudulent."

Without adding more, I think it is conclusively shown that what is called the market price, or the quotations of the articles for a given day, is not always the only evidence of actual value, but that the true value may be drawn from other sources, when it is shown that the price for the particular day had been unnaturally inflated. It remains only to ascertain whether the defendant gave such evidence as to require the court to submit to the jury to ascertain and determine the fair market value of crude oil, per gallon, on the 31st December, 1869, as demanded by the defendant in his fifteenth point. There was evidence, from which the jury might have adduced the following facts, viz.: That in the month of October, 1869, a number of persons of large capital, and among them Kirkpatrick and Lyon, combined together to purchase crude oil, and hold it until the close of the year 1869; that these persons were the holders, as purchasers, of a large number of sellers' option contracts, similar to the one in suit; that they bought oil largely, and determined to hold it from the market until the year 1870 before selling; that oil, in consequence of this combination, ran up in price, in the face of an increased supply, until the 31st day of December, 1869, reaching the price of seventeen to eighteen cents per gallon, and then suddenly dropped as soon as the year closed. Major Frew, one of the number, says: It was our purpose to take the oil, pay for it, and keep it until January 1st, 1870, otherwise we would have been heading the market on ourselves. Mr. Long says, that on the 3d of January, 1870, he sold oil to Fisher & Brother (the plaintiffs) at thirteen cents a gallon, and could find no other purchaser at that price. Several witnesses, dealers in oil, testify that they knew of no natural cause to create such a rise in price, or to make the difference in price from December to January. It was testified, on the contrary, that the winter production of oil was greater in December, 1869, than in former years by several thousand barrels per day, a fact tending to reduce the price, when not sustained by other means. Mr. Benn says he knew no cause for the sudden fall in price on the 1st January, 1870, except that the so-called combination ceased to buy at the last of December, 1869.

It was, therefore, a fair question for the jury to determine, whether the price which was demanded for oil on the last day of December, 1869, was not a fictitious, unnatural, inflated, and temporary price, the result of a combination to "bull the market," as it is termed, and to compel sellers to pay a false and swollen price in order to fulfil their contracts. If so, then such price was not a fair test of the value of the oil, and the jury would be at liberty to determine from the prices before and after the day, and from other sources of information, the actual market *value* of the oil on the 31st of December, 1869. Any other cause would be unjust and injurious to fair dealers, and would enable gamblers in the article to avail themselves of their own wrong, and to wrest from honest dealers the fruits of their business. It cannot be possible that a "corner," such as took place a few weeks since in the market for the stock of a western railroad company, where shares, worth in the ordinary market about sixty dollars each, were by the secret operations of two or three large capitalists, forced up in a few days to a price over two hundred dollars a share, can be a lawful measure of damages. Men are not to be stripped of their estates by such cruel and wrongful practices; and courts of justice cannot so wholly ignore justice as to assume such a false standard of compensation. Our views upon the effect of the affidavit of defence, on which the learned judge in a great measure ruled the question of damages, will be expressed in the case of Kountz v. The Citizens Oil Refining Co., in an opinion to be read immediately.

Judgment reversed, and a *venire facias de novo* awarded.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested:

Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in January, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

Nov. 29, Joseph Jones et al., Executors of ANN M. BAKER, dec'd.
" 29, Francis D. Worley, Administrator of PHŒBE S. WORLEY, dec'd.
Dec. 3, Hartwell Steer, Adm'r of THOMAS S. STEER, dec'd.
" 3, Margaret J. Ritchie, Administratrix of WILLIAM R. RITCHIE, dec'd.
" 3, E. Hunn Hanson, Executor of JOSEPH B. HANSON, dec'd.
" 3, Thomas S. and Joseph Wood, surviving Administrators of JOSEPH WOOD, dec'd.
" 4, Dr. H. A. Salter, Executor of EDWARD SHORE, dec'd.
" 5, Diana Johnson, Administratrix of JOHN R. JOHNSON, dec'd.
" 6, Adam Engard et al., Executors of ABRAHAM WILT, dec'd.
" 7, Charles Pollock, Administrator of ROBERT POLLOCK, dec'd.
" 7, Mary Curry, Administ'x of HENRY M. CURRY, dec'd.
" 7, Theo. Abbett, Adm'r of SARAH E. SNYDER, dec'd.
" 7, Henry Stevenson, Administrator of WILLIAM COLTON, dec'd.
" 7, Andrew Maurman, Administrator of WILHELM MAURMAN, dec'd.
" 7, Jacob Witmer, Administrator of SAMUEL L. WITMER, dec'd.
" 9, John Fisher, Administrator of CHAS. BAUMANN, dec'd.
" 10, Mary E. Register, Administratrix of MARGARET A. OSKINS, dec'd.
" 10, Elias T. Hall, Adm. d. b. n. c. t. a. of FISHER HALL, dec'd.
" 11, Joseph B. Martin, Administrator of JEMIMA MARTIN, dec'd.
" 11, Robert Soley and Lewis Shallcross, Executors of JOHN SOLEY, dec'd.
" 13, David Webster, Exec'r of STEPHEN MORRIS, dec'd.
" 13, Xavier Joerger, Guardian of GEORGE W. JOERGER, minor.
" 14, Dennis F. Murphy, Administrator of EPHRAIM SINER, dec'd.
14, James P. Rossiter, Administrator of BRIDGET McCOSKER, dec'd.
" 14, Passmore Williamson, Executor of THOMAS WILLIAMSON, dec'd.
" 14, James E. Garretson, M. D., Adm'r of CATHARINE GARRETSON, dec'd
" 18, Daniel Rodden, Guardian of ELLEN and CATHARINE KERNEY, minors.
" 18, Francis Edwards, Adm'r of JOHN C. ERICKSON, dec'd.
" 18, The Fidelity Ins. Co., &c., Guardians of JANE E. VAN COTT, minor.
" 18, The Fidelity Ins. Co., &c., Adm'rs of SAMUEL McCOLLUM, dec'd.
" 19, Charles Calhoun, Administrator of ROBERT ARCHER, dec'd.
" 19, Edwin T. Coxe, Administrator c. t. a. of JOHN EVERMAN, dec'd.
" 19, Elizabeth Connell et al., Executors of GEORGE CONNELL, dec'd.
" 20, Alfred Fassitt and James W. Fassitt, Executors, as filed by Alfred Fassitt, surviving Executor, and of James W. Fassitt, acting Executor, as filed by Alfred Fassitt, surviving Executor, and account of Alfred Fassitt, surviving Executor of JAMES FASSITT, deceased.
" 20, Alfred Fassitt, Executor of ROBERT F. FASSITT, dec'd.
" 20. Final account of Samuel Harvey, Jr., Acting Trustee for ELIZABETH HORNER, late GIRTON, and her children, and of Samuel Harvey, Jr., surviving Trustee for MARY LUCRETIA RICHARDSON, (late Rogers), under the will of Charles Rogers, dec'd,
" 20, Charles Chauncey, Executor of MARGARETTA ROBERTSON, dec'd.
" 20, Albert G. Freeland, Executor of MARY ANN WILSON, dec'd.
" 20, Seneca E. Coates, Administrator of NANCY PIDCOCK, dec'd.
" 20, Samuel Harvey, Jr., Acting Trustee o ELIZABETH HORNER, late GORDON, dec'd, under the will of Chas. Rodgers, dec'd.
Dec. 21, J. Henry Hentz et al., Administrators of JACOB HENTZ, dec'd.
" 21, The Fidelity Ins. Co., &c., Guardians of MARY W. COOK, minor.
" 23, George Young, Executor of PHILIP YOUNG, dec'd.
" 23, William Neill, Executor of JOHN H. LUDWIG, dec'd.
" 23, Jane Horn, Administratrix of JOHN HORN, dec'd.
" 23, Charles S. West, Administrator of EDWIN STROUP, dec'd.
" 23, William H. Howell et al., Trustees under the will of ROBT. HOWELL, dec'd.
" 23, William H. Howell et al., Trustees of ELIZABETH LLOYD HOWELL, under the will of Robert Howell, deceased.
" 23, Geo. T. Stokes, Administrator of ELIZA LAMBERSON, dec'd.
" 24, M. Baird, Administrator of WM. H. BAIRD, dec'd.
" 24, Eli K. Price, Trustee of ELIZABETH EVANS, under the will of Joseph Archer, dec'd.
" 24, Eli K. Price, Trustee of MARTHA B. LEE (formerly Rogers), under the will of Joseph Archer, dec'd.
" 24, Eli Keen, Administrator of ALFRED W. ADOLPH, dec'd.
" 24, G. Dawson Coleman, surviving Administrator of DEBORAH BROWN, deceased.
" 24, J. Sergeant Price, Administrator of EDGAR K. SMITH, dec'd.
" 24, Peter C. Hollis, Executor of AMELIA SIMKINS, dec'd.
" 26, Geo. M. Troutman, Administrator c. t. a. of TREVOR N. ECKERT, dec'd.
" 26, Samuel W. Thackara, Executor of ESTHER W. EARNEST, dec'd.
" 26, William S. Vaux, remaining Executor of ANNA ASHMEAD, dec'd.
" 26, J. Woolman Reeves et al., Executors of ELLWOOD REEVES, dec'd.
" 26, William Strong, Administrator d. b. n. c. t. a. of ELIZA MALLERY, dec'd.
" 26, Ellen Keene Mitchell, Executrix of SARAH LUKENS KEENE, dec'd.
" 26, Bridget Conlin, Administratrix of ELIZABETH McMANUS, dec'd.

WILLIAM M. BUNN,
dec 27-4t. Register.

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In connection with "THE JUROR" it is proposed to have an appendix containing a directory of the principal practising attorneys of the State of Pennsylvania, as information needed by jurors when favorably impressed with the learning, skill or eloquence of those before them. The circulation of this work is already assured to the extent of five thousand copies the ensuing year, in different parts of the State. Members of the Bar will please

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Ninth and Venango, S. W. Corner—Two-story Stone and Two-story Frame Dwellings. Orphans' Court Sale—Estate of Martin Brennfleck, dec'd.

Vine, No. 124—Business Stand—Three-story Brick Store. Executors' Peremptory Sale—Estate of William T. Gorman, dec'd.

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Orphans' Court Sale.—Rear 1124 Dunton Street, 3-story Brick House and lot, 14 x 15 feet, Sixteenth Ward. Estate of Matilda J. Armstrong, deceased.

Sale by Order of Court of Common Pleas.—233 N. Fifth street, Three-story Brick Dwelling, with back buildings, lot 16½ x 87½ feet. Sale Positive.

Peremptory Sale.—1635 Vine street, modern Three-story Brick Residence, with Three-story brick back buildings and conveniences, and 2 Three-story Brick Houses in the rear on Pearl street, lot 18 x 125 feet, being 30 feet wide on the rear.

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SUPREME COURT UNITED STATES. NEW PUBLICATION. 14TH WALLACE.

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The undersigned cannot, however, find space to specify the large variety of cases in this volume, many of them of the first importance. From such a judicial body as the Supreme Court of the United States, every adjudication deserves regard.

The effect of the late civil war has undoubtedly been to make that court a tribunal whose decisions it is necessary for every lawyer to be acquainted with. A leading journal of the city of New York has recently attempted to treat the subject popularly, and thus to keep the country informed of the leading cases decided by it. And it notes, as hardly conceivable, the fact, "that while the nation is periodically thrown into agonies about political rights and duties, and as to who shall be President and who members of Congress, nine grave lawyers are sitting in a quiet room of the Capitol, deciding questions of immediate political and practical concern to every person in the land, though too many have, until lately, been unconscious of what the decisions are." This state of things, as it truly says, can no longer exist; for the decisions come so nearly home to the "business and bosoms of men" that, with the present extensive jurisdiction and almost continuous sessions of the Court, they who are the professional judges of the land cannot be ignorant of what is done in that tribunal, without injury to the constant and practical concerns of all conditions of people among us. The tribunal which used to sit three months now sits almost eight; and is constantly delivering judgments upon every class of subjects.

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Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, JANUARY 24, 1873. No. 4.

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Supreme Court, United States

IMPROVEMENT CO. v. MUNSON.

1. By the settled land laws of Pennsylvania no title can exist under a second survey, unless such second survey had been ordered by the board of property.
2. The mere fact that a second survey was made is not evidence, even after a long time, as against another confessedly first, that an order for the second was made by the board of property, and that the order has been lost. And although the loss of such an order may be presumed after a lapse of time, yet the presumption can be made only where the order is shown by some kind of competent proof to have once existed.
3. Where a charge is merely ambiguous, a party dissatisfied with it ought, before the jury leave the bar, to ask the court to make it clear. He should not acquiesce in the correctness of the instruction, take his chance with a jury and after the verdict is against him, claim the benefit of the ambiguity on error.

In error to the Circuit Court for the Eastern District of Pennsylvania; in which court, Munson and others brought ejectment against The Schuylkill and Dauphin Improvement Company, and two other like companies, all corporations of Pennsylvania, to recover certain valuable lands in the State just named. Judgment having gone for the plaintiffs, the companies brought the case here.

Mr. *N. H. Sharpless*, for the plaintiff in error; Messrs. *G. W. Woodward*, *F. B. Gowen*, and *J. E. Gowen*, contra.

Mr. Justice CLIFFORD stated the case, and delivered the opinion of the court.

Rules of decision in the courts of the United States, as well as the forms and modes of process, are very largely derived from the laws of the States, as construed by the decisions of the State courts, in cases where they apply, except where the Constitution, treaties, or statutes of the United States otherwise require or provide.

Controversy having arisen between the parties in respect to the title to the tract of land described in the record, the plaintiffs, on the sixth of February, 1866, brought an action of ejectment against the three corporation defendants, and the other defendants therein named, to recover the possession of the tract, alleging that the title to the tract and the right of possession were in them and not in the defendants. Service was duly made and the defendants appeared and pleaded that they were not guilty as alleged in the declaration. Issue was joined upon that plea and the parties went to trial, and the verdict and judgment were for the plaintiffs. Exceptions were duly taken by the defendants, and they sued out a writ of error and removed the cause into this court.

Title to the premises in controversy is deraigned by the plaintiffs from one Benjamin Bonawitz, whose claim to the same is supposed to be established by the following documentary evidences of title, as more fully set forth in the bill of exceptions: (1.) An application to the land office of the State, dated December 14th, 1829, made by him for sixty-six acres of unimproved land in Lower Mahantongo township, Schuylkill county, bounded as therein described. (2.) Warrant from the State, of the same date, to the applicant for the land described in the application, as fully set forth in the record. (3.) Return of survey made by a deputy surveyor of the county, June 1st, 1829, in pursuance of the warrant, as duly returned to the land office, and accepted the fifth of March of the succeeding year, as follows, to wit: Situate in Lower Mahantongo township, Schuylkill county, containing sixty-six acres and one hundred and three perches, and allowance of six per cent., returned this third day of March, 1830, in pursuance of a warrant dated the 14th of December, 1829, to Benjamin Bonawitz. Superadded to the return is the following statement, that the lines and corners of the survey were made on the eighteenth of June, 1829, in pursuance of a warrant dated the seventeenth of March of that year, granted to the same person, a return on which was made, but was rejected on account of the survey not answering the description of the warrant. (4.) Sundry *mesne* conveyances from the warrantee and subsequent grantees of the land described in the warrant, to the plaintiffs.

Appended to the statement that those conveyances were introduced, is the admission of the counsel for the defendants that Schuylkill county was erected out of Berks county, and that Porter township, where the premises are situated, as alleged in the declaration, was created out of Lower Mahantongo township, which is the name of the township where the location was made under the warrant, survey, and return.

Documentary evidences of title were then introduced by the defendants to maintain the issue on their part, as follows: (1.) An application, dated July 1st, 1793, made by Jacob Yeager to the land office for four hundred acres of land adjoining land granted the same day to William Witman, Jr., in the county of Berks. (2.) Warrant from the State, dated July 1st, 1793, to Jacob Yeager for the same land, as more fully set forth in the bill of exceptions. (3.) Return of survey on the warrant by the deputy surveyor of Berks county, on the tenth of July, 1794, of four hundred and forty acres and sixty-four perches of land and allowance, situate in Pinegrove township, in the county of Berks, returned and accepted August 26th, 1794, as therein certified. (4.) Sundry conveyances were also offered in evidence by the defendants, tending, as they contend, to deduce title to the said corporations, or one of them, to the land located and surveyed under the warrant to Jacob Yeager, which includes the land embraced in the warrant and survey under which the plaintiffs deraign their title.

Rebutting evidence was then introduced by the plaintiffs: (1.) Certified copies of eighteen applications, dated July 1st, 1793, to the land office, for four hundred acres each, the leading one being in the name of James Silliman, and one of the number being the application by Jacob Yeager given in evidence by the defendants, as follows: Jacob Yeager applies for four hundred acres of land, adjoining land this day granted to William Witman, Jr., in the county of Berks. (2.) Certified copies of eighteen descriptive warrants, issued upon those applications, including the warrant given to Jacob Yeager, introduced in evidence by the other party. (3.) Also certified copies of eighteen surveys, including the Jacob Yeager tract, made by a deputy surveyor of Berks county, upon those warrants, corresponding with the descriptions set forth in the warrants, the certificate of the survey in question being fully set forth in the bill of exceptions. (4.) Return and acceptance of those eighteen surveys, made by Henry Vanderslice, July 16th, 1793, as appears in the list annexed to the return. They also introduced a certified copy of a caveat, entered July 18th, 1793, by John Kunckle and Aaron Bowen against granting the tracts either to the said Jacob Yeager or to any one of the other seventeen applicants under the warrants included in that list. (5.) Certificate from the office of the surveyor general that no proceedings had ever been had upon the said caveat.

By that certificate it appears that diligent and careful search had been made in that department for proceedings on that caveat, and the proper officer certifies that he does not find that any citation was ever applied for, or that any proceedings or action was ever had by the board of property upon or concerning the same, which remains recorded in the office of the surveyor general. (6.) They also offered in evidence a map, showing the two locations of the Jacob Yeager tract, the first by Henry Vanderslice, and the second by William Wheeler, both deputy surveyors of Berks county. (7.) Both sides admitted that Henry Vanderslice was a deputy surveyor of Berks county, and that the location of the Jacob Yeager tract as made by him was made in the county of Northumberland, within one mile of the line between that county and Berks county, and that the second location of the warrant by William Wheeler was made in Berks county, about twenty-two miles distant from the survey made by the other deputy surveyor.

Responsive to the rebutting evidence given by the plaintiffs the defendants then introduced certified copies of returns of surveys made by William Wheeler, July 10th, 1794, upon the Jacob Yeager warrant, and upon three others of the eighteen warrants returned and accepted, August 26th of that year, together with a connected chart of the four tracts, as prepared from the original surveys on file in the office of the surveyor general.

Neither party desiring to offer any further evidence, the presiding justice proceeded to charge the jury. Speaking of the warrant and survey introduced by the plaintiffs, he told the jury that the court saw no defect in the plaintiffs' title under that warrant and survey, adding that the only claim which the defendants have set up is under warrants located several miles from the land in controversy, by surveys returned and accepted, and to that instruction no exception was taken by the defendants. But the court also told the jury that "no subsequent official survey of the land under those warrants, without a warrant of survey or order of the board of property, was authorized." Therefore, said the justice, if the jury take the same view of the evidence as the court, the verdict should be for the plaintiffs, and the jury followed that instruction, and the defendants excepted.

Two errors are assigned, as follows: (1.) That the court erred in charging the jury that no subsequent official survey of the land under those warrants, without a warrant of survey or order of the board of property, was authorized. (2.) That the court erred in telling the jury that if they took the same view of the evidence as the court, the verdict should be for the plaintiffs, as the effect of the instruction, as the defendants contend, was to withdraw from the jury the consideration of the question whether or not the board of property might not have issued an order for a second survey of the tract, the evidence of which had been lost.

Much discussion of the first error assigned is unnecessary, as the defendants admit that the law is well settled in that State that a warrant, where it appears that a survey has been ordered upon it and made, returned, and accepted, is *functus officio*, and that no title under a second survey can be made unless such second survey was ordered by the board of property, which it is admitted is not directly proved in this case. Such an admission by the defendants is a very proper one, as the decisions of the State court which furnish the rule of decision for this court in this case, are very numerous and decisive to that effect. Perhaps the leading case upon the subject is that of Deal v. McCormick, 3 Sergeant & Rawle, 346, in which Gibson, J., said, "The law is well settled that after a survey made and returned into office, a second survey without an order of the board of property is merely void." If the owner of a warrant be prejudiced by the fraud or mistake of the officer, the board of property, which is a board created by statute, will grant him relief, if no new right has attached itself to the land, but a new survey, even pursuant to an order of the board, will not affect an intervening claim: Purdon's Digest, 9th ed., 619, pls. 7 and 8.

Doubtless the official surveyor may correct his survey while the warrant remains in his hands, but his control over it ceases after his return has been made to the land office, and the decisions are direct that no second survey thereon without an order for that purpose is of any validity whatever, either against the State or any other claimant, or, as Justice Strong said, in the case of Hughes v. Stevens, 7 Wright, 197, a second survey without an order for it amounts to nothing, as it is merely an unofficial act, which cannot give the warrantee any rights either against the State or any other claimant of the tract, Drinker v. Holliday, 2 Yeates, 89; Porter v. Ferguson, 3 Id. 60; Vickroy v. Skelley, 14 Sergeant & Rawle, 377; Oyster v. Bellas, 2 Watts, 397; Bellas v. Cleaver, 4 Wright, 260; Gratz v. Beates, 9 Wright, 495.

2. Whether the Circuit Court erred, as alleged in the second assignment of errors, depends upon the disputed fact whether there was any evidence in the case which would have warranted the jury in finding that an order for a second survey was ever granted by the board of property, as it is settled law that it is error to submit a question to a jury in a case where there is no evidence upon the subject.

It is clearly error in a court, said Taney, C. J., in United States v. Breitling, 20 Howard, 254, to charge a jury upon a supposed or conjectural states of facts, of which no evidence has been offered, as such an instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the fact hypothetically assumed in the charge of the court, and if there be no evidence which they have a right to consider, then the charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead them in their deliberations. Goodman v. Simonds, 20 Id. 359; Dubois v. Lord, 5 Watts, 49; Haines v. Stouffer, 10 Barr, 363. When a prayer for instruction is presented to the court and there is no evidence in the

case to support such a theory, it ought always to be denied, and if it is given, under such circumstances, it is error; for the tendency may be, and often is, to mislead the jury by withdrawing their attention from the legitimate points of inquiry involved in the issue. Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Ryder v. Wombwell, Law Reports, 4 Exchequer, 39; Law Reports, 2 Privy Council Appeals, 335. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed. Jewell v. Parr, 13 C. B. 916; Toomey v. L. & B. Railway Co., 3 C. B., N. S. 150; Wheelton v. Hardisty, 8 Ellis & Blackburn, 266; Schuchardt v. Allens, 1 Wallace, 369.

Very strong doubts are entertained whether the construction of the language employed by the judge, assumed by the defendants, is the correct construction of the same, and the settled rule is, if the charge is merely ambiguous, the party dissatisfied with it should have requested to have it made clear before the jury left the bar; that a party under such circumstances may not acquiesce in the correctness of the instruction, by his silence, and take his chance with the jury, and then be allowed, if the verdict is against him, to claim the benefit of the ambiguity without having invited attention to the subject, and given the court an opportunity to have made the correction to the jury. Much weight is certainly due to the suggestions of the plaintiffs, that the judge did not withdraw the evidence from the jury, if any there was in the case, that the language only warrants the conclusion that he expressed his own opinion, as he had a right to do, if he thought it proper, and left the question to the determination of the jury. Assume that to be the true construction of the language employed, and it is quite clear that the exception cannot be sustained, but the court is not inclined to place the decision upon that ground, as it is even clearer that there was no evidence in the case which would have warranted the jury in finding that an order for a new survey was ever granted by the board of property, as required by law and the repeated decisions of the Supreme Court of the State.

Lost instruments may be proved by parol testimony where it is shown that the instrument once existed and is lost, and the proof of loss, where it is first shown that it once existed, may consist of evidence showing diligent and unsuccessful search and inquiry in the place where it was usually kept, or in which it was most likely to be found, if the nature of the case admitted of such proof. 1 Greenleaf on Evidence, 2d ed., § 558. Presumptions of law are frequently absolute and conclusive, as they determine the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. Such presumptions arise in respect to the intermediate proceedings in cases where lands are sold under licenses granted by courts to executors, administrators, guardians, and other officers, where they are required to advertise the sales in a particular manner, and to observe other formalities in their proceedings. Lapse of time, usually for the period of thirty years, affords a conclusive presumption in such cases, if the license and the official character of the party and the deed of conveyance are proved, that all the intermediate proceedings were correct. Were it otherwise, great uncertainty of titles and other public mischiefs would ensue; but the rule that lapse of time, accompanied by the acquiescence of parties adversely interested, does not in general extend to records and public documents which are supposed always to remain in the custody of officers charged with their preservation, and which, therefore, must be proved, or their loss accounted for by secondary evidence. 1 Greenleaf on Evidence, 12th ed., § 20; Hathaway v. Clark, 5 Pickering, 490; Brunswick v. McKean, 4 Greenleaf, 508.

Surveys, it seems, were sometimes made in that State by deputy surveyors in early times, without going upon the land, by plotting the chart and marking the lines and corners in their offices, and those surveys are called "chamber surveys," but such surveys were forbidden by the act of the State Legislature of the eighth of April, 1785, which enacts that every survey hereafter to be returned into the land office upon any warrant issued after the passing of the act, shall be made by actually going upon the land and measuring the same and marking the lines. Purdon's Digest, 9th ed., pl. 65. Decided cases are referred to by the defendants, where it is held that in controversies respecting titles under those surveys, there arises a conclusive presumption, after the lapse of twenty-one years from the return of the survey into the land office, that the survey was regularly made upon the ground as returned and required by law. Mock v. Astley, 13 Sergeant & Rawle, 382; Caul v. Spring, 2 Watts, 390; Norris v. Hamilton, 7 Watts, 91; Nieman v. Ward, 1 Watts & Sergeant, 68; Ormsby v. Ihmsen. 10 Casey, 462. Evidently the cases referred to must be regarded as establishing a rule of property in that State, but the court here is of the opinion that they are not applicable in this case, as the defect in the defendants' title arises from the fact that the new survey was made without any order to that effect ever having been granted by the board of property as required by law. Surveys made under those circumstances, are simply void, as shown by the best considered cases upon the subject decided by the highest court of the State. Deal v. McCormick, 3 Sergeant & Rawle, 346; Oyster v. Bellas, 2 Watts, 397; Cassiday, v. Conway, 1 Casey, 240; Hughes v. Stevens, 7 Wright, 197.

Attempt is made in this case to supply by presumption, a matter absolutely necessary to give legality to the survey, and without which it is a nullity and amounts to nothing, but is held to be as worthless as if there never had been any warrant at all. Viewed in that light, as it must be, it is clear that the case falls within the decision of the court in the case of Wilson v. Stoner, 9 Sergeant & Rawle, 39, which, indeed, is decisive of the controversy. It was there decided that a survey is not evidence without first showing an authority to make it, or proving that such authority existed, and was afterwards lost. Possession in that case was proved for upwards of thirty years, under a survey in the handwriting of an assistant deputy surveyor, endorsed "copied for return," with a memorandum by him that there was authority to make it; but the court held that those circumstances could not be received as affording presumptive evidence from which the jury might draw the necessary conclusion, as matter of fact, that even if the existence of the location was admitted, some account of its loss would have to be given before secondary evidence of its contents could be received, as without that the survey would be inadmissible for want of a previous authority. Unless it can be shown that the rule laid down in that case is not good law, it is quite clear that the second error assigned, must be overruled, as the defendants did not prove possession for any considerable time, or occupation of the premises, nor the making of any improvements upon the same, nor the payment of any taxes assessed upon the land. On the contrary, they proved nothing except the mere lapse of time, unaccompanied by evidence of possession, or of improvements, or the payment of taxes, or any other circumstance, as a ground of presumption to warrant the jury in finding that the board of property ever granted a new warrant of survey, or made any order of a character to give legality to the title set up in their behalf, which is all that need be remarked to show that there is no error in the record. Unquestionably, lost records may be proved by secondary evidence, but their former existence and loss must first be established by competent proof, and it is clear that evidence merely showing that they do not exist is not sufficient to establish either of those requirements.

Judgment affirmed.

Mr. Justice Strong having been of counsel for one of the parties did not sit.

Supreme Court of Pennsylv'a.

STEWART et al. v. THE PITTSBURGH, FORT WAYNE & CHICAGO R. R. CO. et al.

Where the incorporation of one company depended upon the contingency of a judicial sale of the franchises and property of another, a conveyance of such property to the former company by the purchaser at such sale, will not create a trust in favor of the creditors of the latter. Railroad Co. v. Howard, 7 Wallace, 392, distinguished.

Appeal from the District Court of Allegheny county. In Equity.

Opinion by AGNEW, J. Delivered January 6th, 1873.

George W. Cass, T. D. Messler and John P. Henderson, the president, auditor and treasurer of the Pittsburgh, Fort Wayne and Chicago Rail *Road* Company, and afterwards the president, comptroller and treasurer of the Pittsburgh, Fort Wayne and Chicago Rail *Way* Company, were in no way liable to the plaintiffs as attaching creditors. The attachment was not served on them, and no judgment was had against them as garnishees. Nor were they trustees of or for the debts attached, or the securities representing these debts. So far as they were connected with these debts, or in possession of the securities, they were acting as officers and agents of the Rail *road* company, and not of the Rail *way* company; and all they did was in their official capacity and in subordination to the Rail *road* company. Their possession and acts were those of the Rail *road* company, and were not individual, either in their own right or their own wrong. No negligence is charged to make them individually responsible; and if any were, the liability would be to their own principal and not to the plaintiffs, with whom they were in no privity, and who have not charged them by attachment. The liability for the debts and securities attached was, therefore, wholly upon the Rail *road* company. It is not denied that the Rail *road* company is liable. The liability was fixed by the judgment in the attachment, and the return to execution which followed the judgment.

The liability of the other defendant, the Rail *way* company, is attempted to be founded upon its alleged privity with its predecessor, the Rail *road* company, and its possession of the assets of the rail *road* company as trustees for the stockholders of the latter. Neither position is sustained. The Pittsburgh, Fort Wayne and Chicago Rail *Way* Company is a new, original and distinct corporation, deriving its existence and franchises under and pursuant to the act of 31st March, 1860 (P. L. 498), and was by the terms of the act dependent for its existence upon the sale in law or equity of the railroad of the Pittsburgh, Fort Wayne and Chicago Rail *Road* Company. It was upon this contingency, involving the extinction of the Rail *road* company, that the law itself places the incorporation of the Rail *way* company. The term "reorganization" in the title of the act, which was passed before the adoption of the constitutional amendment of 1864, cannot overcome the very facts of the case and the language and intent of the law. Nor could the organization of the company precede the contingency of sale, made by the act the basis of the organization of the new company.

Nor is the position sustained by the facts in evidence, that the new company is the trustee for the stockholders of the old company, of any of its assets; and consequently it is not trustee for the creditors, whose equity, in case of assets, would be superior to that of the stockholders. It is not proved, as charged in the bill, that the reorganization, as it is termed, was in pursuance of certain private agreements between the mortgage bondholders and the stockholders, whereby the new company became possessed of assets or property belonging to the old company. On the contrary, the proof is that the road, property and franchises of the old company were sold under judicial proceedings, to every appearance adversary; and the sum bid—two millions—paid to a receiver before the sale was confirmed, and the deed ordered to be made, vesting the title and franchises of the old company in the individual purchasers, through whom the new company derives its title. In this connection it is to be noticed that there is no charge of collusion or fraud alleged in the bill to subvert the judicial proceedings under which the property and franchises of the old company passed to the purchasers and from them to the new company. The whole case of the plaintiffs, in this branch of it, is rested on the fact that the new company came into possession of the assets and property of the old company under such a voluntary arrangement with the stockholders of the old company as would leave the property liable to the creditors of the old company. This liability is expressly denied in the seventh paragraph of the answer; while in the sixth paragraph not only is it alleged that the sale and foreclosure under the mortgages passed a free and unencumbered title to the new company, but it is also alleged that the rights of the old stockholders were acquired under an arrangement *subsequently* made; and this accords with the power conferred upon the new company by the 3d section of the act of March 31st, 1860. Taking all the facts and evidence found properly in the record, we discover no proof of a preliminary agreement, or such an arrangement with the stockholders of the old company, or such admissions of liability, as would charge the new company with a trust of any of the assets for the creditors of the old company. This is the difference between the present case and that cited from 7 Wallace, 392, Railroad Co. v. Howard. There not only was there a preliminary agreement to sell the property of the Mississippi and Missouri R. R. Co. to the Chicago and Rock Island Co., and to make the proceeding to foreclose the mortgage and sell the road of the former, ancillary to the agreement; but after all this had been done, and the property vested in the latter company, the latter admitted the possession of sixteen per cent. of the fund in hand to belong to the stockholders of the former company, and the real question was whether the stockholders or the *creditors* of the Mississippi and Missouri R. R. Co., should be entitled to this surplus fund. It was held, of course, that the equity of the creditors was superior to that of the stockholders. Finding no error in the decree dismissing the bill with costs, it is affirmed, and the appellants are ordered to pay the costs of this appeal.

MILLER'S APPEAL.

An administrator should charge himself with his indebtedness to the decedent, and if he receive the amount of a policy of insurance on decedent's lifetime, should account for it.

Appeal of John M. Miller from the decree of the Orphans' Court of Washington county.

Opinion of the court by WILLIAMS J. Delivered January 6th, 1873.

This is an appeal of the surety in the administration bond of A. J. Miller, administrator of the estate of Wm. D. Murphy, deceased, from the decree of the Orphan's Court of Washington county, confirming the report of the auditor appointed to

hear and determine the exceptions filed by the decedent's mother and heirs to the account of the administrator, as restated by the register.

The auditor, in pursuance of the written consent and agreement of the accountant, restated the account, by striking out from the credit side thereof, the items excepted to, and surcharging the accountant with the amount of his indebtedness to the intestate for services rendered and for money paid for his use, showing a balance at the date of the exhibition of the account of $6,275.70, which he reported to be due by the administrator to the estate. The report was confirmed without objection, no exception being filed thereto. Subsequently the appellant presented a petition of review, alleging that there were errors in the account, and asking the court to grant a rehearing thereof. The appellee filed an answer denying the existence of the alleged errors, and the court dismissed the petition; and thereupon this appeal was taken by the appellant. No complaint is made of the order of the court in dismissing the petition of review. But it is alleged that the court erred in confirming the report of the auditor because the accountant is improperly charged with the following items:

1st. Because he is charged with $4,900, "net proceeds of policy of insurance," on the life of the decedent. This item is objected to as not being assets of the decedent's estate, but the property of his mother Mrs. Margaret Murphy, to whom the administrator accounted for it by giving her his judgment note. The policy of insurance was taken out by the decedent, and was in his possession at the time of his decease. There is no evidence tending to show that he made a valid gift of the policy to his mother; the very utmost that can be inferred from the evidence; is that he intended in the event of his death that she should receive the amount insured on his life. But he did not give or assign the policy to her, and she has no title to the proceeds, except as next of kin under the intestate act. The money was received by the accountant as administrator of the decedent's estate, and he was properly charged with it. If he has settled and accounted with the decedent's mother for the proceeds of the policy, he will be entitled to a credit therefor in the settlement of his distribution account, but whether he has paid her or not, he is clearly chargeable in his administration account with the amount he received.

2d. The two remaining items alleged to have been erroneously charged, may be considered together. The accountant admitted his indebtedness to the intestate for services as clerk and salesman, and for money paid for goods purchased and put in his store. The evidence as to the value of the intestate's services and the amount paid for the goods, fully sustains the charges made by the auditor. The conditional partnership agreement between the parties was never consummated, and by its terms the intestate was entitled to compensation for his services; and there can be no question as to his right to be reimbursed for the money paid for the accountant's use. The Orphans' Court was therefore clearly right in confirming the report of the auditor.

Decree affirmed, and appeal dismissed at the costs of the appellant.

[From 14th Wallace, in advance of publication.]

Supreme Court, United States.

Rees v. Gould.

Patentable invention may consist entirely in a new combination of old ingredients, whereby a new and useful result is obtained.

In a patent for a new combination of old ingredients, the ingredients should be named, their mode of operation given, and the new and useful result pointed out in the specification, that the public may know the nature and extent of the claim, and what the parts are which co-operate to produce the new and useful result.

When only a combination of mechanical devices is claimed, the patent is not infringed by the use of a combination differing substantially in any of its parts, and the omission of one essential feature or element of the combination *as claimed*, avoids the infringement.

Mere formal alterations of a combination do not constitute any defence to the charge of infringement, but the inventor of a combination cannot suppress, under the doctrine of equivalents, subsequent improvements, which are substantially different from his invention, whether such subsequent improvements consist in a new combination of the same old ingredients or of some newly discovered ingredient, or even of some old ingredient, performing some new function not known at the date of the letters patent, as a proper substitute for the ingredient withdrawn.

If a subsequent combination was new, or if a newly discovered ingredient was substituted for one of the ingredients in the patented combination; or even if an old ingredient, performing some new function, was substituted for one of the ingredients of the patented combination, such substitution would avoid the infringement.

A new combination, or a newly discovered ingredient substituted in place of an ingredient in the patented combination, or even the substitution of an old ingredient performing a new function not known at the date of the patent as a proper substitute for the omitted ingredient of the patented combination, is not an equivalent within the meaning of the patent law, and cannot be claimed as an infringement.

An alteration in a patented combination, which merely substitutes another old ingredient for one of the ingredients in the combination claimed, if the substitute performs the same function and was well known at the date of the patent as a proper substitute for the ingredient which it displaces in the combination, is an infringement under the doctrine of equivalents.

If a substituted ingredient is a new one, or if it performs a substantially different function, or was not known at the date of the patent as a proper substitute for the ingredient which it displaces in the patented combination, then such substitution carries the combination in which it is embodied, outside of any infringement, under the doctrine of equivalents.

It was error to instruct the jury that they must find for the plaintiff, whether the ingredient substituted for the one omitted was new or old, or whether the one substituted was or was not well known at the date of the plaintiff's patent, as a proper substitute for the omitted ingredient.

Young v. The Key City.

1. While courts of admiralty are not governed by any statute of limitations, they adopt the principle that laches or delay in the judicial enforcement of maritime liens, will, under proper circumstances, constitute a valid defence.

2. No arbitrary or fixed period of time has been, or will be established, as an inflexible rule; but the delay which will defeat such a suit must, in every case, depend on the peculiar equitable circumstances of that case.

3. When an admiralty lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defence will be held valid under shorter time, and a more rigid scrutiny of the delay than when the claimant is the party who owned the property when the lien accrued.

4. When two corporations united their vessels and other property used in navigation, and formed a new corporation, in which no money was paid by either party, and in the contract of consolidation made arrangements for the payment of the debts of one or both, before any dividends should be declared in the new stock, the new corporation cannot avail itself of the doctrine applicable to such a purchaser without notice; and a lien, three years and a half old, will be enforced against one of the vessels so transferred to the new corporation.

Delmar v. Insurance Co.

1. On a writ of error to a State court, this court cannot revise a decision founded on the ground that a contract is void on the general principles of public policy or morality, when that is the only ground on which the contract is held to be void.

2. But if the decision of a State court is based upon a constitutional or legislative enactment, passed after the contract was made, this court has jurisdiction to inquire whether such legislation does not impair the obligation of the contract, and thereby violate the Federal Constitution.

3. In the prosecution of that inquiry, this court must decide for itself, whether any valid contract existed where the legislation complained of was had, and in making up its judgment on that question is not concluded by the decisions of the State court.

5. This court is of opinion that the notes of the Confederate States, in ordinary use as money, during the rebellion, might constitute a valid consideration for a contract; and that a provision in the constitution of a State, subsequently adopted, declaring such contracts void, was an impairing of the obligation of such contract within the meaning of the Federal Constitution.

6. A judgment of a State court, holding such a contract void, expressly based on the constitutional provision, and not on general ground of public policy, must be reversed in this court.

LEGAL GAZETTE.

Friday, January 24, 1873.

JOHN H. CAMPBELL,
EDITOR.
THEODORE F. JENKINS,
ASSOCIATE EDITOR.

CENTENNIAL CELEBRATION.
1776—1876.

With great pleasure, we give a place in our columns to the following circular, addressed to the members of the Bar.

DEAR SIR:

The Committee of "Lawyers" beg leave to call the attention of their fellow members of the Bar to the subscription list of stock for the Centennial Board of Finance.

In this matter the Bar should take a deep interest, and it is of the first importance that sufficient funds should be raised to render the celebration successful. The well known liberality of the profession justifies the public in anticipating large subscriptions from its members.

If you desire to subscribe, on sending your name and address to any of the undersigned, the subscription book will be sent to you.

JAMES PAGE, Chairman,
272 South Fourth St.
J. SERGEANT PRICE,
709 Walnut St.
EDWARD H. WEIL,
126 South Sixth St.
R. L. ASHHURST,
225 South Sixth St.
F. MARX ETTING,
506 Walnut St.
JOHN CADWALADER, JR.,
252 S. Fourth St.
ALEX. THACKARA,
244 S. Third St.
ELLWOOD WILSON, JR.
1112 Walnut St.
PAUL M. ELSASSER.
217 S. Third St.

The fight in Illinois over the manner in which the Supreme Court reporter of that State does his work, grows quite lively. In reply to the fierce attack upon the reporter, issued in the name of the Chicago Law Institute, and which we noticed a short time since in the Gazette, comes another document, signed by over fifty members of that society, alleging that the issue of the address was only authorized by a vote of 14 to 12, while the number of members of the institute is 270. These fifty gentlemen are perfectly satisfied with the reporter, and so we have allegation and counter-allegation. Now for the judgment!

The Constitutional Convention has at last got to work. After much delay and uninteresting debate on questions of printing, and accounts, and adjournment, it has begun seriously to consider sections of the new constitution. Now that it has evinced an industrious disposition, the public can gather from its proceedings, its temper and feeling on questions of reform. We are glad to say, that partisanship, thus far, is rather below par in the convention.

In the Supreme Court of Pennsylvania, upon Monday, January 20th, the motion to quash the appeal in Griffin v Griffin, was granted, and the appeal was quashed.

SUPREME COURT OF PENNA.—Upon the 6th instant, the following gentlemen were admitted to practice as attorneys and counsellors in the Supreme Court:

W. W. Weigley, Esq., on motion of Samuel C. Perkins, Esq.

William Nelson West, Esq., on motion of Hon. Wm. A. Porter.

Franklin Swayne, Esq., on motion of Hon. Benjamin H. Brewster.

Walter S. Stark, Esq., on motion of Thos. Greenbank, Esq.

THE CONSTITUTIONAL CONVENTION.

We have reserved a portion of our space for articles upon the Constitutional Convention, and the subjects which will probably come before that body for consideration. All communications intended for publication in this department, should be addressed to the Editor of the Legal Gazette, and must in all cases be accompanied by the name and address of the writer. Correspondents will please state under what names they wish their communications to appear.

LETTERS OF PERICLES.

VI.

TO THE EDITOR OF THE LEGAL GAZETTE:

In my last letter I reached the 6th section of the proposed article upon Suffrage and Elections. As I had merely time to give the wording of the section without explanation, I will commence this letter by again presenting it.

ART. II. SUFFRAGE AND ELECTIONS.

SECT. 6. *Whenever in an election district, over one hundred electors cast their votes at any two successive elections, such election district shall be divided into two distinct election districts of contiguous and compact territory; and whenever in any two or more contiguous election districts, less than one hundred electors cast their votes at any two successive elections, such election districts shall be consolidated into one.*

If this section is adopted, it will go farther to purify elections, and get rid of the vast amount of fraud now perpetrated as well at the election polls as in counting and returning the votes. By reducing the election precinct or district to a small size, every person offering to vote will be known by some one or more of the other voters of his precinct. The great trouble now is, that most of the election districts contain such a large number of voters, that it is impossible to distinguish in many cases those entitled and those not entitled to vote, and hence personation of voters, false registry of names, assessment of illegal voters, the voting of gangs of "repeaters" or "colonizers," and numerous other fraudulent devices at the elections. Another abuse where the size of election district is not limited, is that districts are often *not* subdivided, because they contain a great many voters of an opposite political party from those who happen to be in power, and consequently it is impossible to poll all the votes in the hours allotted for an election. By subdividing an election district, wherever it is clearly established that it contains over one hundred electors, all these frauds and abuses are prevented, because everybody in the district is known, persons not entitled can be easily detected if they attempt to vote, and great temptation is taken away from election officers, who will be afraid to tamper with or alter the returns of a district when the number of votes polled can be so easily ascertained. Another advantage is, that no registry laws of any kind will be required, as the sole, honest purpose of such laws is to identify the voters. The length of residence need not be extended to a greater time than one month, or even less, in case this section is adopted, as the residence qualification of a voter is also for the purpose of identification, which purpose is answered by the small election districts. The only objections that can seriously be made to the introduction of the small election district system, is the multiplication of election officers and its cost. As to the first, the number of officers in each precinct could and should be reduced from five, viz., the judge, two inspectors and two clerks, to three, viz., the judge and two inspectors, who could easily act as clerks, and where there are so few votes to receive and count, could get through their task much earlier and easier than at present. As to the cost, it would no doubt be found, that with a simple, pure electoral system, many men, if in fact it would not be a general thing, would consent to serve as election officers without pay, or even if not, what is the cost of such a system compared with the cost of the present system, in the shape of fraudulent elections, dishonest officers and legislators, taxes upon taxes piled up, until nearly every municipality is being driven into insolvency, and thousands, aye millions of dollars collected from the taxpayers, and squandered by their own servants?

The small election district system has been advocated by many serious thinking citizens of late years, and it strikes me as the real great reform needed to purify our elections. Coupled with the other reforms I have already indicated, in regard to the qualification of voters, it will give us, what we want,—free elections.

As to the number 100, I think this is not too small in cities of any size, nor, indeed, in the country districts either. In the cities, if anything, it is *too large*, as it is extremely difficult to prevent election frauds in them.

SECT. 7. *Elections by persons in their representative capacities shall be viva voce; all other elections shall be by open ballot, a record being made of the numerical order of the voter, his name and residence, the persons for whom he votes, and the number of votes cast by him for each of said persons.*

The section of the present constitution in reference to the manner of voting, is as follows, viz. art.: III. sec. 2. "All elections shall be by ballot, except those by persons in their representative capacities, who shall vote *viva voce*."

I do not expect that voting by open ballot will be agreed to by the convention, as the prejudices in favor of the present system of voting by secret ballot are too many and too strong to permit of any change, but I hope that by discussion and agitation of the subject, the public may be prepared at some future time to adopt the open ballot. I know that the current of popular feeling at present, is strongly in favor of the secret ballot, but I think that the experience of the people at elections during the last few years, is leading to a great change in this current. The secret ballot, and its merits and demerits, have been seriously considered by thinking men of late years; and while in England a secret ballot bill has been recently passed, here, in the United States, a disposition to do away with the secret ballot has been evinced in many sections.—Kentucky has for a long time held all her elections *viva voce*, although I think the open ballot much preferable to this method of voting. In the State of Illinois, the ballots are required by law (Laws of Illinois of February 22d, 1861, sec. 13, and February 15th, 1865, sec. 16) to be *numbered* by the proper election officers, which really does away, to a certain extent, with the secrecy of the ballot. In the most recent Constitutional Convention held in this country—that of West Virginia in 1872—a motion to strike out the provision for voting by ballot, and inserting *viva voce* voting, was lost only by a vote of 29 to 36, and the report of the committee was amended so that the section (afterwards adopted by the people) was made to read as follows: "In all elections by the people, the mode of voting shall be by ballot; but the voter shall be left free to vote, either by open, sealed or secret ballot, as he may elect" (art. IV. sec. 2). In the convention now being held in this State, Judge Woodward has already offered a resolution favoring the abolition of the secret ballot, and Judge J. S. Black, is a pronounced advocate of such abolition. Even the recent ballot act in England does not provide for strictly secret voting; by the provisions of that act, each voter marks on paper, containing the names of all the candidates, a cross on the right hand side of the name of the candidate for whom he votes; the "voting-paper" is furnished him by the election officers, and after marking it, presumably in secret, he folds it up and returns it to the officer, running the risk, all the time of being watched when he marks his ticket, or if he be infirm or illiterate, having his ballot recognized by the officers who assist him in getting it ready for voting.

In an interesting article in the Edinburgh Review (April, 1870), the disadvantages of the English ballot system are set forth in a very forcible manner, notwithstanding the writer's politics evidently warps his judgment in pronouncing so strongly against the governmental ballot bill.

Now, *viva voce* voting by the people, is undoubtedly cumbersome, vexatious, and the occasion of great disorder and delay, and I would not like to see it adopted, but these objections do not hold to the open ballot, which provides a simple method of voting, and does away with many of the election frauds of which we now complain. The great argument in favor of the secret ballot, is that it prevents (so it is assumed) intimidation of workmen and others by their employers, or persons whose influence or power they fear. Now this intimidation is after all very much limited in this country, where the working classes avow their sentiments pretty openly, and the evil resulting from it is nothing compared with the gigantic evils of fraudulent voting, personation, counting illegal votes, altering returns, stuffing ballot boxes, etc., etc. What is wanted in this country is a pure election system, and the secret ballot does not give it to us. Make, if necessary, the most stringent laws against the capitalist, if he interferes with his employees in their right to vote as they please (and I would favor them to the utmost in this respect), but let those employees gradually be convinced, that to vote openly is the fair, manly, honest way of expressing their desires, and then we will not be "a nation of liars," attempting to *conceal* how we vote, but a nation, purified and regenerated by "free elections."

SECT. 8. *The general election for State executive officers, judges of the Supreme Court and members of the Legislature shall be held on the Tuesday next following the first Monday in November; but the Legislature may by law fix a different day two-thirds of each house consenting thereto.*

The Convention has already passed a section, similar to this but without nameing the officers to be elected, and as the purpose of the section is substantially the same, I merely give this section here, without further comment, than, that it expresses my views more fully.

SECT. 9. *All elections for county, city, ward, borough and township officers, except elections to fill vacancies, shall be held on the third Friday in February.*

The Convention has passed the following section: "All elections for city, ward, borough, and township officers, for regular terms of service, shall be held on the third Friday of February." As far as it goes, this section is very good, but it should undoubtedly have county officers, also included within its provisions The day fixed is the one which most of the members of the convention seemed to favor, and as the principle involved, viz.: the separation of local from State and national elections, is retained, the day should be fixed at a time to suit the people. As the third Friday of February seems to suit them, I have inserted that day.

SECT. 10. *Elections to fill vacancies shall be for the unexpired term only, and shall be provided for by law.*

This section is to avoid the present want of system in electing Supreme Court judges, and other officers in this State.

In section 1 of the present article, the word *male* is inserted as a qualification for an elector. This was not intended to deny *female* suffrage, but was inserted merely, because I do not think the people of Pennsylvania are *yet prepared* to grant the suffrage to women, and with the view

that the whole section, in case it should in substance be adopted by the convention, might not be defeated by reason of having the word *male* omitted. Now I am in favor of granting the suffrage to women, and for that purpose I wish to see a separate section, with the word *male* stricken out, submitted when the constitution is submitted, and every five or three years thereafter to a vote of the men *and women* of Pennsylvania, so that in case it should be adopted, it would take the place of section 1, given in my last article.

The letter from a judge of the Supreme Court in Wyoming Territory, read at the hearing granted by the Committee of Suffrage and Elections, to the advocates of women suffrage, gives facts in reference to women voting in that territory, that, go far to remove the objections of those who think woman suffrage is a matter of expediency and fitness, and not of right. Orderly and peaceable elections, greater purity in the administration of public affairs, the elevation of the moral tone of the community, have been the result of granting the suffrage to women in that progressive place. I would vote, if in my power, to give the suffrage directly to women; but as all the amendments or provisions adopted by the convention must be submitted to the people of the commonwealth, I have provided, by the means above suggested, a practical method of obtaining suffrage for women, as soon as the people can be convinced of the justice of it.

ART. III. OF THE LEGISLATURE.

In my next letter I will commence my proposed article on the Legislature, its main features are as follows: the Senate to consist of 45 members; the House of Representatives of 225 members.

The State to be divided every ten years into 75 Representative Districts, in each of which 3 representatives are to be chosen by the "free vote," thus providing for practical minority representation. At the time of such division, 15 Senatorial Districts to be formed by grouping 5 contiguous Representative Districts into 1 Senatorial District, and in each of said Senatorial Districts, 3 senators to be chosen by the "free vote." The Senate to be presided over by a lieutenant governor; the House by a speaker elected by it from its own members. The terms of senators to be 3 years and of representatives 1 year. The regular time of meeting of the Legislature to be on the first Tuesday of January, and its time of adjournment the 22d of February.

January 21, 1873. PERICLES.

TO THE EDITOR OF THE LEGAL GAZETTE:

I.

Vattel in his admirable work on the "Laws of Nations," chapter iii., sec. 27–30, declares that the fundamental laws of a State should be plain and precise, to the end that they may possess stability, and that they may not be eluded. The constitution of a State is defined in Dwarris on Statutes and Constitutions, page 347, to be the framework of political government.

A constitution being the fundamental law of a State, as Vattel expresses it, or a framework of political government, as defined in Dwarris, should be of a plain phraseology, precise language, and without a pretext for elusion. The constitution of the Commonwealth of Pennsylvania is not in accordance with this standard, and it is the object of these letters to point out some of its failings, and first some pretexts for elusion:

Art. 1, sec. xxv. and xxvi. contain the words: "In such manner, however, that no injustice shall be done to the corporators."

Sec. xxv. ordains that no charter for banking corporations shall hereafter be granted for longer than twenty years. Both sections xxv. and xxvi. declare that the Legislature shall have power to alter, revoke or annul any charter of incorporation hereafter conferred by or under any special or general law, whenever in their opinion it may be injurious to the citizens of the commonwealth; in such manner, however, that no injustice shall be done to the corporators.

The intent of both sections is evidently to keep corporations within governmental control. And nothing can establish a more efficient check to corporate arrogance, than the power of the people, exercised through their representatives, to revoke the grant of the charter as soon as the corporate object becomes injurious to the citizens of the commonwealth.

But why the proviso? What meaning has the word "injustice" in the above phrase? How can injustice be done to corporators or associators who allow the object of their association to work out injury to the citizens of the commonwealth? Can the abatement of an injury, and especially such general injury, work out injustice to the faulty party?

The word injustice, in the above phrase, is very apt to be interpreted with "losses," and if such interpretation can be judicially established, it neutralizes the benefits of the sections, and gives the welfare of the citizens entirely into the hands of corporations. We then would experience the strange anomaly that the citizens of this commonwealth, through their representatives, could create an artificial being, which may work out the most oppressive injury to the citizens, without any remedy in those who created it.

Such a position cannot be intended. The welfare of the citizens of the commonwealth (which, as it must be kept in view, is the commonwealth itself) cannot be jeopardized because wrongdoers, who are corporators and commit the wrong through their corporate object, may have so-called "injustice" done to them, or may sustain losses through the revocation of their charter. The word "injustice" stands with evil grace, and the sections alluded to will certainly gain in precision and clearness if the whole proviso, contained in the words first above quoted, were stricken out. T.

Supreme Court of Pennsylv'a.

IN EQUITY.

MARVINE v. DREXEL.

To prevent injury arising from a mistake, the court refused to confirm a public sale of real estate, and gave a party in interest leave to offer a bid.

Per Curiam opinion delivered January 23d, 1873.

Delay is always regarded in equity. In such a case as this, a time must arrive when further delay becomes injustice. So we thought in the case before us, when in July last, after many futile efforts to sell the property in the interest of the plaintiff, we concluded that justice to the estate of Mr. Drexel required more promptness in proceeding. And even then, while ordering a public sale, we endeavored to aid the plaintiff by allowing an intermediate private sale, if one could be effected to his advantage It is admitted, that the receiver has done his whole duty in giving publicity to the offer of the property for sale. Mr. Marvine has not been able to obtain a purchaser or purchasers at private sale, and cannot or will not take the property himself. On the day of the public sale, many persons attended. but except in two or three instances, gave no bids. Mr. A. J. Drexel, a gentleman of undoubted financial ability, bid on all the parcels offered, sums, in the aggregate amounting to $170,500, that being the sum nearly of the original purchase money and interest. There is no intimation that there has been any unfairness in the sales, or that the receiver was managing it in the interest of Mr. Drexel, or of Drexel's executors. Mr. Marvine, with his counsel, attended at the sale, but declined to bid thereat. With a privilege of the order of this court for a peremptory sale, it is not in proof, that Mr. Marvine has been able to procure a purchaser or purchasers at higher prices than those bid by Mr. Drexel, or that better prices can be obtained. After the long lapse of time and the admitted full and honest effort of the receiver to sell the property, and the publicity he gave to the public sale, and the refusal of Mr. Marvine to bid upon the property, the sale must be taken to be a fair test of the value of the property, and it should be confirmed. Mr. Marvine, it seems, acted under the advice of counsel in declining to bid. We know not the ground of the advice. It may have been entirely proper, but lest Mr. Marvine may have been led to act by his own hope of further time, we are disposed to give him an opportunity of retrieving his misstep, by enabling him to bid upon the property before a final confirmation of the sale. We have therefore made an order to this end.

And now, January 23d, 1873, it is ordered by the court, that the report of the receiver, of the sales made by him in this case, stand over for final confirmation or modification, and final allowance, until the eighth day of March next, and that Edward E. Marvine, the plaintiff, be permitted to file, on or before the 15th day of February next, a bid or bids, including an agreement to be bound thereby, for the property sold by the receiver, or for any or as many of the subdivisions thereof sold to A. J Drexel, as he shall think proper to bid for, of which notice shall be given to the said A. J. Drexel, by delivering to him or to his counsel a copy thereof, on or before the day of filing, as aforesaid. That the said A. J Drexel shall have leave to advance his bid or bids over the sum or sums bid by the said Edward E. Marvine, upon any and as many as he may elect to advance, and to file his election and advance on or before the 24th day of February next, a copy of which shall be delivered to the said Edward E. Marvine or his solicitor, on or before the day of filing. The said several offers and bids shall be laid before the court on or before the day fixed for final confirmation, and shall be subject to the further order of the court, as in equity, and justice may be right.

By the court.

PUBLICATIONS RECEIVED.

THE JUROR: being a guide to citizens summoned to serve as jurors. Containing information as to the manner of drawing and selecting jurors, their rights, privileges, liabilities and duties; reasons for exemption from service, and mode of arriving at and rendering verdicts. By Andrew Jackson Reilly, officer of the District Court for the city and county of Philadelphia. Revised by E. Cooper Shapley, Esq, of the Philadelphia bar, and secretary of the board for selecting and drawing jurors for the city of Philadelphia. 18mo., pp 96. Philadelphia, John Campbell & Son, 1873. Price 50 cents.

The title of this excellent little work expresses fully its purpose and the subjects of which it treats. The want of such a publication has long been felt, not only by those citizens who have been actually summoned to serve on juries, but by the body of the citizens generally, who, though not yet called upon to perform this duty, yet may expect to be so called at any moment. The work has been carefully prepared by Mr. Reilly, whose long experience as an officer of the District Court, has enabled him to make it a useful, practical, and comprehensive guide. It deserves, by all means, an extensive sale.

THE LEGAL CHRONICLE, Pottsville, Pa., Nos. 1 and 2.

Pennsylvania seems to be pre-eminently the State wherein legal publications thrive and flourish. Philadelphia, Pittsburg, Harrisburg, Lancaster and Scranton, have already their legal organs, and now comes the city of Pottsville to add its quota to the general fund of information. The more the merrier, say we, and the Chronicle has our hearty welcome and best wishes for its firm establishment and prosperity. We like its neat appearance and make up, and if Mr. Sol. Foster, Jr., will continue to edit it with the same ability displayed in the first two numbers, now before us, we have no doubt he will make the Chronicle a useful institution to the bar of Schuylkill and adjoining counties. With Judges Pershing and Walker to help him, there is no reason why he should not succeed in his venture. We gladly place the Chronicle upon our list of exchanges.

THE LADIES' BAZAAR, Vol. 1, No. 1. Philadelphia, T. Ellwood Zell, Publisher. January, 1873.

This is a new rival to Harper's Bazar, and we would be glad of its success. This, the initial number, is admirably gotten up, and contains a number of well executed plates of fashions, dresses, etc., equal in our estimation to the best of Harper's. There is also a neat picture of "Finding the Wind," and another, of "The Flower Signal," which are decidedly well engraved. Altogether we like the Bazaar very much. Its price is only one dollar per year.

BENCH AND BAR, for January, 1873. A quarterly magazine. Chicago, Illinois. James A. L. Whittier, Editor, Callaghan & Co., Publishers.

Recent Decisions.

[Our thanks are due to P. F. Smith Esq., State Reporter, for advance sheets of vol. 19 of his reports. We make the following selections from them.]

PENNSYLVANIA.

MORROW v. REES.

1. To sustain an action to recover back purchase money on the ground of fraud, there must be an actual rescission by the party defrauded, notice of it to the other party, and unless the subject be utterly worthless, an offer to return it, so as to put the vendor *in statu quo*.

2. Evidence for the jury in this case as to rescission.

October 12th, 1871. Before Thompson, C. J., Read, Agnew, Sharswood and Williams, JJ.

Error to the District Court of Allegheny county: No. 167, to October and November Term, 1870.

PIER v. CARR.

1. Carr rented to Sewell; during the term Sewell's goods were levied on for tax; before the sale he left the premises. The constable delivered the key to Carr, who had a bill, "To let," put on the house, retained the key; had repairs done to the house, and showed it to a person applying to rent it. *Held*, that these acts did not discharge Sewell from the rent before the end of the term.

2. Had the tenant returned during the term, he would have had the right to enter.

3. When a tenant is evicted, he is discharged from the rent for the time following, not for that *due* before eviction. Per Stowe, J., of Common Pleas.

4. If the acts of the landlord are such an interruption of the tenant's rights under the lease as interfere with his possession, or amount to taking the property off the tenant's hands, the rent will be suspended from that time. Id.

October 5th, 1871. Before Thompson, C. J., Read, Agnew, Sharswood and Williams, JJ.

Error to the Court of Common Pleas of Allegheny county: Of October and November Term, 1870. No. 96.

MCKEE v. PERCHMENT.

1. Asken, in a plan of lots, laid out an alley between the rear of two tiers, and conveyed the lots, ninety-four feet in depth as bounding on the alley, to different persons with use of the alley to each. The alley could not be abandoned without the consent of all the lot holders.

2. In an action by a lot holder against another for obstructing the alley by a building, the defendant gave evidence that erections had been made up to the centre

of the alley, and maintained for twenty-one years or more. *Held*, that the plaintiff might show by the acts and declarations of different former proprietors of the lots, that such occupation was for temporary purposes.

3. The deed to defendant from a former grantee, described the lot as ninety-four feet deep "with use of the alley." This was not a *recital* in the deed, but a description of the thing granted; and even if defendant's grantor had acquired title to the soil by abandonment, it was not conveyed to the defendant.

4. The plan of lots was not recorded, but was referred to in the deeds; this was notice to the defendants of the existence of the alley.

October 5th, 1871. Before Thompson, C. J., Read, Agnew, Sharswood and Williams, JJ.

Error to the District Court of Allegheny county: No. 111, of October and November Term, 1870.

M. Masters v. The Pennsylvania Railroad Co.

1. A custom so long persisted in as to be known and practised by a community, is the law of the particular business in which it exists; and the presumption arises that it is in the view of the parties who contract about its subject matter

2. To establish such custom it should be reasonable, continued and acquiesced in by all acting within its operations.

3. There was a custom that a railroad company should deliver freight on the platform of *minor stations*, whose business would not justify a warehouse, &c., to be received there by the consignee on discharge from the car. *Held*, a good custom.

4. A custom will control the general law of liability of carriers.

5. To relieve a carrier, the custom must be clearly proved; and that the employer knew it, or is to be presumed to know it, by reason of its generality in the neighborhood.

6. Distinction between carriage by rail and by wagon or water craft stated.

October 12th, 1871. Before Thompson, C. J., Read, Agnew, Sharswood and Williams, JJ.

Error the Court of Common Pleas of Allegheny county: No. 159, to October and November Term, 1870.

Maffitt's Admin. et al. v. Rynd et al.

1. Although a conveyance of land with a parol trust to hold for the benefit of the grantor, be not enforceable under the act of April 22d, 1856, yet a parol declaration of trust by the grantee after its conversion into money, will impress the proceeds with the trust.

2. The act does not raise a bar to enforcing a parol declaration of trust as to personal estate.

3. Creditors of a debtor bought real estate in their name under a mutual agreement that the debtor should take charge of it at a salary, and when their advances and debts should be paid from it, the surplus should be the debtor's. It was afterwards conveyed to Maffitt, he agreeing by parol to hold it upon the same condition. The real estate was sold and a surplus remained, which Maffitt acknowledged was subject to the trust. *Held*, that from this, the law implied a promise by Maffitt to pay the debtors.

4. Since the act of 1856, an absolute deed can be shown by parol to have been a mortgage.

5. A mortgage may be given to secure future advances, whether for the mortgagor or third persons.

6. Suit was brought by the debtor against Maffitt. During the trial the court allowed an amendment by inserting the names of the creditors "to the use of" the debtor. *Held*, not to be error.

7. The refusal of the court to grant a continuance on an allegation of surprise on account of the amendment, is not reviewable in the Supreme Court.

8. When an amendment in the names of the parties is allowed after the jury are sworn, they should be resworn according to the amended condition of the record.

October 13th, 1871. Before Thompson, C. J., Read, Agnew, Sharswood and Williams, JJ.

Error to the District Court of Allegheny county: No. 189, to October and November Term, 1870.

Neiler & Warren v. Kelley.

1. Trover will not lie for a "share of stock," but may be maintained for the certificate.

2. A declaration of a single count in trover was for seventy shares of stock of the value of $100 each, and for four bonds of $1000 each. The declaration was defective as to the stock, but not as to the bonds, and a demurrer to the *whole* declaration was properly overruled.

3. In trover the goods ought to be set out with some degrees of certainty of description, but the same certainty is not required as in detinue and replevin, *damages* being recovered in trover, the *very articles* in detinue and replevin.

4. If some counts are good and others bad, and the defendant demurs to the whole declaration, the plaintiff will have judgment.

5. In general the measure of damages in trover, is the value of the goods at the time of the taking, with interest; if there be circumstances of outrage, jury may give more.

6. When there is a duty on a party to deliver stocks or securities at a particular time, which duty has not been fulfilled, he is liable for the highest price in the market between that time and the trial.

7. Kelley pledged to Neiler stocks as collateral for debt; the debt being due and unpaid, Neiler sold the stocks without notice to Kelley, he having neither demanded them nor tendered payment. In trover against Neiler, *Held* that the measure of damages was the market value of the stock at the time of sale, with interest.

8. In trover for wrongful conversion of a pledge, a tender of the debt is not necessary, but it may be recouped by the jury from the damages.

October 16th and 17th, 1871. Before Thompson, C. J., Read, Agnew, Sharswood and Williams, JJ.

Error to the Court of Common Pleas of Erie county: No. 76, to October and November Term, 1870.

Selden v. Merchants' National Bank of Meadville.

Mrs. Selden owned a United States bond for $5000, and assigned it to a bank as collateral, for $4700 lent to her husband. The bank attached the difference between the loan and the proceeds of the bond to pay a judgment subsequently recovered against the husband. *Held*, that the bond was the wife's, and the difference was not liable for the husband's debt.

October 17th, 1871. Before Thompson, C. J., Read, Agnew, Sharswood and Williams, JJ.

Error to the Court of Common Pleas of Crawford county: No. 175, to October and November Term, 1870.

Grant v. The City of Erie.

1. An act of Assembly empowered a city to make a sufficient number of reservoirs "to supply water in case of fire." The council constructed reservoirs, but suffered one to dilapidate so that it would not hold water. A fire occurred near this reservoir, and no water could be obtained from it; the buildings were burned. The owner claimed damages, alleging negligence on the part of the city. *Held*, that it was discretionary with the city to construct the reservoirs, and they were not liable.

2. The city having in pursuance of the act constructed the reservoir, was not therefore bound to maintain it.

3. Carr v. N. Liberties, 11 Casey, 324, recognized.

October 18th, 1871. Before Thompson, C. J., Read, Agnew, Sharswood and Williams, JJ.

Error to the Court of Common Pleas of Erie county: Of October and November Term, 1870. No. 116.

Bissell v. The First National Bank of Franklin.

1. An advertisement was "Bissell & Co., Bankers, R. L. Irwin, Cashier," &c. Irwin was asked at the banking house to discount a draft, payable to Bissell & Co.'s order, not being able to do it, at his request on the street after bank hours, the cashier of a bank discounted it, Irwin endorsing it, "R. L. Irwin, Cashier." Irwin had actual charge of B. & Co.'s business; signed his name as cashier in their business transactions, &c. *Held*, under the circumstances, that B. & Co. were bound by Irwin's endorsement.

2. The cashier of an incorporated bank is the general executive officer to manage its concerns in all things not peculiarly committed to the directors; he is agent of the corporation, not of the directors.

October 17th, 1871. Before Thompson, C. J., Read, Agnew, Sharswood and Williams, JJ.

Error to the Court of Common Pleas of Venango county: To October and November Term, 1870. No. 43.

Rogers v. Bemus.

1. Rogers contracted to build a sawmill on Bemus' land, Bemus to prepare the foundation at a specified time, and to furnish means for the erection, with other expenses, to stock the mill until the earnings should pay for stocking, Rogers to have half the profits. Rogers prepared the superstructure, &c. Bemus did not lay the foundation, or furnish means as stipulated, and Rogers was thereby delayed from operating the mill. *Held*, that evidence of what the mill would have rented for when finished, was proper in measuring damages in an action by Rogers on the contract.

2. Probable profits from the manufacture of lumber, the mill being unfinished, would be too remote, contingent and speculative.

3. A party may resort to different means of estimating his damages, to be judged of by the jury.

October 19th, 1871. Before Thompson, C. J., Read, Agnew, Sharswood and Williams, JJ.

Error to the Court of Common Pleas of Crawford county: Of October and November Term, 1870. No. 121.

Kelsey v. The National Bank of Crawford Co.

1. The maxim *Omnis ratihabitio retrotrahitur et mandato æquiparatur* applies as well to corporations as to natural persons, and is equally to be presumed from the absence of dissent.

2. A principal not promptly disavowing an act of his agent, who has transcended his authority, makes the act his own.

3. Upon the discovery of the robbery of a bank, a minority of the directors and the cashier met with a detective in the bank; the cashier with the advice of those directors offered a reward for the money and the thief, and sent to different places telegrams containing the offer; all the directors lived in the same place; they did not disavow the cashier's act; the detective arrested the thief and obtained the money. *Held* to be evidence of ratification by the bank.

4. It was not necessary, in order to bind the bank by acquiescence, that notice of the cashier's act should be given to the directors when acting officially. If personally cognizant of it, they should have assembled the board and disavowed the cashier's act, if unwilling to be bound by it.

5. The robbery and offer was whilst the bank was a State institution; the suit for the reward was brought after becoming a National bank under the enabling act, August 22d, 1864: *Held*, that the action was properly brought, the National Bank being responsible for all the liabilities of the State bank.

6. Objection not having been made in he court below to a defective but amendable declaration; the Supreme Court will allow the amendment as if made below.

October 17th, 1871. Before Thompson, C. J., Read, Agnew, Sharswood and Williams, JJ.

Error to the Court of Common Pleas of Crawford county: Of October and November Term, 1870. No. 99.

The American Express Co. v. The Second National Bank of Titusville.

1. Common carriers cannot so limit their liability by special notice or contract, as to relieve themselves from the consequences of their own or their servants' negligence.

2. If a common carrier fails to deliver property safely at its destination, the burden is on him to prove that it was not lost or injured whilst in his custody.

3. An express company received a package of money from a bank at Titusville, to be transmitted to Lancaster. In their printed receipt, they undertook to "forward to the nearest place of destination reached by this company." By conditions printed with the receipt, they were not to be liable "except as forwarders only, * * * or for any default or negligence of any person or corporation to whom" the package should be delivered, "at any place of the established route run by this company," and such person, &c., was to be taken to be the agent of the consignor. To reach Lancaster the package was carried by three other express companies. The consignee at Lancaster refused to receive it, and directed it to be returned to Titusville, to which place it was carried by the same routes. On its arrival there it was found that part of the money had been abstracted. *Held*, that at most the company were liable as carriers only to the end of their own route, and afterwards were forwarders, responsible only for reasonable care and diligence in selecting proper carriers.

4. The burden was not upon the company to prove when, where, or by whose negligence the package was lost.

5. The contract in the conditions of the receipt was not unreasonable or unlawful.

6. Forwarders are not insurers as common carriers; they are liable as an ordinary bailee for hire, who need only satisfy the jury by the best evidence in his power of his care and fidelity; and that the loss was not from default of himself or servants.

October 16th, 1871. Before Thompson, C. J., Read, Agnew, Sharswood and Williams, JJ.

Error to the Court of Common Pleas of Crawford county: No. 48, to October and November Term, 1871.

Sumner v. Stewart.

1. S. gave orders to R. in the employ of W., a broker in Pittsburg, to buy five hundred barrels of oil, on terms, &c., specified; the order was telegraphed to W.'s house in Philadelphia, who telegraphed in reply, "we have bought subject to immediate confirmation, five hundred barrels," &c., on the terms of the order, R., not knowing the name of the seller, immediately replied: "We hereby confirm purchase," &c., signing S.'s name, having had no further communication with S. Next day R. received the name, and told S., who, not being satisfied with the seller's standing, refused him, and W.'s guaranty, and refused to sign a contract or accept the oil. The custom of oil dealers is that the contract with the name of the seller must be submitted to the principal for confirmation. When names are given and rejected, the sale fails. *Held*, that there was no evidence of a contract on which the seller could recover from S.

2. The broker could not bind his principal, except in the manner recognized by the custom, and R.'s confirmation was without authority.

October 5th and 6th, 1871. Before Thompson, C. J., Read, Agnew, Sharswood and Williams, JJ.

Error to the Court of Common Pleas of Allegheny county: No. 62, to October and November Term, 1870.

LAMB et al. v. IRWIN.

1. Unseated land was assessed in Clark's name; the land book showed payment of taxes by Irwin; and also after a tax sale "redeemed by Irwin for Clark's heirs; Irwin afterwards bought the land at a tax sale; and continued to pay taxes in his own name. He denied having any agency for Clark or his heirs, alleging that he had before his purchase redeemed for a creditor of Clark, who had not repaid him. The court charged that the evidence was too slight to constitute an agency in Irwin for Clark. *Held* to be error—these were facts for the jury.

2. Where a party in redeeming from tax sale claims to have paid all taxes *demanded*, in order to be relieved as to any not demanded, it must appear that the fault was with the treasurer *exclusively*. The party must have demanded a search for *all* sales, and not allowed the treasurer to believe that a particular sale only was asked for.

October 11th, 1871. Before Thompson, C. J., Read, Agnew, Sharswood and Williams, JJ.

Error to the Court of Common Pleas of Forest county: Of October and November Term, 1870. No. 145.

WISCONSIN.

[Our thanks are due to the Clerk of the Supreme Court of Wisconsin, for the following head-notes of decisions in that court.]

STATE v. HILL.

1. A draft, note, or other instrument required by the act of Congress to be stamped, is not void for want of a stamp, but is valid, unless the omission is shown to have been fraudulent. Rheinstrom v. Cone, 26 Wis. 163; Grant v. Conn. Mut. Life Ins. Co., and Timp. v. Dockham 29 Wis., followed.

HARER v. THE CITY OF MILWAUKEE.

1. The *statute* (R. S., ch. 19, sec. 120; Tay. Stats. 513, § 156) which makes towns liable for damages to person or property caused by the insufficiency or want of repairs of a highway, relates only to damages sustained by a *traveller* using the highway as such, and *not* to damages caused to adjoining property by the overflowing of water caused by an obstruction of the highway.

2. In general, a municipal corporation has no more right than a natural person to create and maintain a *nuisance*, and is liable for injuries occasioned thereby in any case where a private person would be liable under like circumstances.

3. If a city, in causing a sewer to be constructed in a street by its officers or agents, knowingly permits earth, etc., to be placed in the street unnecessarily, or to remain for an unnecessary length of time, so as to obstruct the proper flow of water in the gutters, such obstruction is a public nuisance, and the city is liable to an adjoining owner for injury done to his property by an overflow of water caused by such obstruction.

4. The fact that the sewer was being constructed under a contract will not relieve the city from liability, if the contractor acted as its agent and subject to its control as to the *mode* of performing the work.

5. If a public work is constructed under an *independent* contract (lawfully entered into by the city), the municipal authorities having no control of the mode of performing the work, the contractor alone, and not the city, will be liable for such injuries.

6. Where a city contracts for the construction of a work of improvement (as a sidewalk, gutter or sewer), the fact that the expense thereof is chargeable upon the adjoining lots, will not render the contractor an agent of the lot owner's rather than of the city.

7. If such works were not regarded as *public* works, *it seems* that the Legislatore could not authorize the municipality to make them.

LUM ET AL. v. HOAG ET AL.

1. One who purchases chattels in good faith, for their full value, and pays for them by discharging the just debts of the true owner, is entitled to hold them as against such owner's other creditors, who have not a prior specific lien, although such purchase may have been made in form, and a bill of sale taken, from some one claiming title other than the true owner.

2. Where the property was brick in a kiln, and the vendee took a bill of sale and took control of the kiln, this was a sufficient delivery and change of possession (as against general creditors), although he delayed removing the brick until certain attachment liens thereon were discharged.

NICHOLS ET AL. v. MITCHELL.

1. An oral agreement by M. to deliver 25,000 bushels of wheat to N., at a specified time and price (no part of the wheat being delivered, or of the price paid), *held* void by the statute of frauds.

2. If N. subsequently bought the wheat at M.'s request, and upon his implied promise to pay the difference between the contract price and the market price at the time of such purchase, such promise is void for want of a consideration. Hooker v. Knab, 26 Wis. 511.

3. Such purchase cannot be treated as one made for M. by N. as his agent, where it appears that the title was not expected to vest at all in M., but immediately in N.

NOODAN v. MCNAB, IMP.

1. A stipulation in articles of copartnership that neither partner shall, without the other's written consent, sell or assign his interest in the copartnership, or in any property thereof: *Held* to restrict the *jus disponendi* only during the continuance of the partnership, and not after its dissolution and the appointment by the court of a receiver of the partnership property.

2. The articles not providing for the continuance of the partnership for any specified time, it must be presumed that the object of the stipulation was to prevent a dissolution by such a sale or assignment by one partner without the other's consent.

3. The fact that an assignment of the interest of one of the former partners was made to a person with whom the firm had been engaged up to that time in a protracted litigation, will not justify a different construction of said stipulation, or an interference by the court to prevent the sale; especially as the stipulation was made long before such litigation commenced.

4. Neither of the former partners can interfere with the receiver in winding up the partnership business; nor can the assignee of one of them do so.

HOLDEN v. MEADOWS. (Denying motion for a rehearing.)

1. A party interested, who, having reasonable grounds for believing that a will was obtained fraudulently, or by undue influence, or when the testator had not testamentary capacity, did not take steps to prevent the probate of the will, nor attempt to have it set aside until after five years: *Held* guilty of *gross laches*.

2. The complaint in an action to set aside a will, etc., avers that by reason of the softening of his brain, the testator's "memory and mental faculties had become *almost wholly obliterated*," and that he had been in that condition for many months before the will was made, and died a few weeks after its execution: *Held*, that upon these averments the testator cannot be regarded as having had, at the time, testamentary capacity.

IN RE BERGIN.

1. Rowan v. The State, 30 Wis., holding valid ch. 137, Laws of 1871 (which authorizes the commencement of criminal prosecutions by *information* instead of indictment), is here followed.

2. In re Boyle, 19 Wis. 264, holding that the act of 1859 establishing the Municipal Court of Milwaukee, is a *general* law, is also followed; and the provisions of ch. 137, Laws of 1871, are held applicable to that court.

3. A "misdemeanor" is a "crime" within the meaning of sect. 2, art. i. of the State constitution, which prohibits involuntary servitude, except as a punishment for crime.

4. The Legislature may, therefore, authorize a person convicted of an assault to be sentenced to imprisonment at hard labor.

5. All boards of county supervisors in this State are authorized to establish *houses of correction* for the confinement at hard labor of persons convicted of crime, and the court in which such conviction is had, when the term of imprisonment exceeds six days, may sentence the prisoner to be kept at hard labor in such houses. Tay. Stats. 1948, §§ 5, 6.

6. The act authorizing the courts of Milwaukee county to pronounce such sentences is, therefore, not invalid on the ground that it applies to no other county in the State.

7. Whether the act would be invalid if the courts of other counties were not authorized by law to pronounce a similar sentence, is not here decided.

CHAPMAN v. INGRAM ET AL.

1. For a refusal to accept chattels according to agreement, the usual measure of damages is the difference between their contract price and that at which they might have been sold to other parties on the day when the vendee was bound to receive and pay for them.

3. If the vendor carries the goods to another market and sells them, he cannot recover the difference between the contract price and the net proceeds of such sale, after deducting the charges for such carriage.

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Supreme Court of Pennsylv'a,

IN EQUITY.—AT NISI PRIUS.

LONG v. COCHRAN & RUSSELL.

1. All reasons for sustaining a bill in equity, predicated upon a necessity for procuring the defendant's testimony, are now removed; for in a common law action the defendant can be compelled to testify.
2. When there is an adequate remedy at law a bill will not lie.

STATEMENT OF CASE.

Plaintiff alleged in his bill that in 1867, he being the owner of certain coal oil land, agreed with the defendants to form a stock company for the mining of oil. Plaintiff was to convey said land to the company for $200,000, of which $30,000 was to be paid in stock. Defendants were to sell the stock and pay the plaintiff for the land out of the money so received. Plaintiff did convey the land to the company, received the $30,000 worth of stock, and defendants sold the remainder, but did not account for nor pay to plaintiff any of the money arising from said sale. Plaintiff prayed for an account, and for general relief. The defendants demurred, and assigned the four causes stated in the opinion.

Opinion of the court by MERCUR, J. Delivered January 25th, 1873.

The defendants have assigned four causes of demurrer. They are substantially:

1. The plaintiff does not present such a case as entitles him to the relief for which he asks in a court of equity.

2. It is not such a case as entitles him to an account as prayed for.

3. The plaintiff has a full, complete, and adequate remedy in a court of law.

4. All the persons shown to be necessary parties are not made parties thereto.

The bill charges that the plaintiff was the owner of large quantities of land, which were supposed to be favorable for the mining of oil, and being anxious to dispose of the same, met with the defendants, and it was agreed that an oil company should be formed, called the Mercantile Petroleum Company; the capital of which should be $400,000; the plaintiff should convey five certain pieces of land, in the bill described, to said company, for which he should be paid $200,000.

$30,000 thereof, to be paid in stock, and the balance in cash when the same should be realized from the sales of said stock. The defendants were to receive the subscriptions, sell the stock, originate the corporation, and pay over to plaintiff, when received by them from sales of stock, the consideration aforesaid. The defendants were to receive for their services the sum of $10,000. That in pursuance of said agreement the company was duly formed and incorporated, and the plaintiff conveyed said land. That the defendants acting under said agreement, sold all or nearly all the stock of said company, to wit, eighty thousand shares, and received for the same the sum of $5 per share; that the defendants, although justly bound to account for the full consideration stated, out of the moneys coming into their hands as receivers aforesaid for plaintiff, and the other parties conveying the lands, have not paid over to him any money or consideration whatever, save six thousand shares of said stock, which plaintiff accepted for the sum of $30,000. The bill also avers, that "other conveyances of land were made by other parties," and prays that an account may be taken of all stock sold and moneys received by the defendants for and upon account of the parties conveying said lands to said company; that an account be stated showing to what portion of the same the plaintiff is entitled; and that said defendants be decreed to account and pay over to the plaintiff whatever sum may be found in his favor, and for general relief.

This, then, was a single transaction. The plaintiff was to convey certain lands, for which the defendants were to pay him $200,000. $30,000, part thereof in stock, and the residue of $170,000 in cash, when the same should be realized from the sale of stock. The plaintiff conveyed the land. The defendants have sold the stock, for which they have actually received $400,000, but have paid plaintiff $30,000 only. The residue of the $200,000 remains unpaid and in the hands of the defendants.

There is no averment that any portion of these $400,000, which the defendants have received, was realized from the sale of stock based upon the lands conveyed by other parties. It is distinctly charged, that the said eighty thousand shares, from the sale of which said sum was realized, were sold by "the defendants acting under said agreement." There was no other agreement than the one already stated. The case does not require any examination of accounts. There is no prayer for a discovery. It is simply that an account may be taken and stated. Any inquiry in regard to the "other conveyances of land made by other parties" is wholly irrelevant.

Acting under and in pursuance of the agreement with said plaintiff, the defendants have sold the stock, and have received therefor twice as much money as they agreed to pay the plaintiff. The demand is for a specific sum. A sum which they have received for the use of the plaintiff and retain.

What prevents a recovery, therefore, in an action of assumpsit? Will not that give a full, complete and adequate remedy? Under existing laws there is no impediment in the way of compelling the defendants to disclose under oath, in a common law action, all the facts necessary to sustain the complainant's allegations, as fully as they can be compelled in a court of equity. All reasons for sustaining a bill predicated upon a necessity for procuring the defendants' testimony, are now removed. The remedy is full, complete and adequate in a court of law. The third cause of error is sustained. This makes it unnecessary to discuss the other causes assigned.

Demurrer allowed.

Thomas R. Elcock, Esq., for plaintiff.
E. Spencer Miller, Esq., for defendants.

DANZEISEN v. MILLER et al.

A. conveyed his property to B., the latter agreeing to take the property, raise money for A. through a building association, apply the rents to the repayment of the loan, and to reconvey the property when the building association had expired: *Held*, the conveyance was a mortgage, and B. could be compelled to account, and to reconvey the property upon being refunded the money advanced. The decree at Nisi Prius, reported in 1 Legal Gazette Reports, 215, reversed.

Opinion of the court by AGNEW, J. Delivered January 27th, 1873.

The transaction between Danzeisen and the elder Miller in this case, was a mortgage. The former conveyed his property to the latter, expressly as a security for money to be obtained to pay his debts. Miller agreed to take the property, raise the money through a certain building association, apply the rents to the repayment of the loan, and to reconvey them when the building association expired. In Harper's Appeal, 14 P. F. Smith, 320, where the difference between a mortgage and a trust is very clearly shown by our brother Sharswood, and that the former is within the act of 2d April, 1856, he says, whenever there is in fact an advance of money to be returned within a specified time, upon the security of an absolute conveyance, the law converts it into a mortgage, whatever may be the understanding of the parties. Here the intent to deliver the deed only as a security for the money to be borrowed on the faith of it, is very clear, and the time for repayment is equally distinct. In such a case, where the purpose of the parties is not to sell, but to make the deed a mere security, it cannot be material that Miller was to procure the money from an association, whose business it was to lend money on real estate security. The fact that the parties, who were Germans, called it a trust, cannot overcome the distinct terms of their agreement, that it was to be a security only. Indeed, their use of the word trust, giving to it an ordinary signification, only confirms the intent not to make an absolute conveyance. It is very evident that the deed was a mortgage, or a trust *ex maleficio* would arise, for when the deed was delivered, no consideration passed. Miller procured the estate without the payment of any purchase money, and, therefore, stood in no better situation in point of fact, than one in whose name a deed is taken by another who pays the purchase money. In equity, the estate should remain in Danzeisen, who had received nothing but a promise to raise money for his use, unless the promise to raise it be the equivalent of the money when raised. If the promise was not intended to be performed by Miller, the deed was obtained by a deceit, and it was a fraud at the time it was delivered. But if the promise be performed, the true intention of the parties is executed, and the deed should stand as a security for the money. It would have been different had the deed been intended to enable Miller to raise money by a *sale*, for then Danzeisen would intend to pass an absolute estate, and to trust the promise of Miller to apply the proceeds to his use. A breach of such a promise would not convert Miller into a trustee, and the case in principle would resemble that of Burnet v. Dougherty, 8 Casey, 371. But where no sale is intended, and the conveyance is only to be a security for a loan to be obtained on it, the parting with the title must be by way of mortgage, or the deed is procured by a false pretence. The law, however, will rather treat the deed as a mortgage than to impute a fraud to Miller. In equity, where the estate is conveyed without consideration, and for the special purpose of security for a loan, what difference can it make that the money was not paid on the delivery of the deed? The grantor's intent in its delivery is the same in either event, while any breach of faith in the grantee partakes of a fraud. To say, therefore, that the relation of debtor and creditor did not arise, because no money passed at the time of the delivery, is to stand on a hard technicality, and ignore the true intent and relation of the parties. Miller's intent to raise the money, which was the effective means of procuring the title, must be viewed as the equivalent of the money, where it is raised and applied to Danzeisen's use. Then the purpose of the deed is executed, and then it should stand as a security to reimburse the money borrowed on the faith of it. It is plainly a mortgage, therefore, and equity will so regard it, and compel a reconveyance when the money shall have been refunded. As was said in Thomson v. Hanson, decided in February, 1872; in all the cases the sum of the matter has been to determine by the true nature of the transaction whether the conveyance was an actual *sale* or a mere *security* for money. But without further discussion, the case of Sweetser v. Jiffkins, decided last year, is an authority in point, that even a sheriff's sale will be converted into a mortgage, when it is made an instrument to carry out the agreement of the parties to raise money by way of loan, and when the loan is subsequent to the deed. Legal Intelligencer, September 13th, 1872, page 392. At Nisi Prius, this case was treated as a question of trust. The draftsman of the bill evidently looked at it in that light, and in that light the bill was dimissed. But a careful examination of the bill discloses all the facts essential to support it as a bill to redeem a mortgage; and it prays for an account and for a re-conveyance. With these substantial averments and appropriate prayers, and with the ample power of amendment possessed by the court to do equity, and reach the justice of the case, we cannot turn the plaintiff out of court by reason of inappropriate terms used in the bill, indicating a trust instead of a mortgage. Treating the bill as substantially one to redeem a mortgage, we are of the opinion the evidence clearly proves the conveyance by Danzeisen to Miller to be a mere security for money to be borrowed for the use of Danzeisen, and therefore, it was a mortgage in law, and that Henry E. Miller was not a *bona fide* purchaser for a valuable consideration, without notice of the nature of the deed. The decree of the Court of Nisi Prius is therefore reversed; the plaintiff's bill restored; a decree for an account to be taken between the plaintiff and the defendants is ordered, and George M. Dallas, Esq., is appointed a master to take the account and report the same to the court, together with the proper form of a final decree, in accordance with the rules and practice in equity.

NATIONAL BANK OF COMMERCE v. THOMAS et al.

As between a corporation and its corporators, the stock book is the evidence of the ownership of stock, and an assignee of stock of an expired corporation, who neglects to have the transfer entered on the stock book, or to notify the trustees thereof, cannot complain of their making distribution according to the books.

Opinion by AGNEW, J. Delivered January 27th, 1873.

This bill is to make the officers of an ex-

pired corporation, responsible for alleged negligence in the settlement of the affairs of the corporation and the contribution of its assets, on the ground that the complainant is the holder of an outstanding certificate of stock under an assignment, but without a transfer on the books, or notice to the corporation, or to these defendants, that the plaintiff held the stock.

In point of fact notice was not given for nearly three years after the dissolution of the corporation and the settlement of its affairs. As between a corporator and the corporation, the records of the corporation, or its stock book as it is called, is the evidence of their relation. Meetings of the stockholders, elections, and dividends, &c., are regulated by this record. The certificate is but secondary evidence, and is never demanded except when the stockholder deals with the corporation in a contract relation. Such was the case of Building Association v. Sendmeyer, 14 Wright, 67. The assignment of the certificate is only an equitable transfer of the stock, and to be made available, must be produced to the corporation and a transfer demanded. As between adverse claimants of the certificate, the possession of it with the transfer upon it is often the test of the title. But when the corporation itself is not dealing with its stockholder on the security of his stock, and is merely performing a corporate duty, its own record is all it needs to consult, for whoever would demand the privilege of a stockholder, should produce the evidence of his title and ask to be admitted to participate. These defendants acted officially as the trustees of the expired corporation to settle its affairs under the powers conferred by the law, and in doing so made their distribution according to the record of the corporation, which exhibited the membership of its corporators. In doing this without any notice from the plaintiff of his equitable assignment of the stock, clearly they were not guilty of any negligence, while the loss of the plaintiff was attributable to his own negligence, and negligence on their part is the only ground of this bill.

The decree of the Court of Nisi Prius dismissing the bill is affirmed, with costs to be paid by the appellants.

DILLINGER & SON v. MACKEY.

1. One to whom a factor pledges his principal's goods can not retain them, if at the time of the pledge he knew the factor was not the actual owner.
2. Set off does not exist in replevin: but when the goods for which the action is brought are the subject of a charge or lien, it can be enforced by way of recoupment.

Certificate from Nisi Prius.

Opinion of the court by AGNEW, J. Delivered January 27th, 1873.

This was an action of replevin for forty barrels of whiskey. Dillinger & Son were distillers in the western part of the State, and consigned the whiskey to Moorhead & Co., of Philadelphia, for *sale*. Moorhead & Co. pledged the whiskey to Mackey, for the repayment of a loan of $3,700. The instrument of hypothecation embraced other whiskey pledged for the same loan, including ten barrels testified to belong to Moorhead & Co. themselves. On the trial, James R. Moorhead, who transacted the business, testified that he had told Mackey that that orty barrels of whiskey were consigned to them by Dillinger & Son for *sale*, at a limit of one dollar and ninety cents a gallon. The question of Mackey's knowledge of the ownership of the whiskey by Dillinger & Son was submitted to the jury, with the instruction, that if he did not know of the consignment by Dillinger & Son to Moorhead & Co. for sale, when he took the hypothecation, that the plaintiffs could not recover. The verdict establishes the fact of Mackey's knowledge. This, therefore, raises the principal question in the cause, the defendant claiming the right of a consignee for sale to pledge the goods for a loan to himself, made even with a knowledge that the consignee was not the owner, and had no authority from the owner to hypothecate. In Lanpatt v. Lippincott, 6 S. & R. 386, it was said by Chief Justice Tilghman: "That a factor cannot pledge the goods of his principal for his own debt, seems to be too well settled to admit of dispute." He regretted that this rule, "puts it in the power of the factor, to deceive innocent persons who deal with him *bona fide* and on valuable consideration"—for he says, "it bears extremely hard upon persons who deal with a factor without a probability of knowing that the goods do not belong to him." The revisers who reported the factor's act, passed on the 14th of April 1834 (Purdon, 453), referred to this case in their report, and to the alteration of the common law rule, by the statute of 6 Geo. IV. ch. 94, passed in the year 1825, which they took as the foundation of the factor's act reported by them. They say also, that "the evil complained of by the board of trade of Philadelphia, and by the mercantile community in general, is that consignees and factors authorized to sell the goods of their principal, and who are held out to the world as the owners thereof, have not power to pledge the goods in their possession for advances made by persons *who have every reason to believe that they are the actual owners*." They then add, "now we would apply a remedy for *this particular evil*, but we think that it would not be prudent at present to go further, lest evil should be produced on the other side." In remarking upon the third section, they say, it "is intended to protect all persons who in the ordinary course of business may have paid or advanced money to consignees or factors, authorized to sell goods of their principals, *without knowledge that they were not the actual owners of the goods*." The phraseology of this section, (the report adds) "*is designedly guarded*, and we have thought it best to *limit the power* of factors *more* than we find it expressed in the statutes of England and New York, which we have alluded to."

We have been referred by the plaintiff in error to the case of Navalshaw v. Brownrigg, 13 Law & Equity Reports, 262, in support of the right of Mr. Mackey to take the goods in pledge for a loan, even with the knowledge of Morhead, & Co. being consignees for sale only. That case, however, is decidedly against him, it being decided on the force and effect of the statute of 5th & 6th Victoria, ch. 39, which has not been adopted in this State. The Lord Chancellor states there, the common law rule and the statutes of 4 Geo. IV., ch. 83, and 6 Geo. IV. ch. 94, and commenting on the statute of 6 Geo. IV., said: "So that the statute enabled the agent, as regarded third persons, to sell or pledge, provided the persons with whom he pledged did not know that he, (the person that pledged) was not the actual and *bona fide* owner of the property."

With these guides to the interpretation of the factor's act of 1834, it would not be difficult to arrive at its meaning, if the language were more doubtful than it is. But the language is clear. The pith of the act is contained in the first and third sections. But the second section, and the proviso to the third section, expressly except the case of one having notice by the bill of lading document or *otherwise*, that the persons in whose name the merchandise was shipped or transmitted, or who is the holder, is not the actual owner thereof. The fourth section is equally explicit, for one who accepts a pledge for a *pre-existing* debt *without* notice, or one who takes the pledge *with notice*, shall acquire the same interest only in the merchandise, as the factor himself had at the time of making the pledge. The purpose of the 4th section, says the revisors, was to reserve to the person taking on deposit goods for a precedent debt without notice, or for any debt with notice, of the person being only a factor, all the rights of the factor over the property, as against his principals, which might be supposed to be impaired by the preceding sections. The fifth section is also intended (they say) to prevent the preceding sections from operating injuriously to existing interests. An examination of the several clauses in the 5th section bears out this intent, as is obvious in the clauses themselves, and furnishes at once the answer to the argument of the plaintiff in error, which sought to give an extension to the pledgee's rights by these clauses, instead of the protection they are designed to give to the existing rights of the owner as well as the factor

On the trial of the cause, the defendant Mackey rested his case wholly upon his right to hold the whiskey for his entire claim of $3,700. Neither at the time of the demand of the goods by Dillinger, nor on the trial, did he set up any claim for freight or storage. He did not even claim for the advances made by Moorhead & Co.; but the jury were instructed by the judge, that if they found Mackey had notice of the ownership of the whiskey, they should still allow the defendant for the advances made by Moorhead & Co. to Dillinger & Co. on the whiskey, or whatever balance was unpaid; by way of recoupment from the damages. It was insisted in the argument, that although no claim was made for freight or storage, and no attention called to them, the judge erred; because the language of his charge would in effect restrict Mackey's claim to advances of Moorhead & Co, and the sum of $117.36, contained in Mackey's account of sales, as charges for freight, ought to have been allowed. But evidently, the language was not intended to lay restrictions on the extent of the recoupment. The whole subject of the charge was upon the right of Mackey to hold the whiskey in pledge for the repayment of the loan of $3,700, and when it was said the defendant in that case having no right to demand these conditions, can now be permitted *only* to recoup the advance of Moorhead & Co., from the damages, it is clear this was by way of contrast of these two aspects of the case, and not to limit the rights of Mackey to any claim he could legally set up by way of recoupment. It was his own fault, therefore, if he did not claim the freight. But in fact, as the evidence stood, he had no such claim on this whiskey. The hypothecation shows that Mackey had taken three lots of whiskey, in pledge of which the testimony proves that ten barrels were the property of Moorhead & Co. The account of sales shows that the gross proceeds of the three lots amounted to $5,333.21; and gross set-off, $538.65. Of this, the $117.36, was the freight on the whole. Thus, by his own showing, the freight was paid by the charge in the accounts. While the ten barrels of Moorhead's whiskey, were ample to pay all expenses, no attempt was made to prove how much, if any, of this charge for freight, applied to the forty barrels of Dillinger & Son's whiskey. And besides this, Mackey's knowledge of Dilinger & Son's ownership of the whiskey, being found by the verdict, how can a charge for expenses incurred by Mackey in the transfer and storage of the whiskey as a pledge, in violation of Moorhead & Co.'s authority, stand on a higher ground than the loan itself? Viewed in any aspect, therefore, the charge in this respect did the plaintiff in error no harm.

The only question remaining which we need notice, relates to the tender said to be necessary. Mackey refused to deliver the whiskey unless Dillinger & Son paid him the loan of $3,700, and put the Craycroft & Co. order out of the way. In charging that this refusal, and insisting on terms not binding on the plaintiffs, would be a waiver of a tender of the advances made by Moorhead & Co., clearly the judge did not mean to say that it was a waiver of Mackey's right to these advances, but only of a *tender*, as an act precedent to a suit. The instruction following immediately, to allow Mackey the advances by way of recoupment, proves this. The instruction was according to the general doctrine of tender, that when a party declines to accept payment or performance, except in a particular way, to which he is not entitled, he cannot insist that the action is prematurely brought. Mackey would deliver the whiskey only on his own terms, and these terms the verdict shows he was not entitled to demand. This necessarily left his rights to be determined by the suit. Set-off does not exist in replevin, but when the goods are the subject of a lien or charge, the charge upon them can be enforced by way of recoupment; for the charge is inseparable from the thing itself, and therefore when the value of the thing is to be allowed in damages, the charge necessarily reduces the damages by way of a recoupment, in order to do justice to both parties. As to the order to Craycroft & Co, there was no evidence given to show that it had fastened upon the whiskey, by such a *bona fide* sale or pledge as would attach to the property, and enable Mackey to use the title of Craycroft & Co., to defend his possession. We discover no error, and the judgment is therefore affirmed.

Recent Decisions.

UNITED STATES COURTS.

THE U. S. CIRCUIT COURT, S. D. of New York, decided December 31st, 872, in the case of Freidman v. Sigel, that

Under the decision of the Supreme Court in the case of The Collector v. Day, the salary of a judge of a court of record of a State is exempt from the income tax imposed by the United States. The question whether such salary is payable out of the State treasury under a State law, or out of the city treasury, under the authority of a board of supervisors, is an immaterial one; the manner in which a State chooses to determine the salaries of its judicial officers, neither changing the character of the tribunals over which they preside, nor the relation of these officers to the State, or to the Federal Government. 17 *Int. Rev. Rec.* 28.

NEW HAMPSHIRE.

[Our thanks are due to John M. Shirley, Esq., State Reporter, for advance reports of cases to appear in Vo 51, New Hampshire Reports. We take the following from them.]

SUPREME COURT OF NEW HAMPSHIRE—BARNEY v. LEEDS.

The family homestead is the residence or dwelling-place of a family.

A widower, having a minor child residing with him and supported by him, at his own dwelling-place, is the "head of a family," within the meaning of the homestead act of 1851. (Laws, ch. 1089.)

As such "head of a family," he is secured by the law of 1851, in the possession, enjoyment of, and title to a homestead right to the extent of $500 in value, exempt from attachment and levy or sale on execution.

This right thus acquired is not lost or destroyed by the arrival of his only child at years of majority, and the removal of the child from the homestead, the father still continuing to occupy the premises as his own dwelling-place and home.

A debtor's right of homestead is not lost or waived by the debtor's neglect to make application to an officer levying an execution upon his lands, to have such homestead set off to him, as provided by section 3 of the homestead act [of 1851].

An execution may properly be extended upon real estate in which a right of homestead exists, subject to such right of the debtor, in case the debtor (or his wife, if the debtor has a family) does not make application to the officer executing the writ to have a homestead set off to him in severalty.

A creditor, causing the real estate of his debtor to be set off on execution, subject to a family homestead, is estopped to deny the validity of the debtor's then existing homestead right.

The right of homestead, before the same has been set-off and assigned, is not such as estate or interest in the land wherein it ex-

ists as will bar a writ of entry therefor by a creditor who has levied an execution thereon. subject to the debtor's homestead right.

Where a creditor causes the estate of his debtor, of greater value than the homestead right of the latter therein, to be set off on execution, subject to such homestead right, the creditor and the debtor, after the levy of the creditor's execution, and before any proceedings by either for a separation and assignment of their respective interests, are tenants in common of the estate.

A creditor levied an execution on the estate of his debtor. and caused the same to be set off to him in part satisfaction of his execution, subject to a family homestead. He subsequently brought a writ of entry to recover the premises thus set off. and had judgment thereon for a writ of possession, subject to the defendant's homestead of $500. Upon petition by the creditor for partition—*held*, that the committee appointed to make such partition should assign to the debtor, by metes and bounds, so much of the estate as they might find to have been of the value of $500 on the date of the completion of the levy thereon, not at the time when partition is made.

WISCONSIN.

[Our thanks are due to the Clerk of the Supreme Court of Wisconsin, for head notes of recent decisions in that court. We take the following from them.]

GOLDER V. LITTLEJOHN.

1. In construing a will effect is to be given to the *intent* of the testator, if that be not contrary to law.

2. A testator devised and bequeathed all his property, real, personal and mixed. with the rents, issues and profits thereof, to his wife during her life, to be used and enjoyed by her. and directed that after her decease said property should be "sold and converted into money," and the proceeds paid to certain other legatees. *Held*, that this gave the widow a life estate in the property, with remainder to the executors in trust to sell the same after the widow's decease, and pay over the proceeds as directed.

3. In case of a bequest of the whole personal estate (or the residue after payment of debts, &c.) to one person for life, with remainder to others, the general rule is, that the *whole* property must be converted into money, and invested in permanent securities, and the *income* only paid to the legatee for life.

4. But if it can be gathered from the will that the testator intended the legatee for life to enjoy any part of the property in its then condition, the bequest is so far *specific*, although such property is not particularly designated in the will.

5. In this case the direction to sell the property *after* the death of the widow, shows an intent that she shall possess and enjoy for life, *in specie*, all that part of the property capable of being so possessed and enjoyed and then sold; *i. e.*, of *personal chattels* as distinguished from *choses in action*.

6. Such personal chattels being transferred to or left in the possession of the widow, the executor will not be liable for them during her lifetime.

7. If the widow dies possessed of such personal chattels, the executor must resume possession, and sell them for the benefit of the other legatees.

8. If the widow sells or destroys such personal chattels in her lifetime, the remedy of the other legatees is against *her* personal representative, and *not* against the executor of her deceased husband.

9. Where the widow, in such a case, is one of the executors, the possession of the personal chattels by her co-executor is *her* possession; and such possession, by operation of law, immediately vests in her *as legatee*—that of the executors, as such, being divested.

10. A subsequent sale of such chattels by the co executor for the widow's benefit must be treated as made by him *as her agent*, and not as executor. No recovery, therefore, can be had on his bond for the value of such chattels.

11. It is proper for the executor to take from the legatee for life a *receipt* for the personal chattels specifically bequeathed; but *it seems* that a failure to do so is not a breach of his bond; especially where such legatee is also co-executor.

12. The *choses in action* belonging to the estate are held *not* to have been bequeathed by the will above described.

13. It was therefore the duty of the executors to *collect* the notes and other contracts to pay money, as they became due, and to *sell* the railroad stock belonging to the estate; to invest the proceeds in permanent securities, and to pay over the interest accruing therefrom, to the legatee for life; and, after her death, it was the duty of the surviving executor to sell such securities, and distribute the proceeds to the other legatees.

14. If the executors, in good faith, sold the railroad stock for its then market value, they are chargeable only with such value, and not for the highest amount which it would have brought at some subsequent period during their administration.

15. In stating the executor's account, he should be allowed a reasonable sum for the support of the widow before probate of the will.

16. After accepting the provisions of the will, in her behalf, and entering upon their enjoyment, the widow could have no further provision for her support out of the estate.

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LEGAL GAZETTE.

Friday, January 31, 1873.

JOHN H. CAMPBELL,
EDITOR.
THEODORE F. JENKINS,
ASSOCIATE EDITOR.

TESTIMONY OF ACCUSED PERSONS

We had occasion during the session of the Legislature of last year, to notice the passage of the Dechert Act of 1872, permitting persons accused of crimes or offences "not above the grade of misdemeanor," to testify in their own defence if they so desired, and we commended, in the highest terms the advance which that act made towards a more rational administration of justice. We also regretted at the time, that it did not go far enough, and include crimes *above* the grade of misdemeanors, within its provisions. We are glad to perceive that Senator Edwin Allbright, of Lehigh county, has recently introduced into the State Senate, a bill extending the provisions of the Dechert Act to the trial "of *all* indictments, complaints and proceedings against persons charged with the commission of crimes or offences," which bill if passed will accomplish a still greater revolution in our criminal court procedure. In the multitude of bills introduced from time to time in the Legislature, it is pleasant to meet one of such general interest to the bar and to the public generally. There is so much injustice done to accused persons, by not permitting them to volunteer their own testimony in defence of themselves, that it seems to us that nothing but a blind and conservative spirit of reverence for the old law, could prevent such injustice from being done away with. The administration of justice will be much purer, much more suitable to the genius of free institutions, when all the old absurd fictions, obsolete technicalities, and intricate machinery, with which even to the present day it is encumbered, shall be abolished, and a more simple, method of procedure in both pleadings and practice, and a more enlightened system of applying legal principles to actual facts, shall be established in lieu thereof. We regard Mr. Allbright's proposed bill as another important step in the right direction, and shall regard with pleasure its passage.

For the information of our readers, we add the full text of the bill, which is as follows:

"An act to extend the competency of persons to be witnesses in criminal proceedings.

SECT. 1. Be it enacted &c., That on the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offences, in any court of record, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; but his neglect or refusal to testify shall not create any presumption against him, nor shall any reference be made to, nor shall any comment be made upon, such neglect or refusal by the court or counsel in the case during the trial thereof."

THE CONSTITUTIONAL CONVENTION.

Thus far the Convention has adopted two sections of a new constitution, viz.:

ART. —. SUFFRAGE AND ELECTIONS.

SECT. —. The general election shall be held on the Tuesday next following the first Monday of November; but the Legislature may by law fix a different day, two-thirds of each house consenting thereto.

SECT. —. All elections for city, ward, borough and township officers, for regular terms of service, shall be held on the third Tuesday of February.

CONSTITUTIONAL CONVENTION.

We have reserved a portion of our space for articles upon the Constitutional Convention, and the subjects which will probably come before that body for consideration. All communications intended for publication in this department, should be addressed to the Editor of the Legal Gazette, and must in all cases be accompanied by the name and address of the writer. Correspondents will please state under what names they wish their communications to appear.

LETTERS OF PERICLES.

VII.

TO THE EDITOR OF THE LEGAL GAZETTE:

In my last letter I gave the outlines of an article of the proposed constitution on the Legislature. In the present letter I shall proceed with the separate sections of that article.

ART. III.—OF THE LEGISLATURE.

SECT. 1: *The legislative power of this commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives.*

This is the existing section upon the subject.

SECT. 2. *The Senate shall be composed of forty-five, and the House of Representatives of two hundred and twenty-five members.*

The report of the Committee on the Legislature of the Constitutional Convention, now in session, retains the present number of members, viz.: thirty-three in the Senate and one hundred in the House; and the chairman of that committee, Mr. Wayne Mac Veagh, announced in a speech in the convention last week, that he thought that fifteen in the Senate and forty-five in the House would answer the purpose of legislation better than a larger number. Now, in my estimation, the numbers in both houses should be increased, especially in the lower house. Where the numbers are small, there is too much danger of legislative corruption, especially where the immense interests in this great State can raise enormous amounts of money to purchase legislation. In the State of Delaware there are nine members in the Senate and twenty-one in the House, and we all know how notorious is the fact that the Legislature is practically owned by two families of the State, who alternate in sending their members to the United States Senate. In Kansas, South Carolina, Louisiana, Pennsylvania, and many other States, possessing small Legislatures, flagrant instances of legislative corruption are known to exist. The Caldwell investigation now going on at Washington, would probably never have occurred, or at least would have before this detected the guilt, if the Legislature of Kansas had had two or three hundred members. Now, I think it especially important that the lower house of a legislative body should be numerous, springing at short intervals from the people, representing, as far as possible, every nook and corner of the State or county for which it legislates. This is genuine democracy, the reverse of the aristocratic government of the few, which the Committee on the Legislature proposes to us in their advocacy of biennial elections, biennial sessions, and a small number of members of the Legislature. In no State in the Union, except New York, is the ratio of representation so enormous as in Pennsylvania. The following tables, for which I am indebted to J. Alexander Simpson, Esq., a member of the Convention, show the ratio of population to the number of senators and representatives in the various States:

Names.	*Population*	*No. of Senators.*	*Ratio.*	*No. of Represent's*	*Ratio.*
Alabama	996,992	25 to 33	30.213 39,876	100	9,969
Arkansas	484,471	25	18,633	82	5,908
California	560,247	36	15,562	30 to 80	18,674 7,003
Connecticut	537,454	12	44,789	240	2,239
Delaware	125,015	9	13,891	21	5,953
Florida	187,748	24	7,823	51	3,681
Georgia	1,184,109	44	26,912	175	6,766
Illinois	2,539,891	51	49,802	153	16,601
Indiana	1,680,637	50	33,612	100	16,806
Iowa	1,191,792	50	23,836	100	11,918
Kansas	364,399	25	14,576	75	4,859
Kentucky	1,321,011	38	34,763	100	13,210
Louisiana	726,915	36	20,192	101	7,197
Maine	626,915	20	31,346	150	4,179
Maryland	780,894	24	32,537	86	9,080
Massachusetts	1,457,351	40	36,434	240	6,072
Michigan	1,184,059	32	37,002	64 to 100	18,501 11,840
Minnesota	439,706	37‡	11,884	80‡	5,496
Mississippi	827,922	33	25,089	100 to 120	8,279 6,899
Missouri	1,721,295	34	50,626	200	8,607
Nebraska	122,993	13	9,456	39	3,152
Nevada	42,491	18	2,360	36	1,180
New Hampshire	318,300	12	26,525	‡	
New Jersey	906,096	*		60	15,102
New York	4,382,759	32	136,961	128	34,240
North Carolina	1,071,361	50	21,427	120	8,928
Ohio	2,665,260	35	76,150	100	26,653
Oregon	90,923	16	5,682	34	2,968
Pennsylvania	3,521,791	33	106,721	100	35,218
Rhode Island	217,353	†		72	3,019
South Carolina	705,606	32	22,051	124	5,690
Tennessee	1,258,520	33	38,137	99	12,712
Texas	818,579	30	27,285	90	9,095
Vermont	330,551	30	11,018	‖	
Virginia	1,225,163	43	28,492	139	8,814
West Virginia	442,014	18	24,556	47	9,404
Wisconsin	1,054,670	19	55,509	54 to 100	19,531 10,547

* One for each county. † One for each city and county.

‡ First numbers under constitution.

‡ One member for one hundred and fifty registered voters, and one for every three hundred additional.

‖ Each town of eighty taxable inhabitants two members, all other towns, one.

From these tables it will be seen that the ratio of population to the number of senators varies from thirty-five thousand two hundred and eighteen in Pennsylvania, and thirty-four thousand two hundred and forty in New York, down to two thousand two hundred and thirty-nine in Connecticut, one thousand one hundred and eighty in Nevada, and a still smaller ratio in Rhode Island and New Hampshire. To the number of senators from one hundred and thirty-six thousand nine hundred and sixty-one in New York, and one hundred and six thousand seven hundred and twenty-one in Pennsylvania to seven thousand eight hundred and twenty-three in Florida, and two thousand three hundred and sixty in Nevada. Two hundred and twenty-five representatives in Pennsylvania, would give one to every fifteen thousand six hundred and seventy-five population, and forty-five senators would give one to every seventy-eight thousand three hundred and seventy-five population, which would be a juster representation of the people than at present, while at the same time the other extreme of unwieldy and turbulent bodies would be avoided.

SECT. 3. *No person shall be a senator who shall not have attained the age of twenty-five years, nor a representative who shall not have attained the age of twenty-one years.*

These are the ages prescribed in the existing constitution. Members of the lower house must be at least twenty-two years of age in South Carolina; twenty-four years in Delaware, Kentucky, and Missouri, and twenty-one years in all the other States. Senators must be at least twenty-seven years of age in Delaware and Alabama; thirty years in Missouri, New Hampshire, New Jersey, Tennessee, Vermont, and Kentucky; twenty-five years in Arkansas, Georgia, Illinois, Indiana, Iowa, Maine, Maryland, Mississippi, North Carolina, Pennsylvania, South Carolina, and Texas. In most of the other States it is twenty-one years.

SECT. 4. *No person shall be a senator or representative who shall not have been a citizen and inhabitant of the State for two years, and an inhabitant of the district in which he shall be chosen for one year next preceding his election, unless he shall have been absent on the public business of the United States or of this State; and if a senator or representative shall during his term of office remove from the district in which he was chosen, his seat shall be thereby vacated.*

The present limitations as to residence are, for a representative three years in the State and one year in the district, and for a senator, four years in the State and one year in the district. I think the time could be shortened to two years for both senators and representatives, without injury. Alabama, Georgia, Indiana, and North Carolina, require two years' residence of a senator in the State; Iowa, Ohio, Oregon, Wisconsin, and several other States one year; Illinois, Massachusetts, Kentucky, New Hampshire, and others require five years and upwards. For a representative one and two years' residence in the State are required by a majority of States.

SECT. 5. *No member of Congress, no officer, director, or salaried agent or attorney of any railroad, canal, mining, manufacturing, or banking corporation; and no person holding any office (except of attorney at law, and in the militia) under the United States, this State, or any foreign government, shall be a member of either house of the Legislature during his continuance in such station or office.*

The existing provision is as follows (art. 1, sec. 19): "And no member of Congress, or other person, holding any office (except of attorney at law and in the militia) under the United States or this commonwealth, shall be a member of either house during his continuance in Congress or in office."

Nearly every State constitution contains sections similar to this, except that officers of corporations are not prohibited from becoming members of the Legisla-

LEGAL GAZETTE.

[SUPPLEMENT.]

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PHILADELPHIA FRIDAY, JANUARY 31, 1873.

SHERIFF'S SALE.

Abstract of Properties to be sold by WM. R. LEEDS, ESQ., *Sheriff.*

On Monday, Febuary 3, 1873,

At the New County Court House,

Sixth street below Chestnut street, at 4 *o'clock, P. M.*

CONDITIONS OF SALE.

Fifty dollars of the price or sum at which the property shall be struck off, must be paid to the Sheriff at the time of sale, unless the purchase-money be less than that sum, in which case only the purchase-money is to be paid. Otherwise the property will again be immediately put up and sold. The balance of the purchase-money must be paid to the Sheriff, at his office, within TEN DAYS from the time of sale, without any demand being made by the Sheriff therefor. Otherwise the property may be sold again at the expense and risk of the person to whom it is struck off, who, in case of any deficiency at such resale, shall make good the same.

EXPLANATION.

For the benefit of our unprofessional readers, who do not understand the meaning of the letters and figures following the defendant's names, we make the following explanation:

D. C., District Court; C. P., Court of Common Pleas; S. C., Supreme Court—indicate the Courts out of which the writ of execution issues under which the sale is made; V. E. or Ven. Ex., Venditioni Exponas; Lev. Fac. or L. F., Levari Facias—show the kind of writ—a Levari Facias is the writ of sale upon a *Mortgage* or *Mechanic's Lien*; a *Venditioni*, upon an ordinary *Debt*, or for *Ground rent*; 223, J. 69, means No. 223, June Term, 1869, the number and term of the docket entry; the following figures show the amount of debt, and the *name* following is that of the attorney issuing the writ.

The arrangement of the sale being made according to alphabetical sequence of the counsels' names; commencing at A one month, and at Z the other, and so alternately, this is done in order that each counsel's writs may come together.

John L. Van Tine.

D. C. Lev. Fa. 1096 & 1097. D. 72.
$133 84, $156 88. A. Zane, Jr.

No. 1. 2 story brick house, with frame bath room, S. E. side Sepviva st., 65 ft. 6 in. S. W. of Townsend st., 13 ft. front, 32 ft. deep.

No. 2. 2 story brick house and lot, N. W. side Tulip st., 121 ft. 8 in. N. E. of Emlen st., 13 ft. 4 in. front, 36 ft. deep.

Felix Donnelly.

D. C. Ven. Ex. 1100. D. 72.
$417 17. Waln.

Right, title and interest in 3 story brick house and lot, S. side Catharine st., 102 ft. W. of 19th st., thence W. 15 ft., S. 60 ft., E. 38 ft. 10 in., N. 28 ft. 6 in., N. W. 3 in., N. 22 ft.

John O'Reilly.

D. C. Ven. Ex. 1087. D. 72.
$258 53. Weil.

3 story brick house and lot, N. side Spruce st., 104 ft. 6 in. W. of 4th st., 19 ft. 4½ in. front, 102 ft. deep.

Thos. Hopkins, dec'd.

D. C. Lev. Fa. 1191. D. 72.
$1,962. White.

2 story brick house and lot, N. side B st., 291 ft. 4 in. W. of 22d st., 16 ft. front, 50 feet deep. G. R. $39.

J. Bernard Apple and John L. Smith.

D. C. Ven. Ex. 1138. D. 72.
$139 68. Tennery.

3 story brick house and lot, S. side of Washington av. (No. 518), between 5th and 6th sts., 34 ft. front, 80 ft. deep.

Walter Mole.

D. C. Ven. Ex. 1236. D. 72.
$200 26. J. M. Thomas.

2 story brick house and lot, W. side of 63½ st., 125 ft. S. of Hamilton st., 25 ft. front, 100 ft. deep. G. R. $75.

David Goldmen.

D. C. Ven. Ex. 1114. D. 72.
$4,000. Thorn.

3 story brick house and lot, N. side Brown st., 170 ft. 8 in. W. of 12th st., 17 ft. 4⅜ in. front, 136 ft. 11½ in. deep, on E. line, 136 ft. ⅜ in. deep on W. line. Mortgage $1,000.

Chas. Stines.

D. C. Al. Lev. Fa. 1186 and 1187. D. 72.
$109 82 each. Todd.

No. 1. 2 story brick house and lot, W. side Lex st., 108 ft. N. of Eagle st., 13 ft. front, 75 ft. deep.

No. 2. 2 story brick house and lot, W. side Lex st., 184 ft. N. of Eagle st., 13 ft. front, 75 ft. deep.

Jas. A. Maguire.

D. C. Lev. Fa. 1193. D. 72.
$5,837 75. Townsend.

No. 1. 4 story brick store, dwelling and lot, S. E. cor. 4th and Callowhill sts., 18 ft. front, 60 ft. deep.

No. 2. 3 story brick house and lot, S. side Callowhill st., 18 ft. E. of 4th st., 18 ft. front, 60 ft. deep.

No. 3. 4 story brick store, dwelling and lot, E. side 4th st., between Wood and Callowhill, 14 ft. front, 36 ft. deep.

N. B. Nos. 1 and 2 subject to ground rent of $54. No. 3 subject to ground rent of $18.33⅓.

Chas. W. Hepburn.

D. C. Ven. Ex. 1194. D. 72.
$500. Simpson.

No. 1. 3 story brick house and lot, W. side 5th st. (No. 928), below Christian, 18 ft. front, 87 ft. deep.

No. 2. 3 three story and one two story brick houses and lot, E. side 7th st. (No. 755), below Fitzwater st., 17 ft. front, 90 ft. deep.

Thos. E. Combs.

D. C. Al. Lev. Fa. 1172. D. 72.
$2,774 17. R. R. Smith.

Brick house and lot, E. side 37th st., 125 ft. N. of Locust st., 25 ft. front, 100 ft. deep.

Isaac Shinn.

D. C. Al. Ven. Ex. 1088. D. 72.
$1,000. T. D. Smith.

3 story brick house and lot, E. side 16th st., 36 ft. 5 in. N. of Carpenter st., 18 ft. front, 66 ft. deep. G. R. $123.

Holden S. Hay.

D. C. Ven. Ex. 1108. D. 72.
$600. Smithers.

Frame house and lot. S. W. side Venango st., 16 ft. N. W. of Lambert st., 16 ft. front, 72 ft. deep.

Martin Hammer.

D. C. Ven. Ex. 1133. D. 72.
$407 61. Spink.

3 story brick house and lot, N. E. cor. 3d and Buttonwood sts, 20 ft. front, 112 ft. deep.

George W. and Christian H. Geisse.

D. C. Lev. Fa. 1140. D. 72.
$10,892. Rawle.

Several houses and lot, westerly side of Frankford road, beginning at a stake on the side of said road; thence by land of Philip Bokius, N. 48° W. 39 perches and 13 ft. to a stake; thence by same land N. 60° E. 3 ft. 1 in.; thence by same land 48° W. 16 perches 3 ft. 6 in.; thence by Nicholas Wall's land S. 63° W. 39 perches, or thereabouts; thence by ground formerly of John Myers, since of Andrew Dover, S. 48° E. 70 perches to Frankford road; thence along said road north 42° E. 35 perches 5 ft. 3 in. Containing 13 acres 12¾ perches.

Archibald Dillon.

D. C. Ven. Ex. 1219. D. 72.
$452 92. Rawle.

4 houses and lot, N. side Mary st., 208 ft. E. of 7th st., 28 ft. front, 124 ft. deep. G. R. $65 33-100, silver.

Jas. McCaffrey.

D. C. Ven. Ex. 1220 to 1223. D. 72.
$245 26. Rawle.

No. 1 Lot, S. side of Coates st., 20 ft. E. of Florence st., 18 ft. 3½ in. front, 53 ft. 1⅛ in. on W. line, and 55 ft 7⅜ in. on E. line to Beckett st., on which it has a front of 18 ft. ⅞ in. G. R. $114.26½.

No. 2. Lot, S. side of Coates st., 92 ft. 3½ in. E. of Florence st., 18 ft. front, 62 ft. 11⅛ in. on W. line, 65 ft. 4⅛ in. on E. line to Beckett st., on which it has a front of 17 ft. 9¾ in. G. R. $114.26.

No. 3. 1 story brick blacksmith shop and lot, S. side of Coates st., 110 ft. 3½ in. E. of Florence st., 18 ft. front, 65 ft. 4⅛ in. on W. line, 67 ft. 10 in. on E. line to Beckett st. on which it has a front of 17 ft. 9¾ in. G. R. $114.26.

No. 4. One and a half story blacksmith shop and lot, S. side of Coates st., 128 ft. 3½ in. E. of Florence st., 18 ft. front, 67 ft. 10 in. on W. line, and 70 ft. 3⅛ in. on E. line to Beckett st., on which it contains 17 ft. 9¾ in. G. R. $114.26.

Geo. W. Mooney.

D. C. Ven. Ex. 1177. D. 72.
$381 07. J. R. Reed.

Brick house and lot, E. side of 12th st., 80 ft. N. of Oxford st., 16 ft. front, 96 ft. deep. G. R. $108.

Thos. G. O'Hara and Wife.

D. C. Al. Lev. Fa. 1250 D. 72.
$2,841. Quin.

House and lot, W. side Hurst st., 50 ft. N. of South st., 40 ft. front, 16 ft. 6 in. deep.

Oscar O. Gould and Erastus Wood.

D. C. Lev. Fa. 1122. D. 72.
$2,781. P. P.

3 story brick house and lot, with large 2 story brick stable, store and bake house on rear end, S. side Pine st., between 5th and 6th sts., 18 ft. front, 140 ft. deep.

Samuel Spang.

D. C. Al. Lev. Fa. 1185. D. 72.
$5,710 50. W. Patterson.

One-half part in four story brick store house, dwelling and lot, W. side 3d st. (No. 148), between Race and Cherry, 18 ft. front, thence W. 51 ft., widening by an offset on the north to the width of 20 ft. 6 in., and extending the further depth of 21 ft., making the whole depth 72 ft. G. R. £9 7s. 6d. for the easternmost 51 ft. $200 to be paid at time of sale.

John G. Fleck.

D. C. Ven. Ex. 1176. D. 72
$3,279. S. W. Pettit.

No. 1. House and lot, W. side Front st., between Pine and Lombard, 41 ft. front, 100 ft. deep.

No. 2. Lot, at cor. of John Miller's land, thence S. 20 ft., E. 12 ft., N. E. 8 ft. 6 in., thence by part of larger lot, 16 ft. 6 in. to a corner, thence by same W. 21 ft. 6 in.

Geo. W. Mooney.

D. C. Lev. Fa. 1162. D. 72.
$1,649 30. Pile.

Brick house and lot, E. side 12th st., 80 ft. N. of Oxford st., 16 ft. front, 96 ft. deep. G. R. $108.

Jacob Moyer.

D. C. Lev. Fa. 1163. D. 72.
$1,084 74. Pile.

Brick house and lot, N. E. side Dickinson st., 178 ft. 8 in. S. E. of Tulip st., 14 ft. front, 57 ft. deep. G. R. $60.

Alex. H. Ziegler.

D. C. Al. Lev. Fa. 1235. D. 72.
$1,714 12. Pile.

2 brick houses and lot, W. side St. John st., between Brown and Poplar sts., 20 ft. front, 115 ft. deep.

Charles P. Meloney.

D. C. Lev. Fa. 1165. D. 72.
$2,738 46. Potts.

3 story brick house and lot, S. side Market st., 211 ft. 3 in. W. of 42d st., 17 ft. 6 in. front, 125 ft. 6 in. deep.

Euristaor Scott, owner, Freeman Scott, registered owner.

C. P. Lev. Fa. 213. D. 72.
$84 75. Poulson.

Lot, W. side 2d st., 62 ft. 11½ in. N. of Norris st., thence S. W. 131 ft. 11⅛ in., N. 62 ft. 11½ in., E. 121 ft. 9 in., S. 12 ft. ½ in.

Mary W. Neff.

C. P. Lev. Fa. 214. D. 72.
$50 58. Poulson.

2 story frame house and lot, N. E. cor. 10th and Morgan sts., 18 ft. front, 60 ft deep.

Mary W. Neff.

C. P. Lev. Fa. 215. D. 72.
$30 81. Poulson.

4 story brick house and lot, N. side Morgan st. (No. 937), 78 ft. E. of 10th st., 14 ft. front, 18 ft. deep.

Mary W. Neff.

C. P. Lev. Fa. 216. D. 72.
$30 80. Poulson.

4 story brick house and lot, N. side Morgan st. (No. 935), 92 ft. E. of 10th st., 14 ft. front, 18 ft. deep.

Mary W. Neff.

C. P. Lev. Fa. 217. D. 72.
$3,061. Poulson.

4 story brick house and lot, N. side Morgan st. (No. 933), 106 ft. E. of 10th st., 14 ft. front, 18 ft. deep.

Freeman Scott.

C. P. Lev. Fa. 218. D. 72.
$36 74. Poulson.

3 story brick house and lot, W. side Hutchinson st. (No. 916), 135 ft. N. of Poplar st., 16 ft. front, 64 ft. deep.

Freeman Scott.

C. P. Lev. Fa. 219. D. 72.
$70 84. Poulson.

Feed store, small house in rear, and lot, E. side 11th st. (No. 907), 58 ft. N. of Poplar, 16 ft. front, 73 ft. deep.

Freeman Scott.

C. P. Lev. Fa. 220. D. 72.
$82 97. Poulson.

3 story brick house on Carlton st. (No. 1315), and four brick houses on the rear, and lot, N. side Carlton st., 159 ft. 3 in. W. of 13th st., 26 ft. 3 in. front, 75 ft. deep.

Freeman Scott, owner, Mary Scott, registered owner.

C. P. Lev. Fa. 221. D. 72.
$24 87. Poulson.

3 story brick house and lot, N. side Depot st., 145 ft. W. of 8th st., 15 ft. front, 54 ft. deep.

Freeman Scott, owner, Mary Scott, registered owner.

C. P. Lev. Fa. 222. D. 72.
$24 87. Poulson.

3 story brick house and lot, N. side Depot st., 130 ft. W. of 8th st., 15 ft. front, 54 ft. deep.

Freeman Scott, owner. Mary Scott, regis-gistered owner.

C. P. Lev. Fa. 223. D. 72.
$24 87. Poulson.

3 story brick house and lot N. side Depot st., 115 ft. W. of 8th st., 15 ft. front, 54 ft. deep.

Edward Martin.

C. P. Al. Lev. Fa. 224. D. 72.
$41. Poulson.

Lot, N. W. cor. Thompson and Palmer sts., 83 ft. front, 80 ft. deep.

Ann Buck.

D. C. Al. Lev. Fa. 1226. D. 72.
$198. Poulson.

4 story brick house, No. 320 S. 11th st., and four court houses in the rear, and lot, W. side 11th st., 27 ft. N. of Pine st., 17 ft. 4 in. front, 120 ft. deep.

Herman Nitzsche.

D. C. Ven. Ex. 1098. D. 72.
$325. Pratt.

Lot, E. side 54th st., 117 ft. S. of Wyalusing av., 58 ft. 9½ in. front, 206 ft. deep.

Thos. Wagner.

D. C. Ven. Ex. 1229. D. 72.
$1,384 80. J. S. Price.

Lot, S. E. cor. Broad and Fisher's lane, thence along Broad st. 240 ft., E. 101 ft. 6 in., N. 251 ft., W. 93 ft. 10 in. G. R. $480.

Francis McElhone.

D. C. Ven. Ex. 1183. D. 72.
$161 20. Prowattan.

3 story brick house and lot, W. side Espy st., 87 ft. N. of Catharine st., 14 ft. front, 50 ft. deep. G. R. $36.

Hugh J. Sweeney and Wife.

D. C. Lev. Fa. 1099
$2,000. J. D. O'Bryan.

No. 1. Buildings and lot, S. side Federal st., 192 ft. W. of 17th st., 16 ft. front, 74 ft. 8 in. deep.

No. 2. Buildings and lot, S. side Federal st., 141 ft. 8 in. E. of 18th st., 15 ft. front, 76 ft. 8 in. deep. Two mortgages, each $1,250.

John W. Mann.

D. C. Lev. Fa. 1192. D. 72.
$5,000. J. D. O'Bryan.

Brick house and lot, S. side South st., 82 ft. W. of 22d st., 16 ft. front, 75 ft. deep. G. R. $112.

John Robinson.

D. C. Al. Lev. Fa. 1198 and 1227. D. 72.
$3,000 each. J. D. O'Bryan.

No. 1. House and lot, W. side 10th st., 20 ft. N. of Ellsworth st., 18 ft. front, 70 ft. deep.

No. 2. 1 story brick factory, 1 story frame pattern shop, fixtures and lot, W. side 9th st., 188 ft. S. of Wharton, thence S. 45 ft. 11 in., N. W. 106 ft. 2½ in., N. E. 35 ft. 11½ in., E. 85 ft. 3½ in. G. R. $120

Bernard Grimley.

D. C. Lev. Fa. 1228. D. 72.
$4,600. O'Bryan.

3 story brick house and lot, E. side 12th st., 18 ft. N. of Fitzwater st., 18 ft. front, 100 ft. deep. G. R. $126.

Hartman Grau.

D. C. Lev. Fa. 1181. D. 72.
$7,500. McCall.

No. 1. 2 story stone mansion house, with Mansard roof, and two-story brick back building, and other buildings and lot, S. side Locust st., 290 ft. W. of 40th st., 45 ft. front, 100 feet deep.

No. 2. 3 story brick building and lot, N. side Irving st., 300 ft. W. of 40th st., 33 ft. 4 in. front, 75 ft. deep.

Wm. J. Rickards.

D. C. Ven. Ex. 1088. D. 72.
$3,408 74. McCarthy.

2 story brick house, with stone front and Mansard roof, and lot, N. side Hutton st., 82 ft. 6 in. E. of Holly st., 27 ft. 6 in. front, 120 ft. deep. Also the strip of ground 5 ft. wide along E. side of said lot.

Lewis C. Cassidy.

D. C. Al. Lev. Fa. 1188. D. 72.
$5,365. E. S. Miller.

Brick houses and lot, N. side Vine st., 82 ft. E. of 17th st., thence N. 80 ft., W. 12 ft., N. 45 ft., E. 30 ft., S. 125 ft., W. 18 ft. G. R. $54.

Mr. Cassidy has no interest.

Geo. H. Bardwell.

D. C. Lev. Fa. 1180. D. 72.
$1,521 50. Law.

No. 1. Lot, N. E. side Allegheny av. and S. side Almond st., 70 ft. front, 150 ft. deep.

No. 2. Lot, N. E. side Allegheny av., 70 ft. S. E. of Almond st., 35 ft. front, 150 ft. deep.

No. 3. Lot. N. E. side Allegheny av., 105 ft. S. E. of Almond st., 35 ft. front, 150 ft. deep.

No. 4. Lot, S. E. side Almond st., 150 ft. S. E. of Allegheny av., 50 ft. front, 150 ft. deep.

No. 5. Lot, S. E. side Almond st., 204 N. E. of Allegheny av., 50 ft. front, 100 ft. deep.

No. 6. Lot, S. E. side Almond st., 250 ft. N. E. of Allegheny av., 97 ft. front, 140 ft. deep.

N. B. Mr. Bradwell has no interest.

Thos. Caulk.

D. C. Ven. Ex. 1200. D. 72.
$1147 38. Letchworth.

Lot, in middle of Chalkley's lane, 100 ft. N. E. of Erie av.; thence parallel with Erie av. 57 8-10 ft.; thence along S. E. side of same to corner of lot, No. 19; thence S. E. 73 3-10 ft. to Chalkley's lane; thence along same 200 ft. G. R. $50.

Thos. Caulk.

D. C. Ven. Ex. 1201. D. 72.
$3,496 49. Letchworth.

Lot, S. E. side Bristol and Frankford turnpike road, 100 ft. front, 130 4-10 ft. on rear end, 172 3-10 ft. deep on N. E. line, 175 ft. deep on S. W. line. G. R. $175.

Wm. H. Harrison Davis.

D. C. Ven. Ex. 1202. D. 72.
$1238 75. Letchworth.

Lot, corner of Chalkley's lane, and land late of Terhoeven, thence along said lane 216 feet, N. W. 73 3-10 ft., S. E. 105 5-10 ft. G. R. $54.

Theodore J. Fraser.

D. C. Ven. Ex. 1203. D. 72.
$3,916 08. Letchworth.

Lot, S. E. side Bristol and turnpike road 112 ft. front, 99½ ft. wide on rear, 175 ft. deep on N. E. line, 172 3-10 ft. deep on S. W. line. G. R. $196.

Theodore J. Fraser.

D. C. Ven. Ex. 1204. D. 72.
$1,498 49. Letchworth.

Lot, N. W. side Landis st., 217 5-10 ft. N. E. of Erie av., 125 ft. front, 137½ ft. on rear end, 78 8-10 ft. deep on S. W. line, 107 9-10 ft. deep on N. E. line. G. R. $75.

Theodore J. Fraser.

D. C. Ven. Ex. 1205. D. 72.
$1,306 18. Letchworth.

Lot, N. W. side Landis st., 342 5-10 ft. N. E. of Erie av., 125 ft. front, 92 4-10 ft. wide on rear end, 107 9-10 ft. deep on S. W. line, 137 ft. deep on N. E. line. G. R. $65.40.

Robert MacGregor.

D. C. Fi. Fa. 1170. D. 72.
$1,500. A. Longstreth.

3 story brown stone house and lot, N. E. side Madison av., 100 ft. N. W. Frankford road, 25 ft. front, 99 ft. 7 in. deep.

Benj. F. Walton and Wife,

D. C. Lev. Fa. 1237, 1238. D. 72.
$977 55, $431 44. Kinsly.

No. 1. All buildings, improvements and lot, S. E. side Paul st., 144 ft. 11½ in. S. W. of Meadow st., 40 ft. front, 100 ft. deep.

No. 2. All buildings, improvements and lot, S. E. side Paul st., 124 ft. 11½ in. S. W. of Meadow st., 20 ft. front, 100 ft. deep.

Rob't Galbreath.

D. C. 2d Pl. Ven. Ex. 1171. D. 72
$186 02. Jenkins.

House and lot, N, side Queen st., between 2d and 3d sts., 19 ft. 9 in. front, 103 ft. deep.

John Schaeffer.

D. C. Lev. Fa. 1206 to 1212. D. 72.
$1,891 98, $1,051 10. H. C. Haines.

No. 1. 3 story brick house and lot, S. E. side Diamond st., 86 ft. N. E. of Otis st., 14 ft. front, 57 ft. deep.

No. 2. 3 story brick house and lot, S. E. side Diamond st., 128 ft. N. E. of Otis st., 14 ft, front, 60 ft. deep,

No. 3. 3 story brick house and lot, S. E. side Diamond st., 114 ft. N. E. of Otis st., 14 ft. front. 57 ft. deep.

No. 4. 2 story brick house and lot, S. E. side Jasper st., 32 ft. 6 in. N. E. of Serrill st., 14 ft. front, 50 ft. 6 in. deep.

No. 5. 2 story brick house and lot, S. E. side Jasper st., 46 ft. 6 in. N. E. of Serrill st., 14 ft. front, 50 ft. 6 in. deep.

No. 6. 2 story brick house and lot, S. E. side Jasper st., 60 ft. 6 in. N. E. of Serrill st., 14 ft. front 50 ft. 6 in. deep.

No. 7. 2 story brick house and lot, S. E. side Jasper st., 74 ft. 6 in. N. E. of Serrill st., 14 ft. front, 50 ft. 6 in. deep.

Jas. Hallowell.

D. C. Lev. Fa. 1224 & 1225. D. 72.
$892 63, each. Hannis.

No. 1. 2 story brick house and lot, S. side Ann st., 39 ft. W. of Jasper st., 18 ft. front, 57 feet 6 in. deep.

No. 2. 2 story brick house and lot, S. side Ann st., 26 ft. W. of Jasper st., 18 ft. front, 57 ft. 6 in. deep.

James Lafferty.

C. P. Ven. Ex. 197. D. 72.
$62 65. Haverstick.

Lot, W. side Hancock st., 200 ft. 6 in. S. of Norris st., 18 ft. front, 109 ft. deep. G. R. $24.

Jos. Barnes, Jr.

D. C. Ven. Ex. 1121. D. 72.
Hennershotz.

Yearly ground rent of $55 out of three story brick house and lot, S. side Poplar st., 99 ft. 9⅛ in. E. of 13th st., 16 ft. front, 94 ft deep.

Wm. R. Bald and wife.

D. C. Al. Lev. Fa. 1173. D. 72.
$1,559. Hunsicker.

House and lot, W. side 18th st., 137 ft. 7½ in. N. of Master st., 18 ft. front, 90 ft. deep. Mortgage, $3,500.

Wm. Barry.

C. P. Ven. Ex. 192. D. 72.
$67 15. Gimber.

Lot, E. side 2d st. (on plan of Islington lots, No. 15), 20 ft. front, 103 ft. 3 in. deep on S. line, 100 ft. 1 in. deep on N. line. G. R. $65.

Shadrach Lees.

D. C. Al. V. Ex. 1230. D. 72.
$387 89. Graham.

Lot, N. W. cor. Second st. and Allegheny av., 100 ft. front, 239 ft. 1⅛ in. deep on N. line, 238 ft. 3 in. deep on S. line. G. R. $150. $400 to be paid at time of sale.

Alexander Nicholson.

D. C. Ven. Ex. 1126. D. 72.
$759 94. Guillou.

8 brick and frame houses and lot, N. Tower st., Manayunk, thence 106 ft. to Airy st. S. 46° 15′ E. 50 ft. 7½ in., thence by lot No. 26, 97 ft. 7 in., N. 58° 35′ W. 50 ft.

Jacob K. Mesohter.

D. C. Pl. Lev. Fa. 1166. D. 72.
$657 10. W. W. Fell.

Buildings and lot, S. side Berks st., 68 ft. W. of 10th st., 12 ft. front, 44 ft. deep. Mortgage $1,000.

Hugh Donohue.

D. C. Ven. Ex. 1117. D. 72.
$815 85. Ferguson.

Right, title and interest in brick house and lot, E. side Mutter st., 12 ft. N. of Davis st., 12 ft. front, 46 ft. 8 in. deep. Mortgage $800.

Wm. Crawford.
D. C. Ven. Ex. 1118. D. 72.
$201 32. Ferguson.
House and lot, E. side Cedar st., 14 ft. S. of Sergeant st., 14 ft. front, 60 ft. deep. G. R. $96.

Ezekiel H. Steen.
D. C. Al. Lev. Fa. 1153. D. 72.
$1,073. Ferguson.
Brick house and lot, N. side Washington av., 183 ft. W. of 5th st., 16 ft. front, 51 ft. 9 in. deep on E. side, 49 ft. deep on W. side, 15 ft. on rear end.

Lewis Wirth.
D. C. Pl. Ven. Ex. 1175. D. 72.
$2,395. Freedley.
No. 1. 3 story brick house, and 2 story brick brewery and beer vault and lot, W. side Germantown road, 268 ft. 4 in. S. of Camac st., 30 ft. front, 86 ft. 5½ in. deep on N. line, 92 ft. 2 in. deep on S. line, then further west 86 ft. 5½ in. on N. line, and 92 ft. 2 in. on S. line, being altogether 172 ft. 11 in. deep on N. line, 184 ft. 4 in. on S. line.
No. 2. Sheds and lot, W. side Broad st., 137 ft. S. of Dauphin st., 84 ft. front, 177 ft. 10 in. deep.

Joseph Dollen.
C. P. Ven. Ex. 193. D. 72.
$75. Erichson.
House and lot, N. E. side Germantown av., 201 ft. 5⅜ in. N. W. of Wyalusing av., 14 ft. front, 41 ft. ⅜ in. deep on N. W. line, 37 ft. deep on S. E. line, thence E. on N. line, 54 ft. 11⅞ in., and on S. line 50 ft. 8½ in. deep. Mortgage $800.

Charles Toon.
D. C. Ven. Ex. 1069. D. 72.
$218. Erichson.
3 story brick house and lot, N. side Haverford st., 23 ft. E. of 37 st., 27 ft. front, 90 ft. deep.

Adam B. Ehresman.
D. C. Lev. Fa. 1254. D. 72.
$4,160. Davis & Simpson.
3 story brick store, stable, with other buildings, and lot of ground situate on the S. W. side Unity st., 40 ft. N. E. of Penn st., 27 ft. front, 100 ft. deep; rear end 29 ft. front

The Fifth Reformed Presbyterian Church.
D. C. Ven. Ex. 1134. D. 72.
$1,060. Dedrick.
Brick church building and lot, N. side York st., 130 ft. W. of Coral st., 100 ft. front, 150 ft. 3 in. deep.

Jacob Buchmann.
D. C. Ven. Ex. 1101. D. 72.
$357 95 and $170 14. Diehl.
3 story brick house and lot, W. side 10th st., 20 ft. 1⅜ in. N. of Ogden st., 17 ft. 8 in. front, 48 ft. 4⅜ in. deep on S. line, 47 ft. 9⅜ in. deep on N. line, 17 ft. 10⅛ in wide on rear.

James Perry.
D. C. Ven. Ex. 1146. D. 72.
$155. Dolman.
Frame building, other improvements and lot, W. side Ridge av., 20 ft. N. W. of land late of Nathan Lovering, thence along Ridge av. 27 ft. 6 in., S. 58° 30′ W. 40 ft., S. 61° 23′ W. 84 ft. 11¾ in., S. 36° 30′ E. 25 ft., N. 62° E. 125 ft.

Chas. F. Snilkey.
D. C. Al. Lev. Fa. 1174. D. 72.
$2,282. E. S. Campbell.
3 story brick store and dwelling, with back buildings on 2d st., and 2 story brick shop in rear on Palethorp st. and lot, E. side 2d st., 129 ft. 5¼ in. S. of Norris st., 18 ft. front, 109 ft. deep. G. R. $54.

Michael McShane and Wife.
D. C. Lev. Fa. 1195. D. 72.
$1,874 78. Carty.
3 story brick house and lot, N. E. side Nicetown lane, 170 ft. S. W. of Germantown road, 30 ft. front, 58 ft. deep on N. E. line, 61 ft. deep on S. W. line. G. R. $24.

David Reever.
D. C. Ven. Ex. 1196. D. 72.
$195 90. Carty.
3 story brick house and lot, E. side Marvine st., 130 ft. S. of Montgomery st., 60 ft. front, 73 ft. deep. G. R. $60, silver.

Patrick O'Connor.
D. C. Ven. Ex. 1197. D. 72.
$562 70. Carty.
No. 1. Lot, E. side William st., 115 ft. 1⅜ in. N. of Coates st., 13 ft. front, 64 ft. 10½ in. deep on N. line, 64 ft. 11⅛ in. deep, on South line.
No. 2. Lot, S. E. cor. William and Virginia sts., 13 ft. front, 64 ft. 9⅛ in. deep, on N. line, 64 ft. 10½ in. deep, on S. line. G. R. $52.
N. B. On above premises is erected a blacksmith shop.

Wm. F. Fulmer.
C. P. Ven. Ex. 199. D. 72.
$47 62. Caven.
3 story brick house and lot, S. W. side Merrill st., 78 ft. S. E. of Emerald st., 16 ft. front, 77 ft. 6 in. deep. G. R. $93.

Jonas M. C. Savage.
D. C. Lev. Fa. 1155 to 1158. D. 72.
H. G. Clay.
No. 1. 2 story brick house and lot, N. side Hummel st., 80 ft. W. of 28th st., 16 ft. front, 62 ft. deep.
No. 2. 2 story brick house and lot, N. side Hummel st., 64 ft. W. of 28th st., 15 ft. front, 62 ft. deep.
No. 3. 2 story brick house and lot, N. side Hummel st., 16 ft. W. of 28th st., 16 ft. front, 62 ft. deep.
No. 4. 2 story brick house and lot, N. side Hummel st., 48 ft. W. of 28th st., 16 ft. front, 62 ft. deep.

Jos. Keen.
D. C. Pl. Lev. Fa. 1199. D. 72.
$1,562 25. Bell.
3 story brick dwelling, store and lot, N. side Susquehanna av., 58 ft. E. of 3d st., 14 ft. front, 57 ft. deep.

Wm. Mara.
D. C. Lev. Fa. 1215. D. 72.
$581 08 and $525. Bonsall.
No. 2. Lot, N. side Columbia av., 143 ft. 10 in. W. of 17th st., 16 ft. front, 85 ft. 3⅜ in. deep.

James Underdue.
C. P. Ven. Ex. 196. D. 72.
$91 86. Booth.
3 story brick house and lot, N. side Addison st., 232 ft. W. of 18th st., 16 ft. front, 40 ft. deep.

John G. Pierie.
D. C. Lev. Fa. 1231. D. 72.
$857 78. Booth.
Brick house and lot, S. side York st., 146 ft. W. of 28th st., 12 ft. front, 56 ft. 3 in. deep.

Thos. Clark.
D. C. Lev. Fa. 1232 and 1233. D. 72.
$72 46 each. Booth.
No. 1, 2 story green stone house, with French roof and lot. S. side Chestnut st., 150 ft. W. of 39th st., 25 ft. front, 220 ft. deep.

No. 2. 2 story green stone house, with French roof and lot, S. side Chestnut st., 175 ft. W. of 39th st., 25 ft. front, 220 ft. deep.

Wm. Sharswood.
D. C. Al. Lev. Fa. 1246 and 1247. D. 72.
$4,737 75, $2,601. Booth.
No. 1. Yearly ground rent of $430 out of lot, N. E. cor. 25th and Jefferson sts., 143 ft. 7½ in. front, 100 ft. deep.
No. 2. Lot, W. side 24th st., 101 ft. 3⅜ in. S. of Jefferson st., 126 ft. 3⅜ in. front, 200 ft. 4½ in. deep.
N. B.—$500 to be paid on each at time of sale.

Preston L. Hill & Co.
D. C. Al. Ven. Ex. 1144. D. 72.
$624 84. Brinckle.
No. 1. Lot, in 27th Ward, beginning at a point in middle of 70th st., and Paschall av., thence N. E. 161 ft., N. W. 267 ft., S. E. 267 ft.
No. 2. Lot, in middle of Paschall av., 161 ft. N. W. of 70th st., 100 ft. front, 267 ft. deep.
No. 3. Lot, on the side of Darby av., and middle of 70th st., thence N. E. 101 ft., S. E. 205 ft., S. W. 61 ft., S. E. 205 ft.
No. 4. Lot, S. E. side Darby av., 181 ft. N. E. of 70th st., 80 ft. front, 205 ft. deep.
No. 5. Lot, S. E. side Darby av., 101 ft. N. E. of 70th st., 80 ft. front, 205 ft. deep.

Henry R. Coggshall and Wife.
D. C. Al. Ven. Ex. 1139. D. 72.
$253 55. G. D. Budd.
3 story brick plastered house, with 2 story back building and lot, S. E. side Rittenhouse st., 295 ft. S. W. of Marion st., 60 ft. front, 270 ft. deep, with 2 story brick stable and carriage house on Lehman st.

Bernard Clarke.
C. P. Ven. Ex. 195. D. 72.
$72 80. A. Burton.
2 story brick house and lot, N. side Mifflin st., 96 ft. W. of 2d st., 15 ft. front, 52 ft. deep. G. R. $68 75.

John S. Smith.
D. C. Al. Ven. Ex. 1143. D. 72.
$176 31. Arnold.
3 story brick house and lot, N. W. side Richmond st., 19 ft. 4 in. N. E. of Hanover st., 18 ft. front, 80 ft. deep. G. R. $45.

ture. The new constitution of West Virginia (1872) takes the initiative in declaring, art. 6, section 13, *inter alia*, that "no person who is a salaried officer of any railroad company" shall be eligible to a seat in the Legislature. Pennsylvania, which above all other States, is subjected to the power of the mammoth railroad corporations existing within her limits, should follow the example of West Virginia, and put a stop to one dangerous species of legislative corruption—the holding of seats by those who are the paid officers or agents of large corporations.

Delaware, Kentucky, Maryland and Tennessee, do not permit clergymen to become members.

SECT. 6. *No person who shall be convicted of bribery, perjury, or other infamous crime, nor any person who is or may be a collector or holder of public moneys, who shall not have accounted for and paid over according to law, all such moneys due from him, shall be eligible to a seat in the Legislature, or to any office of honor, trust or profit in this State.*

Disqualifications for office on account of infamous crimes, are common to nearly all the State constitutions, some of them including but a few, others a great many such disqualifications. The provision about defaulters with public moneys, is substantially the same as found in the constitutions of Illinois, Georgia, Alabama, Indiana, Oregon, Iowa, Ohio, Mississippi, Missouri, Texas and other States.

SECT. 7. *Senators shall be elected for the term of three years, and representatives for the term of one year. Their term of office shall begin on the first day of December succeeding their election. When vacancies occur in either house, the governor shall issue writs of election to fill such vacancies.*

I have retained in this section the present length of terms of members of the Legislature. The Convention Committee on the Legislature have reported in favor of terms of four years for senators, and two years for representatives. I much prefer the present plan. Especially is it important to have short terms for members of the lower house, in order that the people can frequently call their representatives to account. As "all power is inherent in the people," so should their representatives spring from and return as often as possible from them. I am one of those who have great confidence in the people, and unbounded faith in republican institutions, and, therefore, believe that an assembly is popular so far as it represents the *latest* wishes of the people. Although the people of this State are suffering under great evils and bad representatives, yet the very fact that a "reform" convention is in session shows that they are resolved to have a better state of affairs.

The terms of senators are three years in New Jersey and Pennsylvania; four years in Alabama, Arkansas, California, Delaware, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Maryland, Mississippi, Missouri, and Nevada, Oregon, South Carolina, Virginia, and West Virginia (but as most of these States have biennial sessions of the Legislature, the term is in effect but two years); six years in Texas; two years in Kansas, Michigan, Minnesota, Nebraska, New York, North Carolina, Ohio, Tennessee, Vermont, and Wisconsin; one year in Connecticut, Maine, Massachusetts, and New Hampshire. The terms of representatives are, one year in Connecticut, Kansas, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Wisconsin; and two years in the other States.

As regards the time when the term of office begins, I have fixed it at the 1st of December, in accordance with the action of the Convention in that respect, as the general election is about the middle of November, the interval of time between the two dates is not very long. Some of the States make the terms begin the day after or upon the very day of the election, so as to prevent any possibility of a governor convening the old Legislature after the election of the new. The interval should be as short as is consistent with the proper ascertainment of who are elected members.

The provision about vacancies is that contained in the present constitution (art. 1, sec. 20), except that the issuing of the writs of election is transferred from the Speaker of the respective houses to the governor. This is to prevent the delays and troubles arising from the present method. In nearly all the States the governor performs this duty, and not the Speakers.

SECT. 8. *An election for members of the General Assembly shall be held on the day fixed for the general election next succeeding the adoption of this constitution, and annually thereafter. The General Assembly shall meet at twelve o'clock noon, on the first Tuesday of January in every year, unless sooner convened by the governor; and its regular session shall not continue longer than the 22d of February following, without the concurrence of two-thirds of the members elected to each house.*

The time of meeting here fixed is the present one, art. 1, sec. 10, Const. Pa.—except that the time of the day is also fixed, in order to prevent confusion or illegal gatherings. Annual sessions are retained, as I think the interests of this State require them.

The States having annual sessions are 18, viz.: Alabama, Connecticut, Florida, Georgia, Kansas, Louisiana, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Texas, Virginia, and Wisconsin. Those having biennial sessions are 18, viz.: Arkansas, California, Delaware, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, Ohio, Oregon, Tennessee, Vermont, and West Virginia. Rhode Island has semi-annual sessions.

I have placed February 22d as the limit of the regular session, as the restrictions to be placed on the Legislature as to local or special legislation, will obviate the necessity of long sessions. In many of the States it has been found necessary to limit the sessions. In California and New York they are limited to one hundred days; in Maryland and Virginia, to ninety days; in Indiana, to sixty-one days; in Georgia, Kentucky, Louisiana, and Nevada, to sixty days; in Kansas, to fifty days; in West Virginia, to forty-five days; in Nebraska, to forty days, and in Alabama, to thirty days. With annual elections, annual sessions, short terms and sessions, better methods of selection and election of members and the curtailment of the powers of special legislation, Pennsylvania ought to be a well governed State.

SECT. 9. *In the year* 1873, *and in every tenth year thereafter, the total population of the State, as ascertained by the last preceding Federal census, shall be divided by seventy-five and the quotient obtained, rejecting the fraction remaining, shall be the ratio of population to a district. The State shall then be divided into seventy-five legislative districts, of compact and contiguous territory, each district containing a population equal to said ratio, or at least four-fifths of it, and not more than said ratio and one-fifth thereof, and all of said districts shall be of nearly equal population as possible. Counties containing a population greater than said ratio, shall be divided into as many districts, as they contain the requisite population. Districts shall be bounded as far as possible by county, township, or ward lines, and no ward or township shall be divided in the formation of a district. Counties containing a population less than four-fifths of said ratio shall not be so divided.*

SECT. 10. *Three representatives shall be elected in each legislative district, and in voting for the same, each qualified elector may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same or equal parts thereof among the candidates, as he shall see fit, and the three candidates highest in votes shall be declared elected.*

SECT. 11. *At the same time that the State is apportioned into legislative districts, the Legislature shall apportion it into fifteen senatorial districts, by combining five legislative districts into one senatorial district of compact and contiguous territory.*

SECT. 12. *Three senators shall be elected in each senatorial district, and in voting for the same, each qualified elector may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same or equal parts thereof among the candidates as he shall see fit, and the three candidates highest in votes shall be declared elected.*

I will make some notes upon the last four sections (9–12) in my next letter.

PERICLES.

Philadelphia, January 27, 1873.

TO THE EDITOR OF THE LEGAL GAZETTE:

II.

Another pretext for elusion occurs in art. vii., sect. 1, which contains the words: "As soon as conveniently may be."

The whole section reads as follows: The Legislature shall, as soon as conveniently may be, provide by law for the establishment of schools throughout the State, in such manner that the poor may be taught gratis.

Republican institutions, as established in America (and which Hon. Judge Sharswood in his notes to Blackstone fitly termed representative democracies), can only be perpetuated by giving to all citizens such a mental development, that they may be able to judge for themselves. The constitution, art. ix., sect. 1, guarantees to all men the enjoyment of life and pursuance of their own (sic!) happiness. The commonwealth therefore owes to every man the enjoyment of life, and such a co-equal position with all the others, that his happiness may not be marred. The guaranty of enjoyment of life, clearly means that the Legislature and the State executive should keep the avenues of success open and unobstructed, so that every man may have a fair and equitable chance to work out his felicity. The guaranty of happiness can only mean such an education for every child, that it can, when grown up, fully display its God-given talents, and find its proper level.

The necessity of universal education in our republics being admitted (and our best thinkers deny to any State the right to punish, when it failed to educate), it is difficult to see why former conventions introduced to the very clause, which enjoins an active duty, a pretext for its elusion. Without the words above referred to, the Legislature will find obstacles enough to the introduction of a constitutionally ordained school law, and its introduction is at best of slow progress. With the words, the obstacles may be made a convenient plea of inconveniency.

Happily for us, the Legislature gave us a school law. But the same is insufficient, and will be regarded as such, *until every child in this commonwealth grows up under proper tuition.* By striking out the objectionable words, the Legislature must try and make it convenient to introduce laws for general education, and this is in better keeping with the intent of the clause referred to. T.

A meeting of the bar of Luzerne county, Pennsylvania, was held on January 6th, in the court room at Wilkesbarre, to take action upon the death of Volney L. Maxwell, one of its members. Hon. Garrick M. Harding was called to the chair, and Alexander Farnham, Esq., was appointed secretary. Addresses eulogistic of the decedent, were made by Messrs. Ricketts, H. W. Palmer, Brundage and Wright, and a committee consisting of the last named gentleman and Hon. E. L. Dana and A. T. McClintock, Esq., was appointed to draft appropriate resolutions. The Luzerne Legal Register, commenting on Mr. Maxwell's death, gives the following interesting item of legal information.

"The death of V. L. Maxwell, Esq., leaves another blank in the brilliant constellation which once adorned the bar of Luzerne county. In history, the State of Pennsylvania could point with honorable pride to a long list of distinguished men. But what county in the State could show a better array than Luzerne? There were none in the United States could excel in legal knowledge or forensic eloquence, such men as John N. Conyngham and Chester Butler. Then there was the young and gifted Henry M. Fuller, who was distinguished on the floor of Congress, and who passed away before he was fairly in his prime. There were Judge Scott and B A. Bidlack, minister to Bogota, with Dr. Leib, Judge Ross and H. B. and Harrison Wright, G. W. Woodward, and others whose names are as familiar as household words. Col. Wright, A. T. McClintock, Esq., and Judge Woodward, are now almost the only survivors of all that once noted and brilliant circle."

Supreme Court of Pennsylv'a.

The following judgments were entered upon Monday, January 27th, 1873,

PER CURIAM:

Cresson v. Dickey Re-argument ordered.

Harmer's Appeal. Decree affirmed upon the authority of McBride's Appeal, decided January 9th, 1872.

Pennsylvania Railroad Co. v. Patterson. Judgment affirmed.

Davis v. Maple. Judgment affirmed.

Middleton v. Akers. Judgment affirmed.

Wilson v. Beatty. Judgment affirmed.

Philadelphia and Baltimore Railroad Co. v. Chandler. Decree affirmed.

Elliot v. The City of Philadelphia. Judgment affirmed by a divided court.

Maria Fury's Appeal. Order and decree affirmed.

Lower v. Wightman & Nevins. Appeal dismissed and decree affirmed.

Price's Appeal, Decree affirmed.

By AGNEW, J.:

National Bank of Commerce v. Troemmer. Decree of Nisi Prius Court dismissing the bill affirmed, and costs to be paid by apellants. (For opinion see another column.)

Danzeisen v. Miller. The decree of the Court of Nisi Prius reversed; plaintiff's bill restored; a decree for an account to be taken between the plaintiff and the defendant is ordered, and master appointed to take the account and report the same to the court, together with the proper form for a final decree, in accordance with the rules and practice in equity. (For opinion see another column.)

Dillinger & Son v. Mackey. Judgment affirmed. For opinion see another column.

Thursday, January 30, 1873.

Appeal of James Neal. Appeal from ommon Pleas of Montgomery County. Per Curiam. Decree affirmed, and appeal dismissed at the cost of the appellant.

Zimmerman et al. v. Prest, &c., of the Perkiomen and Reading Turnpike Company. Error to Common Pleas of Montgomery County. Judgment reversed and judgment entered in case stated for defendants.

Opinion by READ, C. J.

SUPREME COURT OF PENN'A.

The following judgments were entered by Read, Chief Justice, January 30th, 1873:

Zimmerman and others v. The President, &c, of the Perkiomen and Reading Turnpike Company. Judgment reversed, and judgment entered in case stated for the defendants.

By the Court. Appeal of James Neal. Decree affirmed, and appeal dismissed with costs.

The Overseers of the Poor of Northumberland v. The Overseers of the Poor of the Borough of Sunbury. Judgment affirmed.

Court of Common Pleas.

ESTATE OF JOHN H. SYFERT.

1. A disagreement between trustees that does not endanger the trust estate, is not sufficient ground for dismissing them.
2. Neither will the court dismiss a trustee because he deposits small amounts of the trust fund with his private account, when it appears it was done merely for convenience until an amount large enough to make a deposit had accumulated.
3. The books and accounts of a trustee should, upon a reasonable demand by one interested in the trust, be submitted for inspection.

Exceptions to report of the Examiner.

Opinion by LUDLOW, J. Delivered January 25th, 1873.

We have carefully consid red the elaborate report of the examiner, the exceptions filed to it, the evidence, and the authorities cited by the parties interested, and we fail to discover any reason why we should sustain the exceptions.

Upon four points especially have we paused and deliberated, because if either of them had been in fact sustained, we might have been obliged to discharge the trustee.

These points may be briefly stated as follows, viz. :

The disagreement of the trustees, the mixing of the trust funds and accounts of the trustee, the giving of checks without funds in bank to pay them, and the refusal to exhibit the books and accounts of the estate.

Upon the first point we are quite certain that unfortunate difficulties exist, but it does not appear to us that this trustee is any more to blame than his co-trustee; the same argument which would oblige us to remove the one would compel us also to discharge the other.

The true rule of law doubtless is, as is proved by an examination of the authorities cited by the examiner, that a disagreement between trustees, which does not endanger the safety of the estate, will not require us to inflict summary punishment. In this instance, the testator had himself selected the respondent, he knew his peculiarities, and it is very possible that because of these he made the selection; no satisfactory proof has been submitted to establish the fact that the trustee is a negligent or dishonest man, and as far as we can judge, on the whole, the trust estate has been properly managed. A division of labor between the trustees seems to have been settled upon, and it will not do to lend a too ready ear to these complaints, when the chief trouble seems to arise from peculiarities of temper for which both parties are to blame.

If this trustee had, to any considerable amount, and without reasonable cause, mixed up his private funds and accounts with those of the trust estate, he might be removed; but the fact is, that while small sums have occasionally been mixed with his own, the reason assigned surely excuses him, for these sums were small, and for convenience he deposited them with his own money, until a large enough amount had accumulated to make a deposit. While we say this, we are not to be understood as sanctioning a departure from the well established rule. As a matter of convenience this course was pursued in this case; it would hardly justify a discharge of the trustee now; it might, however, turn the scale against him had other facts been established throwing doubt upon his integrity or capacity, and it is always attended with peril to the trustee.

The giving of a check without funds provided for payment of it, is another grave cause of complaint, and if the charge had been established, would cause the dismissal of the trustee.

The evidence does not sufficiently support the charge, for the burden was upon the petitioner to establish it.

Checks were given and not at once paid; at the time, however, for some cause, no complaints were made, and a number of accounts have been settled and confirmed; the petitioner failed to specify the dates or amounts of these checks. If any difficulty arose before the settlement of the accounts, it ought to have appeared in proof at the time, or before the accounts were settled. If it occurred since that time, proof of a specific nature should have been made of time and amount, so that the respondent could defend himself.

On the whole testimony we refuse to sustain this point for want of satisfactory evidence.

The fourth material point in this case involves the non-production of books and accounts. The course pursued by this trustee does not satisfy us, but is not a sufficient cause for a discharge. The trustee evidently labored under the idea that he was not bound to produce his books and accounts, but only to file an account. There was error in this view, for the law is, not that a trustee is bound to submit to a vexatious and unwarrantable call for books and papers, but that at all reasonable times, in proper places, the books and accounts should, on call, be submitted to those who have a right to the inspection of them. The trustee here, always, it seems to us, was ready to file an account; he never, so far as we can determine, refused to do so, and this fact saves his case now, but hereafter, and subject to the principles above stated, he must give to his co-trustee and the parties interested, ample opportunity to look into the condition of the estate.

We do not care to notice in detail the other points in this case, because, taken together, and in view of all the evidence, we do not think we would be justified in sustaining the exceptions and granting the prayer of the petition.

One word before we conclude an opinion already sufficiently extended.

The difficulty in this case, we conceive, does not arise from any want of honesty or capacity, but from peculiarities of character upon one side, and a rather suspicious and hasty temper upon the other.

Would it not be well to attempt to modify the one, and control the other?

The interests of the estate demand a careful consideration of this question, for the time may arrive when by the substitution of other trustees we may be obliged to introduce into the management of the estate those whose characters and tempers will not be the subject of judicial criticism.

Exceptions dismissed and prayer of petition refused.

Theo. Cuyler, Esq., for petitioners
J. Austin Spencer, Esq., for respondent.

BRINCKLE v. BRINCKLE.

A libel in divorce must allege with certainty a marriage actually consummated.

Demurrer.

Opinion by LUDLOW, J. Delivered January 25th, 1873.

Leave was granted to the libellant in this case, to amend her libel, by setting forth in explicit terms, that a marriage had been contracted and celebrated between the respondent and herself.

The attempt has now been made to comply with the order of the court, but the majority of this tribunal do not think that the order made has been complied with.

It is true, the libellant declares, that in the month of January, 1857, she became the lawful wife of J. Gordon Brinckle, but she goes on to say, that "a contract of marriage was made between your libellant and the said J. Gordon Brinckle, whereby your libellant agreed to become then and there his lawful wife, and the said J. Gordon Brinckle agreed to become then and there her lawful husband."

Was this contract executed or executory merely? If only executory, then the contract is simply an agreement to marry, and not a marriage. The language used in this amended libel clearly raises a doubt upon the point named, for while one construction might possibly indicate the existence of an executed contract, the other as clearly implies a mere promise, and this idea is strengthened by the fact, that no precise time is specified, but only the month of January.

Our difficulty is to understand why the usual form is not adopted in this case. If the facts to be proved by libellant, and which must be presumed to be within the knowledge of libellant and her counsel, will establish a marriage, according to the law of Pennsylvania, why cannot the libellant conscientiously declare that she was married? Why embarrass the case by allegations which throw doubt upon the question, or at least, qualify the main proposition sought to be established?

Judge Peirce thinks this amendment is within the order of the court, but the other judges do not agree with him, and believe that no useful purpose will be accomplished by permitting a departure from our usual form, especially when it is easy to understand how a door would be open to suits for divorce, in which nothing could be established but the existence of an executory agreement.

Demurrer sustained, with leave to amend.

Legal Gazette.

REPORTS OF CASES

DECIDED IN THE

UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA; THE SUPREME COURT OF PENNSYLVANIA AT NISI PRIUS; THE DISTRICT COURT, COURTS OF COMMON PLEAS, QUARTER SESSIONS, OYER AND TERMINER AND ORPHANS' COURTS OF PHILADELPHIA;

AND IN THE COURTS OF THE THIRD, EIGHTH, NINTH, ELEVENTH, TWELFTH, TWENTY-SIXTH, TWENTY-EIGHTH, AND TWENTY-NINTH JUDICIAL DISTRICTS OF PENNSYLVANIA.

Originally Reported in the Legal Gazette,

From July 2, 1869, To January 5, 1872, inclusive.

BY JOHN H. CAMPBELL.

VOL. 1. JUST ISSUED.

RECOMMENDATIONS.

From HON. JAMES THOMPSON,
Chief Justice, Supreme Court, Pa.

"I have examined the Legal Gazette Reports which you did me the favor to send me, with great satisfaction It is well gotten up, and neatly printed and bound. The variety of matter contained in it, emanating indiscriminately from courts in every portion of the State, renders the volume useful in every section to both lawyers and judges, and to them I cheerfully commend it." March 1st, 1872.

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Philada, March 1st, 1872.

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From HON. J.C. BUCHER,
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"From the examination I have made, I am convinced that they (the Reports) will be of great value to th practitioner and indispensable to all who desire a complete record of all the Pennsylvania cases." Lewisburg, Pa, March 10th, 1872.

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"To me this seems an exceedingly valuable volume. Its decisions must prove of great assistance to both bench and bar, throughout the State. I regard as the peculiar excellence of these reports the class of well considered "lower court" decisions, which aside from their great aid to the profession must so largely tend to establish a most desirable uniformity of practice in the different districts in the State." Greensburg, Pa., March 28th, 1872.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in February, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1872.

Dec. 27, Charles L. Eberle, Administrator of HENRY B. DUTTON, dec'd.
" 30, John P. Woolverton et al., Administrators of RUNYON WOOLVERTON, dec'd.
" 30, Peter Schwindt, Executor of ELIZABETH BERMANN, dec'd.
" 30, George F. Creutzlurg et al., Executors of JOHN H. CREUTZLURG, deceased.
" 30, Elizabeth Ditsche, Administratrix of XAVIER DITSCHE, dec'd.
" 31, Abraham Levy, Administrator of LEWIS HYMAN, dec'd.
" 31, Thomas B. Wattson et al., Executors of EDWARD L. CLARK, dec'd.

1873.

Jan. 2, Alfred Fassitt, Administrator d. b. n. c. t. a. of WILLIAM FRIESTMAN, deceased.
" 3, Harry E. Battin, Administrator of GEORGE W. SHARP, deceased.
" 3, Susanna Froelich, Administratrix of CONRAD FROELICH, deceased.
" 6, James Campbell et al., Executors of HUGH O'DONNELL, deceased.
" 7, Henry Cramer, Administrator of AUGUSTUS SPRINGER, deceased.
" 7, Augustus C. Leidy et al., Executors of Dr. N. B. LEIDY, deceased.
" 8, Joseph S. Ford et al., Executors of GEORGE W. FORD, deceased.
" 10, Andrew Blair, Executor of CHARLOTTE RAPP, deceased.
" 10, Homer Eachus, Executor of HOMER EACHUS, deceased.
" 11, Hugh English, Administrator of MARTHA J. ENGLISH, deceased.
" 11, Robert England, Executor of JOSEPH ENGLAND, deceased.
" 11, Jacob Pefeiffer, Executor of JACOB GROETZINGER, deceased.
" 13, Benjamin L. Wiley, surviving Administrator of WILLIAM E. WILEY, deceased.
" 13, William G. McCauley, late Guardian of DANIEL C. ODENHEIMER, Minor.
" 13, Elizabeth Myers, Administratrix of ANN HEIRSCHBERG, deceased.
" 13, James H. Heverin, Administrator of CHRISTIAN BEICHTER, deceased
" 14, John S. Cornell, Administrator, d. b. n. c. t. a. of EMELINE CORNELL, deceased.
" 15, William Manson, Administrator c. t. a. of SARAH JANE MANSON, deceased.
" 15, Moses A. Dropsie, Administrator c. t. a. of AARON M. DROPSIE, deceased.
" 15, William J. Benkert, Administrator of LOUIS SCHMIDT, deceased.
" 15, Mary Catharine Zanner, late Muller, et al., Executors of JOHN MULLER, deceased.
" 16. Valentine B. Finn et al., Executors of JAMES C. FINN, deceased.
" 16, John C. Cresson et al., Trustees under the Will of ADAM EVERLY, deceased.
" 16, Mary Kelley, Administratrix d. b. n. of THOMAS EDWARDS, deceased.
" 16, Edward B. Frees, one of the Executors of JESSE EVANS, deceased.
" 16, Thomas P. Campbell, Executor of ELIZABETH MARPLE, deceased.
" 17, Thomas H. Montgomery, Guardian of ARTHUR W. MOSS.
" 17, Samuel Bradbury et al., Executors of JESSE W. CARR, dec'd.
Jan. 17, Casper Williamson, Administrator of JOHN SOUDER, dec'd.
" 18, Alfred Driver, Administrator of JULIA C. SHEPPARD, dec'd.
" 18, Samuel B. Jones, Administrator of MARGARET F. JONES, dec'd.
" 18, The Girard Life Insurance Company, &c., Executors of NATHANIEL P. HOOD, dec'd.
" 21, The Pennsylvania Company for Insurance on Lives, &c., Administrators c. t. a. of WILLIAM W. HARDING, dec'd.
" 21, The Pennsylvania Company for Insurance on Lives, &c., Trustees of FRANCIS MIFFLIN.
" 22, William Millevard, Acting Executor of JESSE BOULDEN, deceased, as filed by Daniel S. Winebrener and John W. Buckman, Executors of said William Millevard, deceased.
" 22, Elizabeth Ervine, Administratrix of ELIZABETH R. ERVINE, dec'd.
" 22, Sarah J. Charlton, Administratrix of JOSEPH A. CHARLTON, dec'd.
" 23, Lorenzo M. Kieffer, Executor of H. F. Kohler, deceased.
" 22, Alex. H. Smith, Guardian of ALEXANDER H. SMITH, Jr., Minor.
" 23, Constant Guillou, Executor of CAROLINE MACKAU, as filed by Victor Guillou, Administrator of Constant Guillou, dec'd.
" 23, John Bowman, Administrator d. b. n. c. t. a. of DOROTHY STUCKERT, deceased.
" 23, The Girard Life Ins. Co., &c., Executors of MARULA NEWBAUER, deceased.
" 23, Ellen C. Morrison, Administratrix of JOHN MORRISON, dec'd.
" 23, Mary L. Yardley, Guardian of MARY S. J. MARTIN and J. WARNER YARDLEY, minors, as filed by her Administrator, Wm. F. Miskey.
" 23, Redwood F. Warner, Guardian of MARY S. YARDLEY, late minor.
" 23, William F. Miskey, Administrator c. t. a. d. b. n. of MARY L. YARDLEY, deceased.
Jan. 23, Edward Peace, Trustee of Dr. CHAS. HOLMES, dec'd.
" 23, John Shaffner et al., Executors of JNO. SHAFFNER, dec'd.
" 24, Thomas Shipley, Executor and Trustee of ELIZA JANE BROWN, deceased.
" 24, John A. Schaeffer, Administrator, &c., of JOHN A. SCHAEFFER, dec'd.
" 25, Levi G. Ulrich et al., Guardians of WILLIAM ULRICH, minor.
" 27, Charles J. Gallagher, Administrator d. b. n. of JOHN McDOWELL, deceased.
" 27, Charles J. Gallagher, Administrator of MARY McDOWELL, deceased.
" 27, William L. Edwards, Executor of ASA THOMAS, deceased.
" 27, Thomas Barry et al., Executors of WILLIAM CLANCY, dec'd.
" 27, Thomas Sterrett, Administrator of JOHN STERRETT, dec'd.
" 28, F. Oden Hortsmann et al., Executors of WILLIAM J. HORTSMANN, dec'd.
" 28, F. Oden Horstmann et al., Trustees under the will of SIGMUND H. HORSTMANN, dec'd.
" 28, Samuel Hood et al., Executors of MARY SIMMONS, dec'd.
" 28, John A. Burton, Administrator of WILLIAM T. CATTO, dec'd.
" 28, Frank Wolfe, Executor of JOHN K. WOLFE, dec'd.
" 28, Alexander Ramsey, Executor of JOSEPH CAIRNS, dec'd.
" 29, The Girard Life Ins. Co., &c., Trustees for CHARLES FRY, late Minor.
" 29, Eli K. Price, Trustee of JOHN W. RULON, under the will of Joseph Archer, deceased.
" 29, William W. Ball et al., surviving Executors of THOMAS GRAHAM, deceased.
" 30, James Linton, surviving Trustee of SARAH KIRK, deceased.
" 30, Edwin Shippen, Administrator c. t. a. of WILLIAM C. MEEDS, dec'd.
" 30, Edwin J. Florence, Executor of HANNAH FLORENCE, dec'd.
" 30, Joseph Patterson et al., Administrators of JOHN REU, dec'd.
Jan. 30, Rachel W. Townsend (late Moore) et al., Executors of JOHN WILSON MOORE, dec'd.
" 30, Mary Ann Price, Administratrix of ABRAHAM B. PRICE, dec'd.
" 30, Paul Jagode, Administrator of C. THEODORE KELL, dec'd.
" 30, Frederick Ladner, Administrator of MAGDALENA ERB, dec'd.
" 30, Albert Hewson, Administrator of HENRY N. HEWSON, dec'd.
" 30, John Bistable, Executor of P. F. TURNER, dec'd.
" 30, Bridget McGoveran, Administratrix of JAMES McGOVERAN, dec'd.
" 30, Lina Reichert, Administratrix of DAVID REICHERT, dec'd.

WILLIAM M. BUNN,
dec. 31—4t. Register.

Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, FEBRUARY 7, 1873. No. 6.

PRINTED EVERY FRIDAY,
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ONE COPY FOR ONE YEAR, THREE DOLLARS.

Court of Common Pleas of Philadelphia.

In re CREDIT MOBILIER.

1. Under the act of 1856, the powers of courts of common pleas to dissolve corporations, is not restricted to any class of corporations.
2. A petition for dissolution can be filed only in the county where the corporation has its principal office or place of business, or where its business is chiefly conducted. Hence, if its chief place of business be in another State, it cannot avail itself of the benefit of the act.
3. The capital of banking and other monied corporations, constitute a trust fund and pledge for the payment of creditors and stockholders, and a court of equity will lay hold of the fund, and see that it is duly collected and applied.
4. The court must be satisfied before entering a decree of corporate dissolution, that it may be done without prejudice to creditors, stockholders, or the public welfare.

Opinion by ALLISON, J. Delivered February 1st, 1873.

In the matter of the petition of the Credit Mobilier of America for decree of dissolution.

The petitioners are a corporation chartered by the Legislature of Pennsylvania in 1859, under the name of the "Pennsylvania Fiscal Agency," and by the act of March 26th, 1864, the name of the corporation was changed to that of the Credit Mobilier of America.

The petition is based upon the act of April 9th, 1856. P. L. 293, which declares that it may be lawful for the Court of Common Pleas of the proper county to hear the petition of any corporation praying for permission to surrender any power contained in its charter or for the dissolution of such corporation; and if such court are satisfied that the prayer of such petition may be granted without prejudice to the public welfare or the interests of the corporators, the prayer of such petition may be granted. The restrictions on the exercise of this power, are that such surrender shall not remove any limitation or restriction contained in the charter; that the accounts of the managers, directors or trustees of any dissolved company shall be settled in or approved by the court, and dividends of the effects shall be made among any of the corporators entitled thereto, as in the case of the accounts of assignees and trustees.

The petition asserts that from a date anterior to July 6th, 1868, the corporation has transacted no business except to collect assets and pay previous liabilities and expenses incident to litigation, and that it has no other functions than these to perform, except to distribute among creditors, if any there be, and divide surplus among persons entitled to the same. That by reason of pending suits against the corporation, they are prevented winding up and making distribution of assets.

The reasons assigned in support of the application, are the inconvenience and expense of maintaining the organization, and taxation imposed on their unemployed capital.

At an adjourned meeting of the corporators, held June 12th, 1872, at which 22,900 shares of stock were represented, a vote was passed authorizing the present application; Henry S. McComb, alone, by his attorneys, protesting against the action of the meeting. A resolution was at the same time passed, requesting the directors to vest the property and assets of the company in trustees, in the event of a dissolution being obtained, *in trust*, to pay all claims on the corporation, and distribute the assets among the persons entitled to the same.

This instruction was carried into effect by a conditional conveyance of all the property of the corporation to three trustees, citizens of the city of Boston, Massachusetts, in trust, for the objects set forth in the resolutions of July 12th, 1872.

The case is before us at this time on exceptions filed by Henry S. McComb to the report of the master, to whom the petition was referred. The report recommends that the prayer of the petitioners be granted.

It is made a ground of objection that the act of April 9th, 1856, does not apply to corporations chartered by the Legislature; that the true intent and meaning of the act is, that no other corporations except such as are created by decree of the Court of Common Pleas, can avail themselves of its provisions. If we felt at liberty to regard this as an open question, there is much in this suggestion worthy of serious consideration. It might be proper for us to look at the title of the act, as needed to let light in upon that which may be regarded as obscure without it, it is called a supplement to the acts relating to incorporation by the courts of common pleas, and the context of the act would seem to point to corporations created by the Common Pleas of the "proper county" which is authorized to entertain jurisdiction of the application, and it needed subsequent legislation to explain the true meaning of the term proper county. A legislative interpretation was given to it by the act of April 4th, 1872, which provides that the proper county intended by the act of April 9th, 1856, may be either the county in which the principal operations of the corporation are conducted, or the county in which its principal office or place of business is located. But it may be a question of no little difficulty in some cases, to settle even this point, as where a corporation, like a railroad or canal company, may extend from one border of the commonwealth to the other, having extensive operations and places of business in several counties. There are other considerations which it might be proper to refer to in this connection, if we did not regard the question as settled against the exceptant by the case of The Commonwealth v. Safer, 3 P. F. S. 71, which holds that the act of 1856, does not restrict the power of courts of common pleas to dissolve corporations, to any class of corporations, whether chartered by the Legislature, or by the courts, or by letters patent, granted by the governor, under the act of July 18th, 1863, relating to the incorporation of mechanical, manufacturing, mining and quarrying companies. This decision we regard as the conclusion of all controversy upon this point; nor do we agree with the argument made by the exceptant, that we ought to consider as extra judicial all that is contained in the opinion of the court, giving to the act an interpretation broad enough to embrace companies chartered by the Legislature, because not necessary to the decision of the question then before the court. But the point was doubtless made in resisting the application for a mandamus to compel the secretary of the commonwealth to file in his office a decree of the Court of Common Pleas, dissolving a corporation holding letters patent from the governor, under the act of July 18th, 1863. To the broad question the court addressed itself in the decision of the cause, which stands to us as *res adjudicata*, behind which we cannot go; we, therefore, pass by, without further remark, the very able argument made by the counsel for the exceptant, against giving to the act under which the petition is filed, a construction which takes in corporations whose authority is desired by direct grant from the Legislature. Starting with this as a point established against the exceptant, is the way clear on all other grounds for a decree of dissolution and surrender of corporate power?

It is not unworthy of remark just here, that the master has not found as a fact, that which is necessary to give jurisdiction to this court. No one could have decided before the act of April 4th, 1872, the "proper county" in which to make the application for dissolution; this is determined by the fact of location of the principal office or place of business, or the county in which the business of the corporation is chiefly conducted. Before a petition for dissolution can be entertained, one or the other of these facts ought to appear *prima facie*, at least, and before a decree in accordance with the prayer of the petitioner can be entered, such fact must be shown to the satisfaction of the court.

This does not appear to have been done, perhaps because it could not have been established. In the charge of Judge Pearson, reported in 17 P. F. S. 250, in the case of the Credit Mobilier, v. The Commonwealth, I find this statement: "The corporation was created by the Legislature of Pennsylvania, and was required to keep an office in this State, which was done in point of form merely, as all of its business was transacted in the cities of New York and Boston, where the stockholders mainly resided."

Assuming this to be true, the petitioners are not entitled to make application in the Court of Common Pleas of either of the counties of this commonwealth; if its principal offices and places of business are in other States, then it is not in a position to avail itself of the benefits of the act under which the petition is filed, for the act of 1872, clearly contemplates the location of the principal office, or the transaction of the chief part of its business, in one or the other of the counties of Pennsylvania, as determining the "proper county" in which to make application under the act of 1856.

It is further objected against the right of the petitioner to the decree of dissolution, that the act does not contemplate the case of a corporation whose affairs are unsettled, and against which suits are pending and undetermined. It is confessed in the petition filed, that suits have been instituted against the Credit Mobilier, which places them in the position of not being able to wind up the affairs of the corporation by a division of corporate property among stockholders and creditors whose claims are not denied. The act does not, in terms, provide for the ascertainment or payment of debts due to creditors.

The court must see that the public welfare and the interests of corporators suffer no prejudice, and this would seem to look to the dissolution of a corporation when its affairs were settled up, so that nothing remained to be done but to divide the effects among corporators who are the members of the corporation or stockholders of the body. The omission of the act to provide in terms for the ascertainment of the claims of creditors, and distribution among them, favors this view, and unless such power can be drawn from the latter clause of the sentence referring to the settlement of the accounts of the corporation, it does not exist. It says the accounts shall be settled and approved by the court, and dividends of the effects made among corporators, as in the case of the accounts of assignees and trustees. The master is of the opinion that creditors may maintain their claims on settlement of the accounts as contemplated by the act. He asks, may not the company's liabilities be ascertained in this court, upon the settlement of the accounts of the trustees, and will not this satisfy any creditor, and fully meet the substantial requirements of justice?

No stronger reason can be urged against this interpretation of the act because of the magnitude of the interests which by this process might be brought into liquidation, than could be made against the settlement of the affairs of a bank, or railroad, or other corporation which should make an assignment for the benefit of creditors, involving property of the value of millions of dollars, and the adjustment and payment of claims of equal magnitude.

But with this much conceded we are not prepared at this stage of the proceeding to decide that such is the correct interpretation of the act, and to give a binding construction to it now; this can be better done when the question arises, if it ever should, upon the report of an auditor making distribution upon settlement of the accounts of the directors of the corporation, as preliminary to a decree of dissolution. Upon one point we are very clear in our opinion, that is, that no such decree should be made in any case until the court are able to make distribution among the corporators of that which remains after the payment of creditors; so that we can with certainty carry out the injunction of the act, and see to it that the decree works no prejudice to the interests of the corporators, and at the same time guards the just interests of those whose rights stand upon an equity prior to that of the stockholders.

Such has been the practice of this court in all cases which have been brought before us, under the act upon which the petitioners ground their application. The instances have not been frequent, but several have arisen and been acted on, where incorporated engine or hose companies have gone out of service since the paid fire department of the city has taken the place of the old organization. The exceptant, Henry S. MacComb, is not merely a creditor by demand, made to the officers of the corporation, for payment of his claim, but in 1868 he brought suit in the Supreme Court of Pennsylvania, in equity, against the Credit Mobilier in its corporate capacity, and Sidney Dillon, et al., claiming that he is the owner of between three and four hundred shares of the stock of the company, together with all the dividends and profits accrued thereon since 1866. He seeks, in this proceeding in equity, to recover the value of 375 shares of stock, at $500 per share, and profits amounting to $280,000, which he claims had accrued thereon up to the

date of the finding of this bill. This suit is still pending and undetermined. It is not doubtful what the effect of a decree of dissolution would have upon this claim if the exceptant was seeking to enforce its payment by suit at law. It is certainly true that *at law* debts due to and from a corporation, are totally extinguished upon dissolution, so that neither can they be recovered by it or charged against it, and both at law and in equity all pending suits by or against thereby abate. Angell & Aymes, S. 779.

Where, during the pendency of a suit, a corporation surrenders its charter, which is accepted by the Legislature, it becomes defunct and the suit abates, unless the Legislature save the right of action against the corporation. 3 Story, 567; Greeley v. Smith. And this must be equally true where the Legislature, without saving the rights of suitors, gives to the courts the power to accept a surrender of corporate authority, and decree the death of the body. To the same effect is Merrill v. The Bank, 31 Maine Reports, 57; May v. State Bank, 2 Robinson, 56.

This is conceded by the master, who reported in favor of a dissolution, and says a technical abatement of a suit at law against the Credit Mobilier would be worked by a decree of dissolution, whilst the rights of a creditor remain in equity unaffected, as against the assets of a dissolved corporation. It is difficult to see how a suit at law can be maintained after the death of the defendant, who can make no temporary disposition, appoint no executor, and upon whose estate no administration can be raised.

The master, however, holds that as the assets of the corporation in the hands of the trustees are held subject to any claim that may be established against them by creditors, the protection is ample. The question is asked, without being answered, may not the trustees be made parties defendant to the suit in the Supreme Court? This may be so, and yet there is room to doubt whether the suit against the corporation now pending would not abate, and the creditor be turned over to a new proceeding against the trustees.

The equity of the creditor to obtain satisfaction of his debt out of the assets of a dissolved corporation, is now well established. In support of this doctrine the master cites 8 Peters, 281; 15 Howard, 304; 8 Georgia, 493; 10 Paige, 541.

He also cites from Chancellor Kent, who states the doctrine thus: The rule of the common law has, in fact, become obsolete; it has never been applied to dissolve monied corporations in England. The sound doctrine now is, as shown by statutes and by judicial decisions, that the capital and debts of banking and other monied corporations, constitute a trust fund and pledge for the payment of creditors and stockholders; and a court of equity will lay hold of the fund and see that it be duly collected and applied.

But whether the present suit in equity can be maintained by calling in the trustees as parties defendant, after the death of the corporation, or whether a new proceeding would have to be instituted, we should pause before we make a decree that might impose on suitors against the Credit Mobilier great risk and inconvenience in the prosecution of their claims against the company. We are not to shut our eyes to the fact that all three of the trustees are citizens of the State of Massachusetts, and not therefore within reach of the process of courts of Pennsylvania, and that a decree such as is prayed for, would to a great extent, if not wholly, deprive the exceptant and other suitors in equity from obtaining such further discovery as they may be entitled to have in the maintenance of their demands. If dead in law, the corporation could make through its proper officers no further answer to inquiries that might be important, if not essential, to more full and perfect discovery in equity.

The master, as we have seen, asserts the general doctrine that equity will carry the effects of a dissolved monied corporation over to the trustees for the use and in trust for creditors. But the rights of creditors, under the act of 1856, to make claim upon the funds of the corporation in the hands of the trustees, upon accounts settled under the act, which in direct terms makes no provision for creditors, is not entirely free from doubt; the question should be settled before we enter the decree prayed for. Nor is it satisfactorily shown that the pending suit in equity would not fall dead the moment such a decree was made; nor in what way the trustees, if the suit survives, can be made parties to it, if they elect to keep beyond the jurisdiction of the court. A decree ought not to be made that would subject suitors to either one or the other of these risks, which would impose great inconvenience if suits had to be again brought, and might result in entire loss of remedy before the tribunals in which they have chosen to litigate their claims. To do that which we are asked to do, in advance of the settlement of the accounts of the corporation, would be to bar in some degree the way of justice, and impair, if we did not destroy, the remedy which the law of the land now gives to those having claims against the body.

But there is still another reason why we should at least pause and at this time refuse the petitioners the death for which they pray. The law says that the court must be satisfied before entering a decree of corporate dissolution, that it may be done without prejudice to public welfare. In view of recent developments, which reach us as a part of the history of the Government making inquisition into the past transactions and present standing of the Credit Mobilier of America, can any one affirm that the dissolution of this corporation would be without prejudice to the interests of the public?

The Government has given notice that it claims to be a creditor of the corporation to a large amount. Congress has by its action directed the employment of counsel to investigate and prosecute such claims. Shall we embarrass the possible future action dependent on such an inquiry, by taking from the body its very existence, and enable it to pass out of sight, by quietly descending into a grave, which by anticipation it has prepared for itself, and turn the Government as well as individual creditors over to a scramble for the effects of the body?

This corporation should be compelled to continue to live and stand in its proper place until the way be made clear, beyond reasonable doubt, that without prejudice to public welfare or the interests of corporators, and we may add that of creditors, we may safely give to it the death which it desires to die by our hands.

The exceptions to the report of the master are sustained, and the prayer of the petitioners is refused.

Court of Quarter Sessions.

CITY v. WILLIAMSON.

1. Every presumption is in favor of marriage, and it will not be destroyed upon doubtful testimony.
2. A foreign statute upon the subject of marriage, which is in direct conflict with the established policy of the American government, and tends also to debase and destroy public morals, will not be recognized as binding.
3. Where a marriage took place in Ireland, and the parties lived and cohabited there as man and wife for sixteen years, and the husband then established his domicile here, if an English statute be interposed as a bar to proceedings against him for desertion, in the absence of evidence clearly establishing the fact that the case is within the statute, an order will be made for the support of the wife.

Desertion.

Opinion by LUDLOW, J. Delivered February 1st, 1873.

This case presents a number of questions, all of them interesting, and in view of the facts proved somewhat novel.

The real plaintiff here is a woman, who alleges that she married the defendant, lived with him as his wife for sixteen years, and was the mother by him of seven children, all are now dead except two, and one of the survivors appears with his mother in court. The defendant does not deny that he went through the ceremony of marriage with this woman, and that the ceremony was performed by a Catholic priest, in a private room at Antrim, in Ireland, at or near the place of the then residence of the parties; the cohabitation and birth of children during a period of sixteen years is admitted, but the defendant declares he is, and always has been a Protestant, and interposes as a flat bar to this motion an English statute, passed in the nineteenth year of the reign of George II, which declares, chap. 13, section 1: "That every marriage that shall be celebrated after the 1st day of May, 1746, between a Papist and any person who hath been or hath professed him or herself to be a Protestant at any time within twelve months before such celebration of marriage, or between two Protestants, if celebrated by a Popish priest, shall be and is hereby declared absolutely null and void to all intents and purposes, without any process, judgment, or sentence of law whatsoever."

As a consequence, it has been argued that the children of these parties are bastards, and their mother nothing more than a concubine.

With these facts before us, and these consequences likely to flow from a decision in favor of the defendant, we are more anxious to give to him the amplest opportunity to sustain his case; to do so, however, he must very clearly establish the existence of the law, and of the facts necessary to bring his case within its provisions, and we must be certain that the case is one which does not fall within the class of exceptions recognized by all jurists, and, moreover, that to enforce a general principle will not be to destroy that policy of our own government, which will not tolerate the enforcement of a law born in bigotry and intolerance, and which will carry havoc and ruin into many a virtuous household. The general principle undoubtedly is that between persons *sui juris*, marriage is to be decided by the laws of the place where it is celebrated; if valid or void there, it is valid or void everywhere. But Judge Rogers in delivering the opinion of the court in Phillips v. Gregg, 10 Watts, 168, most righteously observes that our courts have not established, *e converso*, that marriages of citizens not good, according to the place where celebrated, are universally and under all possible circumstances to be disregarded." Well known and universally recognized exceptions to the general rule exist, as in cases involving polygamy or incest; for, says Chancellor Kent, no Christian country will recognize such marriages. 2 Kent, 91, note.

Story, in his Conflict of Laws, pp. 85, 87, 91 and 92, in substance, maintained that, whenever the laws of a foreign country are in violation of the laws of God, sound principles of morals, or settled principles of public policy, they will not be recognized.

Bishop, in his work upon Marriages and Divorce, p. 130, also refers to cases which must of necessity be exceptional. Indeed, the whole doctrine of the law upon this important subject, while it recognizes the law of marriage as a part of the *jus gentium*, as distinctly enforces the idea that in the application of that law, the courts having jurisdiction of a particular case, must be governed by the facts of that case, and by its opinion of the applicability of the general principle to the particular cause.

It is not absolutely necessary now for us to dispose of this motion upon a question of law alone. Granting that the English statute is now in force and has been properly proved, if it could be disposed of upon no other ground, I incline most strongly to the opinion that, in so far as it is now sought to destroy this marriage, the effort must be abortive, for upon grounds of public policy an American court cannot recognize the legal effect of this English statute.

The words public policy may have an unlimited meaning, and therefore we pause here to specify some of the reasons which induce us to use that language.

Marriage is universally regarded as the foundation stone of all the social relations. Without its existence the social fabric falls into ruins. The presumption of law is always in its favor, and he who contests its validity has the burden of proof thrown upon himself.

A religious test is of all things most objectionable to an American legislator or jurist, and a law which would bastardize issue and destroy civil rights upon the basis of a difference of opinion in religion, could not be tolerated in the United States. The government is one of universal toleration, and its policy has been and is to invite to its hospitable shores the inhabitants of all the earth. Foreign governments, to execute their own schemes may, indeed, render impossible marriages between different classes of their own subjects; but unless we are prepared to give effect to laws, the relic of other days, days of bigotry and rank intolerance, and of a policy as short-sighted as it was cruel, we will declare that universal toleration, hospitality, and protection, shall not only be proclaimed, but shall also be enforced.

We shall not be told that a husband and father may come into this jurisdiction, make it his domicile, and then when followed by his wife and children, shall deliberately turn them all out upon the cold charity of the world, proclaiming that every right has been destroyed by virtue of an antiquated statute. Seizing the principle that exceptions do exist to the general rule of law upon the subject of foreign marriages, sustained and fortified upon this point by the opinions of text writers, jurists, and publicists the most eminent, we are not to be deterred from the expression of an opinion by any supposed international law, which would countenance as binding upon us an English statute, which, if it does not belong to the class which includes bigamy and polygamy, certainly does deserve to be ranked among those laws, enacted by another sovereignty, which tend to debase public morals, and to introduce a test utterly at war with a fundamental principle of American government. If this nation, in the strength of its manhood, is to be respected; if it has achieved the right to speak and to be heard, its policy upon this subject ought to be marked and understood; and it surely will entitle itself to the grateful consideration of the civilized world, if it emphatically declares that upon the subject of marriage, and especially its destruction, it will determine every case by its own enlightened principles of morals and of public policy, and, in such a cause as this, upon the policy of universal toleration.

There is another view to be taken of this cause. The English statute has not been proved according to law. It may be in force, but we are not absolutely certain that it has not been qualified, become obsolete, or been repealed; and therefore we are not bound to regard its provisions. Assume, however, that it is in force: how stands the cause upon the evidence?

Mrs. Williamson details the circumstances of courtship and marriage. Her testimony as to cohabitation and reputation of marriage is corroborated by several other witnesses.

Upon the question of the religious faith of her intended husband, we do not agree with the view taken of the evidence by defendant's counsel. We think Mrs. W. declares that she told him she would never marry a Protestant; that he wrote a letter to the priest, which he showed to the plaintiff, informing him that he was a Catholic; that he so informed his intended wife before marriage, adding that he had for a long time been a Catholic.

He was married by a Catholic priest. His children were baptized by a Catholic priest in his own house and presence. The defendant admitted, on the hearing, that he took his son James in a carriage to the Catholic chapel to be confirmed by the bishop. To the important and essential points in this testimony, the defendant interposes an absolute denial, but he stands alone, and as to collateral matters, he was contradicted in several particulars.

If a doubt existed as to his religious faith, that doubt would settle the case in favor of the wife, for, as the presumptions of law are in favor of, rather than against, a marriage, it cannot be destroyed by doubtful testimony.

We, however, go further than this, for upon the evidence we have no doubt that Williamson did represent himself to be a Catholic, and had done so for a long time before the celebration of the marriage.

In Yelverton v. Yelverton, 4 McQueen's H. of L. Cases, p. 862, Lord Wensleydale said: "The appellant having been born a Protestant, must be deemed to have continued so, unless he had done something to denote a change in his religious persuasion, and nothing of that kind appears."

And again, "Had he said he was a Roman Catholic, it would have raised the question reported to have been decided by Baron Alderson in Regina v. Owell, whether he was estopped by his declaration that he was a Roman Catholic."

The evidence here, as we have already stated, seems to be, at best, in a doubtful condition upon one point, but the weight of it seems to establish the fact that this defendant considered himself a good enough Catholic to contract this marriage, to live for sixteen years unmolested by any legal authority, to become the father of seven children by his wife. Nor did the defendant discover how thorough a Protestant he was until it became convenient to abandon this wife, establish a denial here, and contract another marriage with another woman in this country.

It gives me great judicial satisfaction to be enabled, upon the facts before me, to render a decision in favor of this wife; to make this faithless husband and father, who did not hesitate in fact to brand his own offspring, in an open court of justice, as a bastard, to understand that justice is administered here, and that his conduct does not fail, in the most unequivocal manner, to meet with the sternest, most uncompromising judicial condemnation.

Let an order be prepared directing the defendant to pay for the support of his wife $6 per week, and let a bond in the usual form be also prepared in the sum of $700, conditioned for the faithful performance of this order.

Daniel Dougherty, Esq., for wife.

Ford & Bonham, Esqs., for defendant.

ACTS OF CONGRESS.

The following list embraces a statement of the material parts of all the acts of Congress of general interest, thus far passed at the present session.

An act to amend the one hundred and thirty-third section of an act approved June 8th, 1872, entitled "An act to revise, consolidate, and amend the statutes relating to the post office department." Approved January 9th, 1873.

The effect of this statute is to authorize the transmission by mail of packages of seeds, cuttings, bulbs, roots, and scions of any weight, for each package not exceeding four pounds, at a rate of postage of one cent for each two ounces or fractions of an ounce of such package.

By the previous law, such packages sent through the mail could not exceed twelve ounces in weight.

An act supplemental to and amendatory of an act to prescribe the mode of obtaining evidence in cases of contested elections, approved February 19th, 1851. Approved January 10th, 1873.

Sections one and two prescribe the time within which testimony, in cases where a contest arises as to election of a representative in Congress, may be taken, and authorize depositions of witnesses to be taken in the districts in which they reside. Sections three and four prescribe the course of the examining officers anywhere throughout the United States, in taking depositions and returning them. The act reads as follows:

SECT. 1. That in all contested election casesthe, time allowed for taking testimony shall be ninety days, and the testimony shall be taken in the following order: The contestant shall take testimony during the first forty days; the returned member during the succeeding forty days, and the contestant may take testimony in rebuttal only during the remaining ten days of said period. Such testimony in rebuttal may be taken on five days' notice. Testimony may be taken at two or more places at the same time.

SECT. 2. Depositions of witnesses residing outside of the district and beyond the reach of a subpœna, may be taken before any officer authorized by law to take testimony in contested election cases, in the district in which the witness to be examined may reside.

SECT. 3. That the party desiring to take a deposition or depositions under the provisions of this act, or of the act to which this is an amendment, shall give the opposite party notice, in writing, of the time and place, when and where, the same will be taken, as well as of the name of the witness or witnesses to be examined, and of the name of an officer before whom the same will be taken. The notice shall be personally served upon the opposite party, or upon any agent or attorney of his authorized by him to take testimony or cross-examine witnesses in the matter of such contest, if, by the use of reasonable diligence, such personal service can be made; but if by the use of such diligence, personal service cannot be made, the service may be made by leaving a duplicate of the notice at the usual place of abode of the opposite party. The notice shall be served so as to allow the opposite party sufficient time by the usual route of travel to attend, and one day for preparation, exclusive of Sundays and the day of service. And the taking of the testimony may, if so stated in the notice, be adjourned from day to day. The notice with the proof or acknowledgment of the service thereof, shall be attached to the depositions when completed. The party notified as aforesaid, his agent or attorney, may, if he see fit, select an officer (having authority to take depositions in such cases) to officiate with the officer named in the notice, in the taking of the depositions; and if both such officers attend, the depositions shall be taken before them both, sitting together, and be certified by them both. But if only one of such officers attend, the depositions may be taken before and certified by him alone. It shall be competent for the parties, their agents, or attorneys authorized to act in the premises, by consent in writing, to take depositions without notice; and it shall also be competent for them, by such written consent, to take depositions (whether upon or without notice) before any officer or officers authorized to take depositions in common law or civil actions, or in chancery, by either the laws of the United States or of the State in which the same may be taken, and to waive proof of the official character of such officer or officers. Any written consent, given as aforesaid shall be returned with the depositions; and every such officer so chosen by the parties, their agents or attorneys, and officiating, shall have all the powers in the premises that are conferred by the act to which this is an amendment, upon the officers named therein. At the taking of any deposition under this act, or the act to which this is an amendment, either party may appear and act in person, or by agent or attorney.

SECT. 4. All officers taking testimony to be used in a contested election case, whether by deposition or otherwise, shall, when the taking of the same is completed, and without unnecessary delay, certify the same, and carefully seal and immediately forward the same by mail, addressed to the Clerk of the House of Representatives of the United States, Washington, D. C.; and shall also endorse upon the envelope containing such deposition or testimony, the name of the case in which it is taken, together with the name of the party in whose behalf it is taken, and shall subscribe such endorsement. Upon the written request of either party, the clerk of the House of Representatives shall open any deposition at any time after he shall have received the same, and he may furnish either party with a copy thereof.

An act to amend section twelve of an act entitled "An act to authorize the appointment of shipping commissioners," &c., approved June 7th, 1872. Approved January 15th, 1873.

The act here referred to, is the well known act passed last year, prescribing the general rule that seamen for merchant vessels, with certain exceptions, should be shipped by an agreement in writing specifying certain terms and stipulations, and signed in the presence of a "shipping commissioner."

The new act provides that the above requirement shall not apply to vessels when engaged in trade between the United States and the British North American possessions, or the West India Islands, or the Republic of Mexico.

An act to prevent certain officers of the United States and Territories, from practicing as attorneys or solicitors in courts of the United States, in certain cases. Approved January 16th, 1873.

This act provides that no clerk, assistant, or deputy clerk of any territorial, district, or circuit court, or of the Court of Claims, or the Supreme Court of the United States, or marshal or deputy marshal of the United States, within the district for which he is appointed, shall act as solicitor, proctor, attorney, or counsel in any cause depending in either of said courts, or in any district for which he is acting as such officer, under penalty of being stricken from the roll, and if a marshal or deputy marshal, dismissal from office.

An act to amend an act entitled "An act relating to members of Congress, heads of departments, and other officers of the Government," approved June 11th, 1864. Approved January 16th, 1873.

The former law forbade any member of the Senate or House of Representatives, while in office, or any departmental officer, to receive or agree to receive, any compensation for any services to any person in relation to any proceeding, claim, &c., or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau officer, or any civil, military, or naval commission whatever; and declared his doing so punishable by fine and imprisonment.

The new law extends the prohibition and penalty to delegates from the Territories and District of Columbia.

LEGAL GAZETTE.

Friday, February 7, 1873.

JOHN H. CAMPBELL,
EDITOR.
THEODORE F. JENKINS,
ASSOCIATE EDITOR.

DEATH OF JUDGE SMYSER.

ACTION OF THE ADAMS COUNTY BAR.

At a meeting of the judges, members of the bar, and officers of the courts of Adams county, held January 13th, 1873, Hon. Robert McCurdy was called to preside, and John M. Krauth, Esq., appointed secretary.

On motion of R. G. McCreary, Esq., a committee, consisting of Messrs. E. B. Buehler, D. McConaughy and D. A. Buehler, was appointed to draft a minute expressive of the views of the meeting on the occasion of the death of Hon. Daniel M. Smyser. The committee reported an appropriate minute *in memoriam*, which was unanimously adopted after remarks by Messrs. R. G. McCreary, E. B. Buehler, D. McConaughy, and D. A. Buehler, viz.:

On Monday afternoon, Jan. 27th, 1873, Edward B. Buehler, Esq., presented to the court, this action of the members of the bar and officers of the court on the death of Judge Smyser, with a motion that they be entered on the records of the court, and that the court adjourn, as a mark of respect for the memory of the deceased. Mr. Buehler accompanied his motion with a few remarks, referring to his intimate relations to the deceased as law student under him, and in subsequent practice at the bar. The minute thus presented having been read by the prothonotary, Judge Fisher ordered it to be entered on the records, at the same time paying a handsome tribute to the deceased in the following words;

Our feelings of respect and regard for the Hon. Daniel M. Smyser in his lifetime cannot permit this motion to be acted upon, without paying our tribute to his character, as a citizen, a lawyer, and a judge.

Our acquaintance with him has been long, and our intercourse of the most friendly character. The first time we visited Gettysburg on professional business, although an entire stranger to him, he tendered to us the use of his library and his office; and afterwards, whether concerned with him or opposed to him, we always received the same polite invitation.

At the time of his decease, he was the survivor of those who composed the Adams county bar when we first became acquainted with it. In a few short years death has claimed all of them for his own.

Daniel Martin Smyser was born on the twenty-seventh day of February, 1809, at the residence of his father, the late Hon. George Smyser, near "Table Rock," Straban township, this county. On the removal of his parents to Gettysburg, their son was placed at the best school this town afforded, and at a proper age was prepared under the direction of the Rev. David McConaughy, D. D., for his collegiate course. Early in life he entered Dickinson College, and graduated with the highest honors of his class in September, 1827, being then eighteen years of age. On his return home he entered as a student at law the office of Hon. Thaddeus Stevens. On his admission to the bar on the 23d of August, 1831, he became a partner of that gentleman as an attorney at law, which relation continued until 1841, when Mr. Stevens removed to the city of Lancaster.

Mr. Smyser was an active and ardent member of the Whig party, and was elected to the House of Representatives of this State in 1849. In that body he distinguished himself as an able and eloquent debator, and exhibited such marked ability that Governor Johnson selected him as a suitable person to fill the important office of attorney general of Pennsylvania; but Mr. Smyser declined the appointment for the reason that, having been elected by the people of his native county as her representative in the councils of the State, it was his bounden duty to serve them in that capacity, and not accept another position, although of greater honor and emolument, which required him to sever the official relations which then existed between himself and his constituents. Surely this was a rare instance of the sacrifice of personal preferment at the shrine of duty, and well worthy to be remembered, and well deserves to be remembered, and is worthy of imitation in all time to come.

At the close of Mr. Smyser's term of service in the Legislature, he was nominated as a candidate to represent York and Adams counties in Congress, but failed of an election by less than four hundred votes.

The commission of Chief Justice Black expiring in December, 1854, Mr. Smyser received the nomination of the Whig party to fill the vacancy thus created on the bench of the Supreme Court; but Judge Black was re-elected.

In 1851, most unexpectedly, and without any previous knowledge on his part, Mr. Smyser was nominated for president judge of the Seventh Judicial District, and having accepted the nomination was elected to that office by a large majority. He then removed to Norristown, where he has since resided. On the expiration of his term of office he recommenced the practice of law, and for nine or ten years did so with great ability and success. For the last year or two, his health has declined rapidly, and he died at the residence of his son-in-law, David Wills, Esq., at Gettysburg, on the eleventh of this month.

Mr. Smyser was eminently fitted for the profession of his choice. His perceptions of all subjects were clear and accurate; in addition to which he possessed what may be called a legal mind. When he came to the bar, he was well grounded in its elementary principles; and being so, in his early practice he revolved in his own mind any legal question submitted to him in the light these principles afforded, and then turned to his law books to discover whether his conclusions were sustained by adjudged cases—a course well calculated to make him the sound lawyer he afterwards became.

From his youth to his latter days he was a close and diligent student, and it is to be feared that severe and unremitted mental labor brought on the disease that terminated his professional career.

In addition to other qualifications, Mr. Smyser brought to his assistance at the bar a correct literary taste, formed by the study of the ancient classics and the standard writers both of England and America.

The hours that many professional men spend in frivolous pursuits, called by them relaxation, HE spent in reading works on science and history, the poets, or the light productions of the day.

As a practitioner of law, the interests of his client were always looked to rather than his own emolument, and his views of the case were given with sincerity and truth. He discouraged litigation, when no honest or proper end was to be obtained by it; but when justice was sought, or innocence was to be defended, he left no honorable means untried to insure success. To his opponents he was frank and courteous, and no man ever tried a case with him as an opponent who did not form a high opinion of his fair and upright action and gentlemanly bearing.

As a legislator, he was the leader of his party in the House. His views on public questions were presented in a forcible manner, and proved him to be rather a statesman than a politician, and more anxious to serve his country than promote mere partisan ends.

As a judge, to the laborious duties of the bench he brought accurate legal learning and untiring industry. In the trial of cases, where the facts were many and complicated by conflicting testimony, he exhibited an ardent desire to analyze them, separating the truth from the falsehood, to place them in a proper light before the jury. Upon questions of law, where the decisions of courts were in conflict, he was indefatigable in his research, and delivered his conclusions in opinions fraught with learning and sound and convincing argument. On all occasions he treated with great kindness the junior members of the bar. He desired to have them well instructed and improved in their profession; to this end he encouraged the establishment of a Moot Court, and allowed himself to be elected their presiding officer. In this capacity he sat in their imitative court, prepared for it imaginary cases, heard them argued with patient attention, delivered opinions, and referred to cases of undoubted authority to elucidate the points of law involved and decided in them.

His great legal knowledge, judicial firmness, and unbending impartiality and integrity, obtained for him the confidence and respect of the bar and the public; whilst the kindness of his disposition, social qualities and liberality, secured for him their regard and affection. Why should we multiply words? We can sketch the character of Judge Smyser in a single sentence: He was respectful, obedient and affectionate as a son; tender, kind and loving as a husband and father; faithful as a friend; conscientious as a lawyer; public spirited as a citizen; pure as a legislator; upright and incorruptible as a judge. In short—in thought, speech and action, he was an honest man and an honorable gentleman.

In conclusion, we tender our sympathy to the bereaved wife and family of our deceased friend—direct that the resolutions adopted by the members of the bar and officers of the court, at the time of his death, be entered on the records of the same—and order that the court do now adjourn as a mark of our respect for his memory.

Our thanks are due to Hon. Benjamin Vaughn Abbott, Commissioner to revise the United States Statutes, for abstracts of the general laws passed during the present session of Congress. We print them in another column.

Supreme Court of Pennsylv'a.

In the Supreme Court, on Monday, February 3d, 1873, S. M. Murphy, Esq., on motion of John Goforth, Esq.; and John Grady, Esq., on motion of E. Spencer Miller, Esq., were admitted to practice as attorneys of the court.

The following judgments were entered:

County of Northumberland v. Borough of Sunbury. Error to Common Pleas of Northumberland. The judgment in this case is erroneous in not being for the interest as well as the principal of the debt. We, therefore, modify said judgment by entering judgment for the plaintiff below, for the sum of $4.500, with interest from the 1st day of May, 1866, to the day of the date of the judgment upon the case stated.

Cummings v. Richter. Error to Union county. The striking off of the appeal at the cost of the defendant, is affirmed upon the opinion of the court below.

Drunkenmiller v. Renn. Northumberland county. Judgment affirmed.

Schrack v. State Bank, at Harrisburg. Error to Common Pleas of Union county. Judgment affirmed.

Bagar v. Henning. Union county. Judgment affirmed.

Drunkenmiller v. Bowen. Northumberland county. Judgment affirmed.

Overseers of Madison Township, Columbia county, v. Overseers of Hemlock Township, Montour county. Error to Quarter Sessions of Montour county. The order affirming the order of removal is affirmed upon the opinion of the court below.

Teets v. Miller. Error to Northumberland county. Writ of error quashed.

Lynn v. Miller. Error to Common Pleas of Northumberland county. Writ of error quashed.

By MERCUR, J.:

Union R R. & Transportation Company v. Jacob Riegel & Co. Certificate from Nisi Prius. Judgment reversed and *venire de novo* awarded.

The Court appointed Messrs. Theodore Cuyler, Wm. H. Rawle, Samuel C. Perkins, C. H. T. Collis, and George Biddle, a committee to revise the equity fee bill.

The court promulgated the following

RULE OF COURT.

On Monday last the Supreme Court made the following order and rule, by reason of which the practice in paying money into court will be the same in that court as it is under the recent rule adopted by the District Court. The justice of this rule is admitted by all, and we think it is the unanimous opinion of the bar that it would be advisable for the court of Common Pleas to adopt the same or a similar rule.

"Sections 43 and 45, of Rule XVI., in the printed rules of practice in the Supreme Court, are repealed, and the rule now adopted is to be section 43 of said rule, as follows:

"Rule XVI., set. 43. The court order and direct that 'The Pennsylvania Company for the Insurance on Lives and Granting Annuities,' shall be the bankers and depository of this court. All moneys paid into this court in banc or at Nisi Prius, by the sheriff, shall be paid by him directly into said company to the credit of the court in the particular suit or proceeding in which the payment is made, and the said company shall keep a separate account of each of said payments, designating by the term and number or other sufficient description thereof, and the entries made accordingly in said book shall be evidence that the money is so deposited in the said company to the credit of the court in that particular suit or proceeding. A duplicate of said deposit book shall also be kept by the prothonotary of this court, in which the same entries shall be made by the said company; when the sheriff is about to pay money into court, in any suit or proceeding, they shall receive the said duplicate deposit book from the prothonotary, and as soon as the deposit and the proper entry by the said company shall have been made as aforesaid, in each of the said deposit books, the said duplicate deposit book shall be returned by the sheriff to the prothonotary. All moneys paid into this court in banc, or at Nisi Prius, by parties other than the sheriff, shall in like manner be paid directly into said company to the credit of the court in the particular case or proceeding in which it is paid, and the receipt of said company for said sum shall be presented to the prothonotary, who shall thereupon have said payment entered by said company in his deposit book, to the credit as aforesaid of said suit or proceeding, and after so doing, shall file said receipt of record, and give to the person or party thus paying said money into court, as his voucher, a certified copy of said receipt, attested by him under the seal of the court.

"No money shall be paid out of court by the said company, except on the checks of the prothonotary, accompanied by a certificate endorsed on said check, under the hand of the prothonotary and the seal of the court, that the money was so ordered to be paid, and to be countersigned by one of the judges of this court.

The prothonotary shall, on the last day of March, June, September, and December, of each year, have his bank or deposit book settled by said company; and shall on the first Monday of January, April, July, and October, make out and present to the chief justice of the court, or in case of his absence from the city, to any of the justices who may be in the city, an account of the moneys paid into and out of the court during the preceding three months, and exhibit his deposit book as a voucher for the correctness of said account.

Supreme Court of Pennsylv'a.

AT NISI PRIUS

TAYLOR v. THE ADAMS EXPRESS COMPANY.

1. The giving of security is a condition precedent to the execution of a writ of replevin, and some return by the sheriff as to the goods is absolutely necessary, to enable the court to pronounce a judgment.
2. Where the sheriff had made no return as to the goods, the defendant having appeared and pleaded, was allowed to withdraw his appearance and plea.

Demurrer to plea.

Opinion by SHARSWOOD, J. Delivered February 1st, 1873.

This case presents rather a novel and curious question. It is a writ of replevin, to which the return of the sheriff was, that he served it "by giving a true and attested copy thereof to Henry Gorman, agent of said company, and making known to him the contents thereof. The goods as mentioned in said writ were not replevied and delivered to plaintiff, she, the plaintiff not making me secure of prosecuting her claim." Mr. Webster entered an appearance for the defendants. The plaintiff filed a declaration in the *detinet*, and ruled the defendants to plead. The plea which is now demurred to, was in effect that the writ was never executed—to which the objection urged is that it is no answer to the declaration.

It is clear, that the writ was not executed. It was certainly a mistake in the sheriff to take any step in the execution before the replevin bond was delivered to him. The act of 1705, 1 Smith, 44, provides that "it shall and may be lawful for the parties of each county in this province to grant writs of replevin in all cases whatsoever, where replevins may be granted by the laws of England, *taking security as the said law directs*, and make them returnable to the respective courts of common pleas in the proper county, there to be determined according to law." Our form of writ is in accord with this express injunction of the statute. "We command you, that you cause to be replevied and delivered unto the plaintiff—if he make you secure in prosecuting his claim," &c., and that "you put by sureties and safe pledges, the defendant, that he be and appear." &c. The security for prosecuting the claim is a condition precedent, and the sheriff would certainly have been justified in refusing to serve the writ on the defendant.

It is contended, however, that the appearance waives this irregularity, and that the action by the clause of summons is a proceeding *in personam*, as well as *in rem*. Undoubtedly, in purely personal actions, and even in mixed actions, this rule holds good. Even in real actions, appearance will cure defects in the service of the process. But replevin is a very peculiar form of action, and some return by the sheriff as to the goods, seems absolutely necessary to enable the court to pronounce a judgment in the case If the goods are replevied and delivered to the plaintiff, the judgment for the plaintiff is that he recover his damages for the taking and unjustly detaining. The judgment for the plaintiff is *pro retorno habendo* Where the goods have not been delivered to the plaintiff, are either left with the defendant, or not being found, the return is *elongned*. the plaintiff recovers as well their value in damages as damages for their detention. Easton v. Worthington, 5 S. & R. 130. It is said that in this case we may, perhaps must, assume either that the goods were left in the possession of the def ndant upon a claim of property, or were *elongned*, as the court to which the defendant is called on to answer, is in the *detinet*. The defendants might certainly plead *non cepernnt*, but then if the plaintiff proves that they had ever been in possession, they must be defeated on that issue; and how is a defendant to protect himself, who is lawfully and innocently in possession—the finder or the common carrier—if ready to deliver the goods to the plaintiff in replevin, on his giving security as the law directs? Now the goods have never been lawfully demanded, and yet if this argument holds good, the defendant will have a verdict against him for the value of the goods in damages, without any evidence of conversion. The return of *eloigned*, if the plaintiff proves a taking, and unless the defendant shows a lawful possession, would be evidence of conversion, and so certainly would be a delivery to the defendant upon a claim of property. It seems to me, therefore, that without a return of the sheriff, or an agreement of the parties as to the goods which are the principal subject of the writ, the court would not be able to give any judgment appropriate to the form of action.

I think, therefore, that the plea is an answer to the action. Perhaps it is properly a plea to the jurisdiction of the court. assuming the act of 1705 as requiring the security to be taken as a condition precedent; in that aspect the appearance is of no consequence. At present I overrule the demurrer, and if the defendants apply, I will give them leave to withdraw their plea and appearance, as I am of opinion that they certainly were not bound to appear and plead and under the circumstances, as they might well conclude, when served with the writ, that it had been duly executed, it is a case in which they ought not to be held to their appearance.

Demurrer overruled.

NEAL'S APPEAL.

The act of 21st April, 1854, so far as it authorizes the courts of quarter sessions to vacate private roads existing by prescription or lapse of time, is constitutional.

Appeal of James Neal from the order and decree of the Court of Quarter Sessions of Montgomery county, vacating a private road in Moreland township, in said county.

Delivered February 4th, 1873.

Per Curiam.

This private road, one perch in width, was laid out by the then owner of the land, for the use of certain lots into which he divided said land. The said private road was over the land now of the petitioner, Ann Krier, and led from a public road over what is now the land of the said Ann Krier, to the said lots of ground which were in the rear of those fronting on the said public road. The petitioner had become the owner of all of the said lots, for the use of which said private road was laid out, whereby the said private road had merged and had become extinguished.

James Neal's land adjoins this private road, and although this private road was not laid out for his use or that of the prior owners of his land, he by reason of having used the said private road for twenty-one years and upwards, claimed that it existed by prescription or lapse of time, which the said Ann Krier did not deny.

The viewers appointed by the court reported, that the said private road had become useless, inconvenient and burdensome, and ought, therefore, to be vacated, which report was confirmed by the court from which decree this appeal is taken, and it was argued here and in the court below, that so much of the first section of the act of 21st April, 1845 (P. L. 416). as authorizes the courts of quarter sessions to vacate private roads "existing by prescription or lapse of time," is unconstitutional.

In Stubers' Road, 4 Casey, 199, this court held this power thus conferred upon the courts of quarter sessions to be a constitutional and valid exercise of legislative authority.

This decision was made sixteen years ago, and so far as we know, has been acquiesced in up to the present time, and it would require a clear conviction of its unsoundness to induce us to reverse it at this late period. It extends only to private roads existing by prescription or lapse of time, and not to private roads resting upon express grant, drawing a clear line between the two kinds of title. The latter title is founded upon contract, the former upon mere lapse of time by an uninterrupted use of it for more than twenty-one years, by analogy to the statute of limitations. This is the true title to such an easement, and not the fiction of a grant, which has sometimes been resorted to as a reason for such a right gained only by prescription or by adverse user for a long period of time. We must, therefore, be governed by the former decision in the case before us. It is not intended in any way to affect vested rights, or to trench in any manner upon property protected by the statute of limitations.

James Neal has no land taken from him, nor any easement secured by grant or contract, and only loses an easement originating in a wrongful use of another person's land.

The order and decree vacating said private road is affirmed, and appeal dismissed at the costs of the appellant.

THE UNION RAILROAD AND TRANSPORTATION CO. v. JACOB RIEGEL & CO.

Where there was a verbal contract, followed by a writing referring to the same subject matter, both the writing and the verbal contract should be submitted to the jury to find what the true contract was.

Certificate from Nisi Prius.

Opinion by MERCUR, J. Delivered February 3d, 1873.

The first and second assignments of error are not sustained. The third, fourth, fifth and sixth. will be considered together. They all relate to the ascertainment of the contract under which the merchandise in question was delivered to the defendants.

The plaintiffs gave evidence that Furniss & Co., of Indianapolis, desired to purchase goods of them upon a credit. Not being satisfied as to their solvency, plaintiffs made an arrangement with Mr. Welch, agent for the Union Railroad and Transportation Company, before delivering the goods for transportation, by which the boxes should be marked "F" Indianapolis, Indiana, care of S. F. Gray, agent, and should not be delivered to Furniss & Co., until further orders from plaintiffs. The boxes thus marked, were delivered to the defendants. The plaintiffs claimed this to be the contract under which they delivered, and the defendants received the goods. The defendants gave evidence, that when the drayman, subsequently, upon the same day, delivered the goods to them, he brought and presented for their signature, a shippers' receipt, filled up by plaintiffs' shipping clerk, in which the boxes were described as "marked F Indianapolis, Ind. For J. Furniss & Co., care of S. F. Gray, agent." Upon the face of the receipt, it declares they were "to be carried and delivered upon the terms and according to the agreement as specified on the back of this receipt." Upon the back of the receipt *inter alia* is part of the consideration of this contract,

"1. That all goods received for transportation shall be .... distinctly marked with the name of the consignee, and the station, when and to whom consigned."

That the defendants signed said receipt, and returned it to the drayman, who took it back to the plaintiffs. This direction as contained in the receipt, was substantially copied into the manifest which was sent on to Gray. It appears that upon the arrival of the goods, Gray delivered them to Furniss & Co., who soon after failed, and the goods were lost to the plaintiffs.

The counsel for the defendants requested the court to charge the jury, that the said shippers' receipt superseded the arrangement made with Mr. Welch, respecting the consignee of the goods. The court declined so to charge. In this was no error. We think, however, the court did err in saying to the jury, that the contract depended *entirely* upon the verbal arrangement. The court thus withdrew wholly from the consideration of the jury the shippers' receipt, which was executed after the verbal arrangement. The receipt, as well as the verbal arrangement, ought to have been submitted to the jury to enable them to find from the whole evidence, what the true contract was. The seventh assignment is not sustained. It assumes the receipt alone embodied the terms of the contract. Whether the agent was authorized to deliver the goods, depended not upon the receipt alone, but upon what the jury found the contract to be under the whole evidence, as we have indicated.

Judgment reversed, and a *venire facias de novo* awarded.

AT NISI PRIUS.

HEVENER v. HEINT.

It appearing that the defendant had been decoyed by the plaintiff within the jurisdiction of the court in order that service might be made on him, the court set aside the service.

Rule to set aside service of writ.

Opinion by SHARSWOOD, J. Delivered February 1st. 1873.

I am satisfied upon the deposition, that the defendant was decoyed into this jurisdiction, if not by the plaintiff himself, by some one acting on his behalf. The defendant was telegraphed by some one in the name of Hoffman. "Come down by three o'clock train, meet me at Merchant's Hotel." The defendant is a member of the bar, and was acquainted with Jacob Hoffman. Jacob Hoffman testified that he never sent such a despatch. Two other gentlemen, of the same name of Hoffman, were examined with the same result. The defendant testified that he knew no other person in Philadelphia of that name. When Mr. Heint came down to Philadelphia, in obedience to the telegram, and went to the Merchants' Hotel, he was immediately arrested there. Under these circumstances, I am clearly of the opinion that it was incumbent on the plaintiff to produce the sheriff's deputy who made the arrest, in order to show that it was not by the instruction of the plaintiff, or his attorney, that he went with the writ at that time, to that place, to arrest defendant.

Rule absolute.

PALETHORP v. WHITTAKER.

A plea that the cause of action was in a former suit between the same parties, pleaded and allowed as a set-off, is in bar and not in abatement.

Rule to strike off plea.

Opinion by SHARSWOOD, J. Delivered February 1st, 1873.

This rule was taken upon the idea that the plea which the court is asked to strike off is irregular, because it is a plea of the pendency of a former action, which is in abatement, and cannot be pleaded after a plea in bar, nor without an affidavit; but the plea is evidently not of this character. It avers very distinctly that the cause of action set forth in the plaintiff's declaration, was, in a former action by the defendant against the plaintiff, pleaded by the plaintiff as a set-off, and had been passed upon and adjudicated in that action. If this be so, it is clearly a plea in bar, and not in abatement.

Rule absolute.

LOWER v. WIGHTMAN & NEVINS.

1. After a master has found a question of fact, it is too late to ask for an issue to determine it by a jury.
2. A. by fraud induced B. to convey lands to him, which A. subsequently conveyed to C. C. had no notice of the fraud. B. filed a bill against A. and C. to obtain a reconveyance. The bill was dismissed as to C., and a decree for pecuniary compensation entered against A.

STATEMENT OF THE CASE.

The facts of the case as set forth in the report of the master appointed by the court below, are as follows:

In February, 1851, Samuel Lower, by virtue of a contract of purchase, became the owner of a certain tract of land situate and lying in Brushvalley township, Indiana county, adjoining lands of David B. Hite, Daniel Cramer and others, containing one hundred and ten acres and fifty-six perches. Immediately after his purchase, he went into the possession, and from that time on until the 5th day of October, 1865, he continued therein, in quiet and peaceable enjoyment, the sole and exclusive owner. For a considerable time prior to this last day, letters passed between Lower and Wightman concern-

ing the Brushvalley farm, and on that day, having met on the premises, they entered into a contract of agreement in writing, whereby the Brushvalley farm was exchanged for lands in Wisconsin.

The article itself is not in evidence, and therefore we are unable to find more specifically what it contains.

Afterwards on the same day, Lower, the complainant, and his wife, joined in the execution of a deed with covenants of general warranty to Wightman for the Brushvalley farm, mentioning therein as a consideration the sum of three thousand dollars.

On the 11th day of February, A. D. 1866, John Wightman prepared and executed a lease of the Brushvalley farm to Lower for one year from the first day of April, A. D. 1866. This lease, having been brought to Lower's house by Wightman's son, was accepted by him, and signed on the 2d day of March, A. D. 1866, and a copy drawn off by his son Isaiah W. Lower, and retained.

On the 24th day of October, A. D. 1865, Wightman executed two deeds to Lower for lands in Wisconsin.

One of which conveyed 160 acres as per government survey. Consideration, $1,600—acknowledged October 23d, 1865.

The other conveyed 120 acres and 80 acres. Being part of the J. P. Huling lands—consideration $1,600. Acknowledged 24th of October, 1865. Both containing covenants of general warranty.

On the 22d of January, 1868, Wightman, through Alexander Taylor, Esq., and W. H. Kerr, tendered another deed dated November 15th, 1867, to Lower, conveying 160 and 11-100 acres, duly stamped; signed and acknowledged by Wightman and wife, before Albert Watson, a notary public of Trumbull county, Ohio, on the 18th of January, 1868. Consideration $1,600.

They then demanded from Lower a reconveyance of the land held by him, by virtue of the first of the above mentioned deeds of October 23d, 1865, which they alleged had been conveyed to him through mistake and not contemplated by the article of agreement of the 5th of October, 1865, and at the same time produced for him to sign and acknowledge, a deed, duly stamped, describing the lands required to be re-conveyed to Wightman, and tender the necessary fees for acknowledgment.

On the 30th of October, 1865, Wightman executed and acknowledged a deed for the Brushvalley farm to John Nevins. Consideration, $3000. Recorded in D. B. A., Vol. 33, page 248, on the 12th day of August, 1866. This deed was not delivered by Wightman to Nevins until the 24th day of March, 1866.

November 22d, 1865, Nevins executed and acknowledged a deed for the "Huron House," situate in New Brighton, Pa., to Wightman. Consideration, $7,000. This deed was not delivered to Wightman until the 24th of March, 1866.

March 24th, 1866, the day on which Wightman and Nevins exchanged deeds, the lease of the 11th of February, 1866, by Wightman to Lower above mentioned, was transferred to Nevins by assignment on the back. This assignment is not dated, and the date is only fixed by the cancellation of the revenue stamp thereto affixed. It was written by W. J. Paulhamus, who has been examined as a witness by respondents, and who fixes this date in his testimony.

During all the time through which these negotiations between Wightman and Nevins extended, Lower remained in the actual, visible and notorious possession of the Brushvalley farm, and in fact had continued therein from the time of his sale to Wightman, and still remains to this day. His possession has been uninterrupted from February, 1851, the time when he bought, until this present time.

Master's Finding.

It is sought by Lower in this bill to avoid the consequences of his contract with Wightman for the sale or exchange of the Brushvalley farm upon three several grounds.

1st. That his consent to the contract and the execution and delivery of the deed was obtained from him by Wightman through fraud and misrepresentation.

2d. That the deed of October 30th, 1865, by Wightman to Nevins was a mere pretence, done in bad faith, for the purpose of avoiding the fraud perpetrated on Lower by Wightman, and without consideration.

3d. That even if for valuable considerations, Nevins at the time of his purchase, had such notice, either actual or constructive, of the fraud, as takes from him the character of an innocent purchaser, for value without notice.

The first of these propositions, we think, is fully sustained by the evidence, and we do therefore find that John Wightman on the 5th day of October, 1865, at and immediately before the signing of the agreement for the sale or exchange of the Brushvalley farm, and the execution of the deed for the same by Lower and wife, practiced such a fraud, either knowingly and wilfully, or otherwise, upon him, by misrepresenting the character, quality and value of the Wisconsin lands, as would in Wightman's hands, render the contract null and void, and require at the hand of a chancellor such relief as is sought for in this bill.

With reference to the second proposition of the complainant, we have failed to discover that the contract of exchange between Wightman and Nevins was a mere pretence. On the contrary, we find that the deed from Wightman to Nevins for the Brushvalley farm was based upon a good and valuable consideration, viz.: A conveyance of the title of the hotel property in New Brighton.

As to the third proposition we find that Nevins, at the time of his purchase, had no notice, either actual or constructive, of the fraud practiced on Lower by Wightman, and that he was an innocent purchaser for value actually paid.

We do further find that on the 5th day of August, A. D. 1869, the complainant Lower, by his counsel, made a tender to the counsel of John Wightman of a deed reconveying the Wisconsin land to him, and also the sum of sixty-one dollars and twenty-five cents, being the amount of money paid by Wightman to Lower at the time of their contract of October 5th, 1865, with interest thereon up to the date of the tender.

The master reported the following

Form of Decree.

And now, to wit: A. D. 1870, the cause coming on to be heard, and having been fully argued by counsel, after due consideration, it is ordered, adjudged and decreed, that the bill of the complainant, Samuel Lower, be and the same is dismissed as against the respondent, John Nevins. And it is further ordered and adjudged, that the respondent, John Wightman, do pay to the complainant, Samuel Lower, the sum of $4.000, for his damages sustained by reason of the representations aforesaid, and that the said Samuel Lower do deliver up and surrender to said John Wightman the several deeds he has received from him for the lands in Wisconsin. And that respondent, Wightman, pay the costs of this proceeding.

Opinion of the Court Below.

Bill in equity.

Opinion by Logan, P. J. Delivered September 26th, 1872.

We had little difficulty in agreeing with the master that the evidence developed such elements of fraud in the original contract between Lower and Wightman, as demanded a decree either avoiding the obligation of that contract or compelling compensation in damage. A much closer question, however, to our mind, is as to whether Nevins was an innocent purchaser of valley farm from Wightman, without notice.

Before going into this, however, we may say that the application by Wightman's counsel to have the questions of fact referred to a jury, made on the final argument, if ever meritorious, is now much too late. After having submitted the determination of the facts to the arbitrament of a master, and having taken the chances of a finding in their favor, they cannot now after an adverse finding select a new tribunal. No allegation of unfairness or charge of partiality is made against the master nor is it presumed any such could be sustained. There is therefore nothing to induce us to grant the request. It is due to the master to say, that his report is elaborate and seems to be candid, and his conclusions probably nearer the truth than the finding of a jury. Turning then to the question as to whether Nevins was an innocent purchaser for value without notice, we will for our own convenience inquire first, whether or not under the facts and circumstances he had constructive notice.

We are free to say that our first impression was that the master erred in not holding these to have been constructive notice, growing out of the fact of the possession by Lower of the land at the time of Nevins' purchase. We did not then think the position of the master sound in ruling—that the fact of a contract of lease, the term of which had not yet begun, constituted Lower's possession as equivocal as to take it without the rule that possession is notice. The master's doctrine seemed to us a dangerous encroachment on a wise and benificent rule of law, and we therefore have given the matter most careful and extended examination.

If it had appeared that on inquiry by Nevins of Lower, then in possession of the land, at the time of his (Nevins') purchase, the fact of the fraud would have been discovered, in such event Nevins' failure to inquire would to us have seemed the absence of ordinary diligence, and therefore constructive notice. In this view the fact of an existing contract for a future lease would not explain a present possession. If Lower became aware of the fraud after the 2d of March, 1866 (the date of the contract of lease of Wightman to Lower), and before the 24th of March, 1866, (the date of the delivery of deed by Wightman to Nevins), he had a right to depend on his possession as notice up until the 1st day of April, 1866, the time at which the tenure under the lease began. After this the burthen would have been on him, as against any one with a knowledge of the lease to have given actual notice. The question then to our mind largely turns on the fact as to the time when Lower first became advised of the fraud perpetrated by Wightman. In short, whether or not at the time of the purchase by Nevins from Wightman, which was on the 24th of March, 1866, and before the term of the lease began, Lower was in a position to have advised Nevins of the fact of the fraud and his claim to the title, despite his deed to Wightman by virtue of that fraud.

Nevins should not be prejudiced by not having made an inquiry, which if made would have been fruitless, and not have insured to the protection of Lower. If on the 24th of March, 1866, Lower had not notice of the fraud, he was in full recognition of Wightman's title, and an inquiry then by Nevins must have resulted in such information as would fairly have induced Nevins to conclude the purchase from Wightman.

As to this fact, namely, the time when Lower first discovered the fraud, the master's report does not advise us, except, as incidentally referred to in supplementary finding. The master's report is, however, so exhaustive of the general features of the case, and this being a single fact discernible by an examination of the testimony, we can have little difficulty in determining it, guided by the supplementary report.

Bringing to the inquiry our utmost care, we are led, after an examination of all the evidence, by the testimony of Samuel Lower, the plaintiff, in answer to interrogatory "41," taken in connection with the testimony of Esquire McCrea, to the conclusion, that Lower did not know of the fraud until July or August, 1866. In this connection, Samuel Lower in substance says, that he did not know at the time of signing the lease that the representations made by Wightman as to the quality, location and value of the western lands, was not correct, and that the first he knew of this was after he got Esquire McCrea to examine the deeds. From Esquire McCrea's testimony, we learn that this examination was in July or August, 1866.

We, of course, make no reference to the testimony of Wightman, Nevins or Nelson in this connection. We rely upon the declarations of Lower, testifying as to a matter against his own interests and peculiarly within his own knowledge, as connected and explained by Thompson McCrea, a wholly disinterested, uncontradicted and unimpeached witness.

Wherefore, as by inquiry Nevins could have discovered no fact at the time of his purchase by an inquiry of Lower, inconsistent with the face of the papers, he was not bound to make inquiry, and in view of this and all the circumstances in the cause, we must conclude there was no constructive notice.

Coming then to the question of actual notice to and alleged complicity with Wightman by Nevins, we have a difficult and anxious inquiry. In the testimony, conflict and contradiction seem apparently irreconcilable. In treating this question, we shall look indifferently to the first and second reports, and the testimony attached to each. We may also find it convenient to treat together allegations of notice and complicity.

Robert Nelson swears positively to actual notice, sufficiently direct, positive and express, if the strongest expressions were to be given credence, to bring it within the rule of the closest case. He is corroborated by the testimony of Wightman in his supplemental examination, who also swears to actual notice in Nevins of Lower's allegation of fraud. Nelson is also corroborated by Alex. Taylor, Esq., who swears to having heard Nevins say to Nelson, shortly after his examination and during the same day, that what he had sworn was true, save as to some immaterial matter. This would have constituted an admission by Nevins of the fact of his having notice, inasmuch as Nelson testified to having given such notice, or otherwise, evidence of complicity with Wightman. This position is somewhat further sustained by the fact of the price of the Huron House—the precedent negotiations—the singular reticence of Dr. Nevins in his first examination as to Nelson and his profuseness on this subject in his later testimony, as also other less significant circumstances developed in the cause. This much as to affirmation of evidence of actual notice and complicity.

On the other hand, we have, however, the fact that up until the first report of the master there is no allegation of prior notice in Nevins, but on the contrary, this fact stood distinctly negatived in the testimony (vide reference to Lower's testimony, *supra*). Dr. Nevins, in terms, positively contradicts the fact of notice under oath, and explains with some plausibility his connection with Nelson. He also denies the fact that the negotiations with Wightman were in a part delayed from November, 1865, until March, 1866, by reason of his claiming a general warranty deed, induced by a fear of difficulty in getting possession. He attributed the delay entirely to a difficulty as to some articles of personal property, and in this he is corroborated by the testimony of Wm. J. Paulhamus, and still more strongly by the fact that in none of the letters which passed between the parties at the time upon the subject, so far as they are in evidence, is there any mention made of the difficulty in getting possession.

We then had the character of Nelson for truth attacked. This effort, however, the master quaintly remarks, "was not attended with such satisfactory results as he (Dr. Nevins) would have wished for." How strong Dr. N. wished the testimony

we cannot say, but that it is largely weak, if evident.

To these, with certain other circumstances, more or less pregnant on his side, is added the finding of the master. Is this finding then sustained by these facts?

It might be conceded, that without the testimony of Lower, before referred to, we would have difficulty in sustaining the master. We cannot, however, imagine that Lower could be mistaken in saying he was not informed of the fraud until he took the deeds to McCrea. If so, this fact is wholly irreconcilable with any such construction of Nelson's testimony as would constitute notice from Lower to Nevins of the fraud. The master did not so credit this testimony of Nelson's. Nor can we, in the light of the testimony and the master's finding, give it the full force sought by the complainants and Wightman's counsel.

We have no doubt that Nelson is mistaken in so far as he contradicts the testimony of Lower, and therefore Nevins could not before his purchase from Wightman have received notice of the fraud from Lower. That Lower, earlier than his actual discovery of the fraud, might have felt in sympathy with his now deceased wife's anguish, in giving up the homestead, of which we are informed in the testimony, and in popular parlance, thought himself cheated by Wightman's fairly getting a good bargain out of him, is possible.

Or it may be that he regarded as cheating, those blandishments allowable by the laws of trade, though responsible to morals through the seductive influences of which Wightman, without actual fraud, had led him into a contract that broke up the family association, sending them from the quiet and peaceful Indiana to the great west, where, as we learn from the testimony, the neighbors told him the Indians were. All this we say is possible, but would not have avoided the contract, and if told to Nevins would not necessarily have been notice. But that Nevins had notice from Lower on or before 24th of March, 1866, of the fraud charged in the bill and which moved the master to sustain the recovery against Wightman, and now moves this court to sustain this action of the master, we cannot believe.

As to whether Nevins had notice of the fact of the fraud from Wightman, or in other words was a party to it, the testimony is at most, conflicting and contradictory. Supposing Nelson to have received his knowledge of the fraud from Wightman, and communicated to Nevins, we would then have him in conflict with himself, and the force of his testimony destroyed. Or looking at the allegation that Nevins was privy to Wightman's fraud, we again glance over the testimony, and find nothing clear and satisfactory pointing to such a conclusion.

No element in the cause seems to invite us in the aid of justice to a reversal of the master's finding upon these questions of fact. Something, and not a little, is due to the conclusions of a master upon such questions. He has the witnesses before him, sees their expressions, their conduct and actions are reflected upon him, and he sympathizes with their motives, therefore his construction of the testimony is entitled to great weight.

Besides, to him is committed questions of fact. Still, apparent injustice or even a marked weight of authority would have moved us. Despite his conclusions of the existence of such in this case, we are not convinced.

It is very much urged by counsel of Wightman, that the master overstepped his power in imposing pecuniary compensation upon Wightman, and that the court has no power to enforce such decree. To this it is enough to say that the authorities referred to by the counsel on argument, fully vindicate the action of the master, and the fact of this case seems with great force to invoke the exercise of such power.

We may also here refer, although somewhat out of order, to the position taken by counsel, that no tender of reconveyance or repayment of the $50 paid by Wightman, preceded the institution of these proceedings. Such tender has, however, been made, and is at present on deposit for the benefit of the defendant. We have not been able to regard the failure to make such tender earlier, as sufficient, under the circumstances at this late day, to dismiss the case with costs.

Wherefore, and now July 26th, 1872, the exceptions to the report of the master are overruled and the report of the master confirmed, and the report adopted as the judgment of the court. It is further directed that a decree conformable to such judgment be drawn by counsel and presented to the court according to equity rules Nos. 78 and 79, and it is further ordered, should the complainant's counsel choose to avail themselves of the privileges of the 80th rule, that the amount entered and indexed shall be the net sum of $4.000, with interest from the 9th of June, 1870.

DECREE OF COURT BELOW.

And now, to wit, September 26th, 1872, the cause coming on to be heard, and having been fully argued by counsel after due consideration it is ordered, adjudged, and decreed, that bill of the complainant, Samuel Lower, be and the same is hereby dismissed, as against the respondent, John Nevins.

And it is further ordered and adjudged, that the respondent, John Wightman, do pay the complainant, Samuel Lower, the sum of $4,000, with interest thereon from the 9th day of June, A. D. 1870, for his damage sustained by reason of the representations aforesaid, and that the said Samuel Lower do deliver up and surrender to said John Wightman, the several deeds he has received from him for the lands in Wisconsin, and that the respondent, Wightman, pay the costs of this proceeding. And it is further ordered, that the compensation of A. C. Boyle, Esq., the master in this case, be fixed at $400. The parties by their counsel being present, waive notice of the making and entering of this decree. (By the court.)

ASSIGNMENTS OF ERROR,

By complainant, Samuel Lower.

1. The court erred in dismissing complainant's bill, as against the respondent, John Nevins.

2 The court erred in finding that John Nevins was a *bona fide* purchaser, without notice, actual or constructive.

3. The court erred in not ordering the agreement between Lower and Wightman, and the deed made in pursuance thereof, dated October 5th, 1865, to be delivered up and cancelled, for the reason that they were fraudulent and void.

4. The court erred in not decreeing the deed of October 30th, 1865, John Wightman to John Nevins, null and void, as against Samuel Lower.

COMPLAINANT'S AUTHORITIES.

2 Barr, 108; Story's Equity, sections 192, 198, 246 (vol. 1); Adams' Equity, 187, note 2; Smull v. Jones, 1 W. & S. 138; Gilbert v Hoffman. 2 Watts, 66; Summervill v. Jackson, 1 H. 369.

Lower's possession was constructive notice to Nevins. Woods v. Farmere, 7 Watts, 382. See opinion of Kennedy, Judge, in Jacqus v. Weeks, 7 Watts, 276; Kerr v. Day, 2 H. 112; Randall v. Silverthorn, 4 Barr, 173; 1 Story's Equity, per section 400; 16 Ves. 253; Burkhart v. Greenshields, 28 English Law and Equity Rep. 77; see Morrow v. Souder, 3 Phila. 112; Basset v. Nosworthy, Law Library, vol. 46, page 92–116; Blight v. Schenk, 10 Barr, 295; Van Amringe v. Martin, 4 Wh. 382; Sailor v. Hertzog, 4 Wh. 259.

If Nevins is an innocent purchaser without notice, actual or constructive, and without any circumstances or facts in the case to put him on inquiry ———, complainant is entitled to a decree for money. 6 P. F. Smith, 475; Swisshelm's Appeal; Adams' Equity, 380–91, note 2, and authorities there cited; 598, note 1; 718, note 3; Woodcocks v. Bennet, 1 Cowen, 711; Andrews v. Brown, 3 Cushing R. 135; Pratt v. Law, 9 Cranch, 492–494; see Adams v. Smith, 7 H. 182–9; C. 280

Lower is not estopped by the contract of lease from asserting his title. Thayer v. Society of United Brethren, 8 H. 60.

The lease confers no estate on the lessee until an actual entry. Blackstone's Commentaries, book 2, page 144; Bacon's Abridgment. vol. 5, 631; Sennet v. Bucher, 3 Ren. & W. 392.

If a replication be filed, the answer cannot be read by respondent. 12 H. 413; see Adam's Equity, note 2, page 363.

ARGUMENT FOR NEVINS, APPELLEE.

The controversy embraces three distinct parties, each having separate and independent interests to protect, each being represented by his own counsel, and each occupying a position antagonistic to the others.

Lower, the complainant, demands—

First. A cancellation of his deed to Wightman, and also of the deed from Wightman to Nevins;

Or, failing in this—

Second. Compensation from Wightman for the injury sustained by reason of the alleged fraud.

Wightman, one of the respondents, defends—

1. By a denial of the fraud alleged to have been perpetrated upon Lower;

Or, failing in this—

2. He seeks to aid Lower, in carrying notice to Dr. Nevins, and thus, by making Nevins the victim, instead of Lower, save himself from the consequences of the decree for damages.

Dr. Nevins' defence consists in this only—

That he was an innocent and *bona fide* purchaser of the lands in controversy from Wightman, for value, without notice, either actual or constructive, of any fraud having been perpetrated upon Lower, if there was any such fraud. This is the only defence set up in his answer, and the only one which he has attempted to rely upon throughout the whole conduct of the case. We refer the argument on the question of the alleged fraud of Wightman to his own counsel, as this is a question peculiarly affecting him, whilst we, representing Nevins, will confine our argument to the question of notice as affecting Dr. Nevins.

Assuming, then, the fraud of Wightman, had Dr. Nevins, at the time of his purchase, notice, either actual or constructive, of such fraud?

1. The master found, as matter of fact, that Nevins had no actual notice. See also page 16 of plaintiff's book.

The finding of the master is, perhaps, not conclusive, but it is entitled to great weight. He had the witnesses before him and saw their manner and method of testifying. He had abundant time and opportunity to sift the facts, and intelligently to weigh the testimony. 18 P. F. Smith, 130. His finding, when reported to the court, is said, in Clark's Appeal 12 P. F. Smith, 450, to be somewhat like a special verdict. Its soundness, however, may be tested on exceptions in the court below.

The court reviewing the findings of the master upon the exceptions filed, say:—

"The master did not so credit the testimony of Nelson, nor can we, in the light of the testimony and the master's finding, give it the full force sought by the complainant's and Wightman's counsel. We have no doubt that Nelson is mistaken, in so far as he contradicts the testimony of Lower, and, therefore, Nevins could not, before his purchase from Wightman, have received notice of the fraud of Lower" (Plaintiff's book, page 35).

When the court below approve of the master's finding, after argument on the exceptions, it will require very clear and satisfactory proof of a mistake to reverse his finding. Clark's Appeal, 12 P. F. Smith, 450.

Kerns v. Swope, 2 Watts, 78; Ripple v. Ripple, 1 Rawle, 390; Woods v. Farmere, 7 Watts, 387; 8 S & R. 496; 14 S & R. 334, cited as authorities as to what is evidence of notice.

2. It is settled that actual and unequivocal possession is notice, not so much, however, because possession is evidence of actual notice, as because it is the duty of one about to purchase real estate to ascertain by whom, and in what right, it is held or occupied Brightly's Equity, sec. 116.

4. But there is a corresponding duty on the part of the occupier, that he shall maintain his possession consistently with his claim. If he claims under one title, he should not record or register another, else his possession will only protect the title which he thus registers or records. By exhibiting a conveyance to which, by his own showing, his possession may be referred, he does what he can to turn a purchaser from the direct path of inquiry. Possession alone would have led to a particular examination of the foundation of it. When the occupant, therefore, points the attention of the public to a particular conveyance or title, he abandons every other index. Woods v. Farmere, 7 Watts, 384. Whilst this principle is directly referable to the recording or registering of titles, and the constructive notice consequent therefrom, application must be made of it, when the occupant executes and publishes any instrument of writing which fully explains his possession, provided actual notice of such instrument is received by the purchaser, and he acts upon the faith of it; otherwise, the purchaser may be the victim of a fraud on part of the occupant. Leach v. Ansbacher, 5 P. F. S. 85, cited in support

John P. Blair and *H. W. Weir, Esqs.*, for appellant.

Stewart and *Silas M. Clark, Esqs.*, for appellee Nevins. *S. Newton Pettis, Esq.*, for appellee Wightman.

DECREE OF SUPREME COURT.

And now, January 27th, 1873. Appeals dismissed and decree affirmed. *Per Curiam.*

SHERIFF'S SALES.

The following are the prices obtained for the properties sold at Sheriff's sale on Monday last.

John L. Van Tine. No. 2. $250
John O'Reilly. 110
Thos. Hopkins, dec'd. 1850
J. Bernard Apple and John L. Smith. 50
Chas. Stines. No. 1, $30. No. 2. 30
Chas. W. Hepburn. No. 2. 25
Thos. E. Combs. 1,000
Isaac Shinn, 500
Holden S. Hay. 50
Martin Hammer. 125
Geo. W. and Christian H. Geisse. 29,250
Archibald Dillon. 1,700
Jas. McCaffrey. No. 3, $450. Nos. 3 & 4. 1,700
Thos. G. O'Hara and Wife. 50
Oscar O. Gould and Erastus Wood. 3,700
Samuel Spang. 5,950
John G. Fleck. No. 1, $6,000. No. 2. 100
Geo. W. Mooney. 2,000
Jacob Moyer. 1,000
Alex. H. Ziegler. 2,500
Herman Nitzsche. 50
Thos. Wagner, 100
Francis McElhone. 50
Hugh J. Sweeney and Wife. No. 1, $950. No. 2. 950
John W. Mann. 2,500
John Robinson. No. 1, $2,500. No. 2. 2,500
Bern'd Grimley. 2,500
Hartman Grau. No. 1. 10,000
Wm. J. Rickards. 2,700
Thos. Caulk. 50
Thos. Caulk. $50
Wm. H. Harrison Davis. 50
Theodore J. Fraser. 50
Theodore J. Fraser. 50
Theodore J. Fraser. 50
Robert MacGregor. 1,000
Benj. F. Walton and Wife. No. 1, $1,000. No. 2, 3,000
Rob't Galbreath. 150
John Schaeffer. No. 1, $50. No. 4, 50. No. 5, 125. No. 6, 150. No. 7. 100
Jas. Hallowell. No. 1, $500. No. 2. 500
James Lafferty. 100
Jos. Barnes, Jr. 700
Wm. Barry. 50
Jacob K. Meschter. 910
Hugh Donohue. 75
Wm. Crawford. 125
Ezekiel H Steen 2,400
Lewis Wirth. No. 1, $1,100. No. 2. 1,600
Charles Toon. 50
Jacob Buchmann. 1,250
James Perry. 550
Chas F. Swilkey. 3.900
Michael McShane and Wife. 650
Wm. P. Fulmer. 600
Jonas M. C. Savage. No. 1, $200. No. 2, 100. No. 3, 150. No. 4. 500
Wm. Mara. 1,250
John G. Pierie. 200
Thos. Clark. No. 1, $800. No. 2. 400
Preston L. Hill, & Co. No. 1, $1,800. No. 2. 450
Henry R. Coggshall and Wife. 850
Bernard Clarke. 450
John S. Smith. 150

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in February, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1872.

Dec. 27, Charles L. Eberle, Administrator of HENRY B. DUTTON, dec'd.
" 30, John P. Woolverton et al., Administrators of RUNYON WOOLVERTON, dec'd.
" 30, Peter Schwindt, Executor of ELIZABETH BERMANN, dec'd.
" 30, George F. Creutzlurg et al., Executors of JOHN H. CREUTZLURG, deceased.
" 30, Elizabeth Ditsche, Administratrix of XAVIER DITSCHE, dec'd.
" 31, Abraham Levy, Administrator of LEWIS HYMAN, dec'd.
" 31, Thomas B. Wattson et al., Executors of EDWARD L. CLARK, dec'd.

1873.

Jan. 2, Alfred Fassitt, Administrator d. b. n. c. t. a. of WILLIAM FRIESTMAN, deceased.
" 3, Harry E. Battin, Administrator of GEORGE W. SHARP, deceased.
" 3, Susanna Froelich, Administratrix of CONRAD FROELICH, deceased.
" 6, James Campbell et al., Executors of HUGH O'DONNELL, deceased.
" 7, Henry Cramer, Administrator of AUGUSTUS SPRINGER, deceased.
" 7, Augustus C. Leidy et al., Executors of Dr. N. B. LEIDY, deceased.
" 8, Joseph S. Ford et al., Executors of GEORGE W. FORD, deceased.
" 10, Andrew Blair, Executor of CHARLOTTE RAPP, deceased.
" 10, Homer Eachus, Executor of HOMER EACHUS, deceased.
" 11, Hugh English, Administrator of MARTHA J. ENGLISH, deceased.
" 11, Robert England, Executor of JOSEPH ENGLAND, deceased.
" 11, Jacob Peiffer, Executor of JACOB GROETZINGER, deceased.
" 13, Benjamin L. Wiley, surviving Administrator of WILLIAM E. WILEY, deceased.
" 13, William G. McCauley, late Guardian of DANIEL C. ODENHEIMER, Minor.
" 13, Elizabeth Myers, Administratrix of ANN HEIRSCHBERG, deceased.
" 13, James H. Heverin, Administrator of CHRISTIAN BEICHTER, deceased
" 14, John S. Cornell, Administrator, d. b. n, c. t. a. of EMELINE CORNELL, deceased.
" 15, William Manson, Administrator c. t. a. of SARAH JANE MANSON, deceased.
" 15, Moses A. Dropsie, Administrator c. t. a. of AARON M. DROPSIE, deceased.
" 15, William J. Benkert, Administrator of LOUIS SCHMIDT, deceased.
" 15, Mary Catharine Zanner, late Muller, et al., Executors of JOHN MULLER, deceased.
" 16, Valentine B. Finn et al., Executors of JAMES C. FINN, deceased.
" 16, John C. Cresson et al., Trustees under the Will of ADAM EVERLY, deceased.
" 16, Mary Kelley, Administratrix d. b. n. of THOMAS EDWARDS, deceased.
" 16, Edward B. Frees, one of the Executors of JESSE EVANS, deceased.
" 16, Thomas P. Campbell, Executor of ELIZABETH MARPLE, deceased.
" 17, Thomas H. Montgomery, Guardian of ARTHUR W. MOSS.
" 17, Samuel Bradbury et al., Executors of JESSE W. CARR, dec'd.
Jan. 17, Casper Williamson, Administrator of JOHN SOUDER, dec'd.
" 18, Alfred Driver, Administrator of JULIA C. SHEPPARD, dec'd.
" 18, Samuel B. Jones, Administrator of MARGARET F. JONES, dec'd.
" 18, The Girard Life Insurance Company, &c., Executors of NATHANIEL P. HOOD, dec'd.
" 21, The Pennsylvania Company for Insurance on Lives, &c., Administrators c. t. a. of WILLIAM W. HARDING, dec'd.
" 21, The Pennsylvania Company for Insurance on Lives, &c., Trustees of FRANCIS MIFFLIN.
" 22, William Millevard, Acting Executor of JESSE BOULDEN, deceased, as filed by Daniel S. Winebrener and John W. Buckman, Executors of said William Millevard, deceased.
" 22, Elizabeth Ervine, Administratrix of ELIZABETH R. ERVINE, dec'd.
" 22, Sarah J. Charlton, Administratrix of JOSEPH A. CHARLTON, dec'd.
" 22, Lorenzo M. Kieffer, Executor of H. F. Kohler, deceased.
" 22, Alex. H. Smith, Guardian of ALEXANDER H. SMITH, Jr., Minor.
" 23, Constant Guillou, Executor of CAROLINE MACKAU, as filed by Victor Guillou, Administrator of Constant Guillou, dec'd.
" 23, John Bowman, Administrator d. b. n. c. t. a. of DOROTHY STUCKERT, deceased.
" 23, The Girard Life Ins. Co., &c., Executors of MARULA NEWBAUER, deceased.
" 23, Ellen C. Morrison, Administratrix of JOHN MORRISON, dec'd.
" 23, Mary L. Yardley, Guardian of MARY S. J. MARTIN and J. WARNER YARDLEY, minors, as filed by her Administrator, Wm. F. Miskey.
" 23, Redwood F. Warner, Guardian of MARY S. YARDLEY, late minor.
" 23, William F. Miskey, Administrator c. t. a. d. b. n. of MARY L. YARDLEY, deceased.
" 23, Edward Peace, Trustee of Dr. CHAS. HOLMES, dec'd.
" 23, John Shaffner et al., Executors of JNO. SHAFFNER, dec'd.
" 24, Thomas Shipley, Executor and Trustee of ELIZA JANE BROWN, deceased.
" 24, John A. Schaeffer, Administrator, &c., of JOHN A. SCHAEFFER, dec'd.
" 25, Levi G. Ulrich et al., Guardians of WILLIAM ULRICH, minor.
" 27, Charles J. Gallagher, Administrator d. b. n. of JOHN McDOWELL, deceased.
" 27, Charles J. Gallagher, Administrator of MARY McDOWELL, deceased.
" 27, William L. Edwards, Executor of ASA THOMAS, deceased.
" 27, Thomas Barry et al., Executors of WILLIAM CLANCY, dec'd.
" 27, Thomas Sterrett, Administrator of JOHN STERRETT, dec'd.
" 28, F. Oden Hortsmann et al., Executors of WILLIAM J. HORTSMANN, dec'd.
" 28, F. Oden Horstmann et al., Trustees under the will of SIGMUND H. HORSTMANN, dec'd.
" 28, Samuel Hood et al., Executors of MARY SIMMONS, dec'd.
" 28, John A. Burton, Administrator of WILLIAM T. CATTO, dec'd.
" 28, Frank Wolfe, Executor of JOHN K WOLFE, dec'd.
" 28, Alexander Ramsey, Executor of JOSEPH CAIRNS, dec'd.
" 29, The Girard Life Ins. Co., &c., Trustees for CHARLES FRY, late Minor.
" 29, Eli K. Price, Trustee of JOHN W. RULON, under the will of Joseph Archer, deceased.
" 29, William W. Ball et al., surviving Executors of THOMAS GRAHAM, deceased.
" 30, James Linton, surviving Trustee of SARAH KIRK, deceased.
" 30, Edwin Shippen, Administrator c. t. a. of WILLIAM C. MEEDS, dec'd.
" 30, Edwin J. Florence, Executor of HANNAH FLORENCE, dec'd.
" 30, Joseph Patterson et al., Administrators of JOHN REU, dec'd.
Jan. 30, Rachel W. Townsend (late Moore) et al., Executors of JOHN WILSON MOORE, dec'd.
" 30, Mary Ann Price, Administratrix of ABRAHAM B. PRICE, dec'd.
" 30, Paul Jagode, Administrator of C. THEODORE KELL, dec'd.
" 30, Frederick Ladner, Administrator of MAGDALENA ERB, dec'd.
" 30, Albert Hewson, Administrator of HENRY N. HEWSON, dec'd.
" 30, John Bastable, Executor of P. F. TURNER, dec'd.
" 30, Bridget McGoveran, Administratrix of JAMES McGOVERAN, dec'd.
" 30, Lina Reichert, Administratrix of DAVID REICHERT, dec'd.

WILLIAM M. BUNN,
jan. 31—4t. Register.

BOARD OF EXAMINERS.

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[Our thanks are due to John M. Shirley, Esq., State Reporter, for the following report.]

Supreme Court of New Hampshire.

HORN v. COLE et al.

If the owner of goods, to prevent them from being attached as his own, represent that they belong to another, and the party to whom the representation is made, relying, and from the circumstances having reason to rely, on the representation as true, attach the goods for a debt due from the party, to whom it was represented that the goods belonged, in trover for attaching the goods, the owner will not be permitted to show that his representation was false, though at the time when he made it he had no notice of the debt on which the goods were attached, and had no intention to deceive the party who attached them.

STATEMENT OF CASE.

Trover, against Cole and Green, for feather-beds, crockery, glass ware, &c. It appeared on trial that the plaintiff was contemplating to remove West; that his son, Charles E. Horn, had removed before, and was residing at Jefferson, Illinois. The plaintiff packed a box of goods and delivered them to the freight agent at East Milan, directed to Charles E. Horn, Jefferson, Illinois, and ordered them to be forwarded by freight on the railroad. The box started from Milan in the freight cars on the 29th of August, 1864.

The defendant Cole, having a note against Charles E. Horn, instituted a suit on it, and had the box and contents attached on the writ at Northumberland, on the same 29th of August; and the defendant Green is the officer who made the attachment. The plaintiff brought this suit on the 31st of the same August. On the 3d of September he procured a receipter for the goods, and had them forwarded according to the original direction. The suit of Cole against Charles E. Horn was settled by payment of debt and costs. The plaintiff, on his arrival at Jefferson, found the box and contents there in good condition. The plaintiff claimed damages for the detention of the goods, and for consequential damages.

The plaintiff testified that the goods all belonged to him when they were delivered to the railroad, and when they were attached.

The defendant Cole testified that the plaintiff, when carrying the box to the depot, passed by Cole's shop, and that he said to the plaintiff, "Are you going to leave us, Horn?" that Horn replied, "No; but Charles had some things at my house, and I took them, and put a few of my things with them into the box, and am sending them to Charles;" that the plaintiff then procured Cole to mark the box, as before stated. The evidence tended to show that the plaintiff made similar statements to others, before and after, as to the ownership of Charles E. Horn.

There was no evidence that the plaintiff knew Cole had any demand against Charles E. Horn.

The defendant Cole also testifies that, relying on this representation to him that the goods belonged to Charles E. Horn, he had procured his writ and caused the property to be attached as belonging to Charles E. Horn.

The plaintiff was not indebted to Cole, but there was evidence that he was indebted to others.

The jury returned a verdict for the defendants, which the plaintiff moves the court to set aside.—and contends that, in order that the plaintiff should be estopped by his statements to show that the goods were his, the statements must have been made with the knowledge that Cole had a debt against Charles E. Horn on which the goods might be attached; and that the plaintiff intended to deceive and defraud Cole.

Fletcher, for the plaintiff, cited Andrews v. Lyons, 11 Allen, 349; Coggill v. H. & N. H. Railroad, 3 Gray, 549; Osgood v. Nichols, 5 Gray 420; Audenried v. Betteley, 5 Allen, 384; Plumer v. Lord, 9 Allen 455; Langdon v. Doud, 10 Allen 437.

Ray, for the defendants.

OPINION OF THE COURT.

By PERLEY, C. J. There is no complaint that the rulings and instructions of the court on the trial were erroneous or improper, provided the evidence warranted the jury in returning a verdict for the defendants; and the verdict must stand, if the evidence was competent to prove such representations by the plaintiff as would estop him to set up his title to the goods attached as the property of Charles E. Horn.

The evidence reported in the case was competent to prove that the plaintiff made the representations on the occasion and in the circumstances testified to by Cole; that the plaintiff, though not indebted to Cole, was in debt to others; that Cole, believing the representations to be true, and relying on them as true, caused the goods to be attached as the property of Charles E. Horn; and, also, that the plaintiff made these representations, knowing them to be false, with the intention that all persons who were interested in the subject should take them to be true and act on them as such, and with the intention to mislead and deceive all to whom the representations were communicated, and induce them to act on them as true; that his intention was to deceive his own creditors, and prevent them from taking the goods as his for the debts which he owed to them. These facts must be taken to have been established by the verdict.

But, as there was no evidence that the plaintiff knew Cole had any demand against Charles E. Horn, we cannot infer that the plaintiff had Cole in his mind as an individual whom he meant to deceive by his false representations, or that he had an intent to prevent Cole from taking the goods for a debt which he owed to Cole, as he owed no such debt; and, on the evidence reported, the jury were not at liberty to find that the plaintiff had Cole in his mind as an individual whom he meant to deceive and defraud by inducing him to take the goods for his demand against Charles E. Horn. This raises the point, which the counsel for the plaintiff takes, whether, to estop a party from showing that his representations were false, it is necessary that the false representations should have been intended to deceive and defraud the individual party who trusted to them and acted on them, provided there was a general intention to deceive and defraud all persons who were interested in the subject matter of the false representations.

The ground on which a party is precluded from proving that his representations on which another has acted were false, is, that to permit it would be contrary to equity and good conscience. This has been sometimes called an *equitable estoppel*, because the jurisdiction of enforcing this equity belonged originally and peculiarly to courts of equity, and does not appear to have been familiarly exercised at law until within a comparatively recent date; and, so far as relates to suits at law affecting the title to land, I understand that in England and in some of the United States, the jurisdiction is still confined to courts of equity. Storrs v. Barker, 6 Johns. Ch. 166, 168; Evans v. Bicknell, 6 Ves. 174, 178; Pickard v. Sears, 6 Ad. & Ellis, 469. The doctrine, however, is a very old head of equity, and is recognized and applied in a great number of the early cases. Dyer v. Dyer, 2 Ch. Cases, 108; Teasdale v. Teasdale, 13 Viner, 539; Hobbs v. Norton, 1 Vernon, 136; Gale v. Lindo, 1 Vernon, 475; Hunsden v. Cheyney, 2 Vernon, 150; Lumlee v. Hanman, 2 Vernon, 499; Raw v. Pote, 2 Vernon, 239; Blanchet v. Foster, 2 Ves. 264; East Ind. Co. v. Vincent, 2 Atkins, 83; Stiles v. Cowper 3 Atkins, 693; Farmer v. Webber, 13 Viner Abr. 525—2 Brown's Parl. Cases 88—2 Eq. Cases Abr. 481; Neville v. Wilkinson, 1 Bro. C. C. 543; Storrs v. Barker, 6 Johns. Ch. 166; Strong v. Ellsworth, 26 Vt. 366.

Many of these cases related to underhand agreements in fraud of marriage settlements; but the principle is of general application. 1 Fonblanque Eq. 267, note (x). Relief was given according to the circumstances of the case—sometimes by enjoining suits at law, in which the legal title was set up, and sometimes by decreeing conveyances and the cancelling of deeds and other instruments; but in all these cases relief was given in equity contrary to the strict legal rights of the defendants.

Thus, in the case of an *equitable estoppel*, a party is not allowed to assert his strict legal right, because in the circumstances of the individual case, it would be contrary to equity and good conscience. Take the present case for an illustration. In trover, following the legal definition of the action, if the plantiff proves property in himself and a conversion by the defendant, he has maintained his action, and is entitled to a verdict and judgment. It is conceded that the plaintiff owned the goods, and that the defendants converted them. The defence here set up appeals from the strict rule at law to the equitable doctrine that a party shall not be allowed to exercise his legal right of proving the facts, if, on account of his previous declarations or conduct, it would be contrary to equity and good conscience. So in a writ of entry; by the technical rules at law, if the demandant proves seisin in himself and a disseisin by the tenant within the time of limitation, he is entitled to judgment; but if the demandant, having a dormant title to the land demanded, concealed his title and encouraged the tenant to purchase from another, he is not allowed in our practice to set up his legal title, because it would be contrary to equity and good conscience.

It thus appears that what has been called an equitable estoppel, and sometimes with less propriety an *estoppel in pais*, is properly and peculiarly a doctrine of equity, originally introduced there to prevent a party from taking a dishonest and unconscientious advantage of his strict legal rights,—though now with us, like many other doctrines of equity, habitually administered at law. But formerly the practice was different, and suits at law, the courts being incapable of giving effect to this equity, were often enjoined where the party insisted on his rights at law contrary to the equitable doctrine, as in Raw v. Pote, Stiles v. Cowper, and Farmer v. Webber, *qua supra*.

It would have a tendency to mislead us in the present inquiry, as there is reason to suspect that it has sometimes misled others, if we should confound this doctrine of equity with the *legal estoppel by matter in pais*. The equitable estoppel and legal estoppel agree, indeed, in this, that they both preclude from showing the truth in the individual case. The grounds, however, on which they do it are not only different, but directly opposite. The legal estoppel shuts out the truth, and also the equity and justice of the individual case, on account of the supposed paramount importance of rigorously enforcing a certain and unvarying maxim of the law. For reasons of general policy, a record is held to import incontrovertible verity, and for the same reason a party is not permitted to contradict his solemn admission by deed. And the same is equally true of legal estoppels by *matter in pais*. Certain acts done out of court and without deed were, by a technical and unyielding rule of law, upheld on like grounds of public policy, and followed always by certain legal consequences. The legal effect of such acts was not permitted to be controverted by proof.

Thus, if one accepts a lease and enters under it, he is estopped to claim any other estate in the land during the term; he cannot show that he owned the land when the lease was made. Estoppels by *matter in pais* were few in number, and all of this general and well defined character; and they all enforced some technical rule of the law against the truth, and also against the justice and equity of the individual case. Coke, in his examination of the different kinds of estoppel by *matter in pais*, enumerates the following: "By livery, by entry, by acceptance of rent, by partition, and by acceptance of an estate." Co. Lit. 352, *a*. In Lyon v. Reed, 13 M. & W. 309, Parke, B., speaking of legal estoppels by *matter in pais*, says: "They are but few, and are pointed out by Ld. Coke, Co. Lit. 352, *a*. They are all cases which anciently really were and in contemplation of law have always continued to be, acts of notoriety no less solemn than the execution of a deed, such as livery, acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences follow."

In the authorities which contain the most complete enumeration of the different kinds of legal estoppels and the fullest discussion of the law on the subject, I find no allusion to the equitable estoppel which we are now considering. All legal estoppels, whether by record, by deed, or by *matter in pais*, depended on strict legal rules, and shut out proof of the truth and justice of the individual case. Viner's Abr., Estoppel, *passim*; Lyon v. Reed, 13 M. & W. 309; Freeman v. Cooke, 2 Ex. 658.

For this reason, because legal estoppels, whether by record, deed, or *matter in pais*, shut out proof of the truth and justice of individual cases, they have been called *odious*, and have been construed

with much strictness against parties that set them up. They were formerly required, like other defences regarded as inequitable, to be pleaded with certainty to a certain intent in every particular. If they were relied on by way of averment and tried by the jury, the jury might find, and according to some authorities were bound by their oath *veritatem dicere* to find, according to the truth of the case regard less of the estoppel. *Trials Per Pais*, 284; Co. Lit. 227, *a*; Com. Dig., Estoppel (S. 5). The practice is now different, and legal estoppels may be relied on, when given in evidence, without being specially pleaded. Legal estoppels exclude evidence of the truth and the equity of the particular case to support a strict rule of law, on grounds of public policy.

Equitable estoppels are admitted on the exactly opposite ground of promoting the equity and justice of the individual case, by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. The facts upon which equitable estoppels depend are usually proved by oral evidence; and the evidence should doubtless be carefully scrutinized, and be full and satisfactory, before it should be admitted to estop the party from showing the truth, especially in cases affecting the title to land. But where the facts are clearly proved, the maxim that estoppels are odious,—which was used in reference to legal estoppels, because they shut out the truth and justice of the case,—ought not to be applied to these equitable estoppels, as it has sometimes been, inadvertently as I think, from a supposed analogy with the legal estoppel *by matter in pa* , to which they have, in this respect, no resemblance whatever. Ld. Campbell, in Howard v. Hudson. 2 Ellis & Bl. 10; Andrews v. Lyons, 11 Allen, 349, 351. In other cases, where more attention has been paid to the real nature of this equitable doctrine, it has been held that such estoppels are not odious, and to be construed strictly, but are entitled to a fair and liberal application, like other equitable doctrines which are admitted to suppress fraud and promote honesty and fair dealing. Mellor and Compton, Justices, in Ashpitel v. Bryan, 3 Best & Smith, 472; Cowen, J., in Dezell v. Odell, 3 Hill, 220; Com. v. Motz, 10 Barr, 530, 531; Buckingham v. Hanna, 2 Ohio St. 557; Van Rensselaer v. Kearney, 11 Howard, 326; Preston v Mann, 25 Conn. 118, 128

In this equitable estoppel, the party is forbidden to set up his legal title, because he has so conducted himself that to do it would be contrary to equity and good conscience. As in other cases of fraud and dishonesty, the circumstances out of which the question may arise are of infinite variety; and, unless courts at law are willing to abdicate the duty of administering the equitable doctrine effectually in suppression of fraud and dishonesty, the application of it cannot be confined within the limit of any narrow technical definition, such as will relieve courts from looking, as in other cases depending on fraud and dishonesty, to the circumstances of each individual case. Certain general rules will doubtless apply, as in other cases where relief is sought on such grounds. But I find myself unable to agree with the authorities where the old maxim, that legal estoppels are odious, has been applied to this equitable estoppel, and where attempts have been made to lay down strict definitions, such as would defeat the remedy in a large proportion of the cases that fall within the principle on which the doctrine is founded.

The doctrine having been borrowed from equity, courts at law that have adopted it should obviously look to the practice in equity for their guide in the application of it; and in equity, the doctrine has been liberally applied to suppress fraud and enforce honesty and fair dealing, without any attempt to confine the doctrine within the limits of a strict definition. For instance, the doctrine has not in equity been limited to cases where there was an actual intention to deceive. The cases are numerous where the party who was estopped by his declarations or his conduct to set up his legal title, was ignorant of it at the time, and of course could have had no actual intention to deceive by concealing his title. Yet, if the circumstances were such that he ought to have informed himself, it has been held to be contrary to equity and good conscience to set up his title, though he was in fact ignorant of it when he made the representations. Hobbs v. Norton, Hunsden v. Cheyney, Teasdale v. Teasdale, *qua supra*; and Burrowes v. Lock, 10 Ves. 470. So if the party knew the facts, but mistook the law. Storrs v. Barker, 6 Johns. Ch. 166. Nor is it necessary in equity that the intention should be to deceive any particular individual or individuals. If the representations are such, and made in such circumstances, that all persons interested in the subject have the right to rely on them as true, their truth cannot be denied by the party that has made them against any one who has trusted to them and acted on them. Gale v. Lindo, Farmer v. Webber, *qua supra*.

In the much and well considered case of Preston v. Mann, 25 Conn. 118, 128, Storrs, J., delivering the opinion of the court, says: "The doctrine of estoppel *in pais*, notwithstanding the great number of cases which have turned upon it and are reported in the books, cannot be said even yet to rest upon any determinate legal test which will reconcile the decisions, or will embrace all transactions to which the general principles of equitable necessity wherein it originated demand that it should be applied. In fact, it is because it is so peculiarly a doctrine of practical equity, that its technical application is so difficult, and its reduction to the form of abstract formulas is still unaccomplished." This was said in 1856, and little has since been done towards extricating the doctrine from the confusion and conflict of authority with which it was then embarrassed. This, as I think, has been caused by the fact that courts have continued to exercise their ingenuity in the vain attempt to compress a broad doctrine of equity within the narrow limits of a technical definition.

The case of Pickard v. Sears, 6 Ad. & Ellis, 469, decided as late as 1837, appears to have been regarded, both in England and in this country, as the leading case at law on this subject. It was trover by the mortgagee of personal goods against the defendants, who were purchasers at a sheriff's sale on execution against the mortgagor. The facts set up in defence were, that the plaintiff was present at the sale, did not disclose his title as mortgagee, and encouraged the defendants to purchase. The question on trial was as to the property of the plaintiff in the goods, and Ld. Denman directed a verdict for the plaintiff. A rule to show cause why the verdict should not be set aside was made absolute.

In delivering the judgment of the court, Ld. Denman said: "His (the plaintiff's) title having been established, the property could only be divested by gift or sale, of which no specific act was even surmised. But the rule of law is clear, that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring a different state of things as existing at the same time; and the plaintiff might have parted with his interest in the property by a verbal gift or sale, without any other formalities that threw technical difficulties in the way of legal evidence. And we think his conduct in standing by and giving a kind of sanction to the proceedings under the execution was a fact of such a nature that the opinion of the jury ought to have been taken whether he had not, in point of fact, ceased to be the owner."

It is worthy of note, that in this suit at law the court, so late as 1837, after stating the general equitable doctrine, did not venture to put the defence directly on the ground that the plaintiff was estopped by his conduct to prove the truth of the case, but allowed the facts to go to the jury as evidence that the plaintiff, in some undefined and mysterious way, had parted with his property in the goods; so late and so reluctant were the courts to admit in suits at law this defence, which depended on fraud and dishonesty, and which belonged, originally and appropriately, to the jurisdiction in equity.

It can hardly be supposed that Ld. Denman, in the statement which he made of this equitable doctrine in reference to the facts of that case, understood that he was laying down a technical definition fixing the limits of the doctrine, and excluding all cases that did not come clearly within the terms which he used on that occasion. Nevertheless, these remarks of Ld. Denman have often being treated as a sort of authoritative text, covering the whole ground, which it was the business of courts in later cases to expound and explain. And it is curious to observe what different and contradictory interpretations have been put on his statement of the equitable doctrine. It has been cited in Massachusetts as authority for decisions, in which it has been held that the representations, to estop the party from showing they were not true, must have been made with the intent to deceive, and the intent to deceive the party who sets up the defence. Plumer v. Lord, 9 Allen, 455; Andrews v. Lyons, 11 Allen, 349. And in California the same case has been relied on for the rule that where a representation comes in any way to the ears of a party, who acts on it, the party making the representation is estopped to deny its truth, unless it had the character of a confidential communication. Mitchell v. Reed, 9 Cal. 204. In England it has been treated as a statement of the equitable doctrine made in reference to the circumstances of that case, and not intended as a formal and complete definition. Freeman v. Cooke, 2 Ex. 654; Gregg v. Wells, 10 A. & E. 90; Jorden v. Money, 5 House of Lords Cases, 212.

It would be a laborious and not a profitable task to attempt an analysis of all the recent decisions on this subject. I will briefly advert to some of those which appear to be the most important.

In Plumer v. Lord, 9 Allen, 455, it was held that to create an estoppel *in pais*, the declarations or acts must have been accompanied with a design to mislead; and Langdon v. Doud, 10 Allen, 433, is to the same point. In Andrews v. Lyons, 11 Allen, 349, the court went one step further, and decided that the declarations or acts must have been accompanied with a design to deceive the party who sets up the estoppel, and induce him to act on them; and in this last case it is said that such an estoppel shuts out the truth, and is odious, and must be strictly proved. In Hawes v. Marchant, 1 Curtis C. C. 144, the rule is laid down that to be estopped the party must have designedly made admissions inconsistent with the defence or claim which he proposes to set up, and another, with his knowledge and *consent*, so acted on this admission that he will be injured by allowing the admission to be disputed; and this rule is cited and apparently approved in Audenried v. Betteley, 5 Allen, 382.

In these cases it is to be observed, the court have not been content with saying, in reference to the facts before them, that if certain things concurred in the case, it would fall within the equitable doctrine, and the party would be estopped, but they have undertaken to lay down a strict legal definition of general application, excluding from the operation of the doctrine all cases that do not fall within the terms of the definition. Applying the rule, as laid down in Hawes v. Merchant, to the present case; if Horn had known that Cole had a demand against Charles E. Horn, had falsely represented to Cole that the goods belonged to Charles, with the design to deceive him and induce him to attach the goods as the property of Charles, and Cole, relying on the representation, had taken the goods as the property of Charles and as Horn intended, yet, if after he had made the false representation he did not know that the goods were taken, as the property of Charles, and assent that they should be so taken, he would not be estopped to set up his own title in the goods. The statement that another party must have acted on the false statement with his *knowledge and assent*, must mean this, or it can mean nothing; for he could not know that he had acted on it at all until the act was done and accomplished.

The remark of Lord Campbell in Howard v. Hudson, *qua supra*, though not called for by the case, is to the effect that the representation must have been intended to deceive.

The authorities would seem to sustain the plaintiff's counsel fully in his position that the false representation must not only be intended to deceive, but also to deceive the identical party that acted on them.

There are, however, authorities of equal respectability, and in greater numbers, which maintain a different doctrine.

In England, the case of Pickard v. Sears does not appear to have been understood as intended to lay down a complete definition of the equitable doctrine excluding all cases that could not be brought within the terms of the remarks made by Lord Denman. In Freeman v. Cooke, 2 Ex. 654, it was held that the term *wilfully*, used in Pickard v. Sears, was not to be understood in the sense of *maliciously*; and that whatever a man's real meaning may be, if he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant he should act on it, and he did act on it as true, the party making the representation would be equally precluded from contesting its truth. This is wholly inconsistent with the notion that an intention to deceive is an essential ingredient of the representation, which precludes the party making it from showing that it was false. So in Jorden v. Money, 5 House of Lords Cases, 212, it was held not to be necessary that the party making the representations should know that they were false; that no fraud need have been intended at the time; but if the party *unwittingly* misled another, you must add that he has misled him under such circumstances that he had reasonable ground for supposing that the person whom he was misleading would act upon what he was saying.

In Gregg v. Wells, 10 A. & E. 90, Lord Denman says: "Pickard v. Sears was in my mind at the time of the trial, and the principle of that case may be stated even more broadly than it is there laid down. A party who *negligently* or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in the action against the person whom he has himself assisted in deceiving." This shows that Lord Denman did not himself understand that his remarks in Pickard v. Sears were to be taken as a definition and limitation of the equitable doctrine, for he says the principle of the case might be stated more broadly than it is laid down there, and may include the case of a culpable negligence. So Hobbs v. Norton, 1 Vernon, 136; Hunsden v. Cheyney, 2 Vernon, 150, Teasdale v. Teasdale, 13 Viner, 539, Burrowes v. Lock, 10 Ves. 475, before cited, show that the practice in equity does not require that there should in all cases be an intention to deceive, or even a knowledge that the representation was false.

We come now to the decisions in this country, which give a broader application to this doctrine than those before cited.

In Dezell v. Odell, 3 Hill, 221, the general doctrine is said to be that when a party, either by his declarations or his conduct, has influenced a third person to act in a particular manner, he will not be afterwards permitted to deny the truth

of the admission, if the consequence would be to work an injury to such third person, and that in such case it must appear, first, that he made an admission which is clearly inconsistent with the evidence he proposes to give, or the claim which he proposes to set up; second, that the party has acted on the admission; third, that he will be injured by allowing the truth of the admission to be disputed. According to this interpretation of the equitable doctrine, it would seem not to be necessary that the representation should be intended to deceive, or that the party making it should know it to be false, or that it should be intended the party should act on it, who does so in fact, and is deceived by it. The rule of this case has been adopted and followed in Newman v. Hood, 37 Mis. 207; Carpenter v. Stillwell, 12 Barb. 135. and Eldred v. Hazlett, 33 Penn. St. 316.

In Roe v. Jerome, 18 Conn. 138, the general doctrine is stated to be, that where one person by his words or conduct causes another to believe in a certain state of things, and thus induces him to act on that belief, so as injuriously to affect his previous position, he is concluded from averring a different state of things as existing at the time; and this rule was followed in the later cases of Cowles v. Bacon, 21 Conn. 451, and Dyer v. Cady, 20 Conn. 563; and in Preston v. Mann, 25 Conn. 118, before cited, it is said that the doctrine did not then rest on any determinate legal test which will embrace all transactions to which the general principles of equity, in which it originated, demand that it should be applied.

Buchanan v. Moore, 13 S. & R. 304, 306, is to the point that though the party believed his representation to be true, and made it under a mistake, he is estopped to show that he made the representation innocently believing it to be true, provided the other party acted on it, and had reason to act on it, as true. So in Strong v. Ellsworth, 26 Vt. 366, it is said by Redfield, C. J., that he who by his words or actions, or his silence even, intentionally or *carelessly* induces another to do an act which he would not otherwise have done, and which will prove injurious to him if he is not allowed to insist on the fulfilment, may insist on such fulfilment, and that the doctrine of equitable estoppels lies at the foundation of morals. In Mitchell v. Reed, 9 Cal. 204, it was held that where a statement made to a third person is not confidential, but general, and is acted on by others, the party making the declaration is estopped to deny its truth; that the intention with which the declaration is made is not material, except, perhaps, where it is confidential. This case, and Quirk v. Thomas, 6 Mich. 76. are authorities that to work the estoppel it is not necessary the declaration should be made to the party who acts on it, nor in his presence, nor that the declaration should be intended to come to the knowledge of any particular person.

In a suit at law to recover damages for a false affirmation that the signer of a note was of age, it was decided, in Lobdell v. Baker, 1 Met. 193, that it was not necessary to allege or prove that the defendant knew the signer was an infant. Wilde, J., in delivering the opinion of the court said: "A party may render himself liable in an action for damages to a party prejudiced by a false affirmation, though not made with any fraudulent intention." This, it may be said, is not directly in point, but the only difference is in the form of the remedy. The principle involved is the same, whether the question is raised in a suit to recover damages for the false representation, or redress is sought by estopping the party to prove the falsehood of the representation. Both cases go on the same general ground, that the party is responsible for the consequences of his false representation.

There are numerous authorities that it is not necessary to the estoppel that the declarations or conduct should be intended to deceive any particular person or persons; that if they were intended to deceive generally, or were of such a character and made in such circumstances that it must have been understood they were likely to deceive, and any person using due diligence was in fact deceived by them, it is enough. Gregg v. Wells, 10 A. & E. 90; Wendell v. Van Rensselaer, 1 Johns. Ch. 353; Adams County v. Brown, 16 Ohio St. 78; Dezell v. Odell, 3 Hill. 221; Quirk v. Thomas, 6 Mich. 76; Mitchell v. Reed, 9 Cal. 204.

It has been declared in many cases that this equitable estoppel involves a question of legal ethics, and applies wherever a party has made a representation, by words or conduct, which he cannot in equity and good conscience prove to be false; and that this kind of estoppel, being a broad doctrine of equity, cannot be limited in application by the terms of any narrow legal definition. In the Canal Co. v. Hathaway, 8 Wend. 483, it is said by Sutherland, J., that the party is estopped when in good conscience and equity he ought not to be permitted to gainsay his admission; and in the same case, by Nelson, J., "from the means in which the party must avail himself of these estoppels, it is obvious there can be no fixed and settled rules of universal application." And in Dezell v. Odell, 3 Hill, 225, Bronson, J., adopting the language of Nelson, J., in the Canal Co. v. Hathaway, adds: "It is a question of ethics." In Strong v. Ellsworth, 26 Vt., Redfield, J., says, the doctrine lies at the foundation of morals. In Lucas v. Hart, 5 Iowa, 415, the court held that "in these estoppels there can be no fixed and settled rules of convenient application to regulate them as in technical legal estoppels; that in many, and probably in most instances, whether the act or admission shall operate as an estoppel or not, must depend on the circumstances of the case, though there are some general rules which may materially assist in the examination of such cases." In the application of these general rules to that case, the court decided that the acts and admissions of the respondent estopped him from asserting his title to the property in question; that to permit him to do it would be "unconscionable, and contrary to that fairness and honest dealing which courts of equity seek ever to promote and encourage."

In Frost v. The Saratoga Co., 5 Denio 154, it is said by Beardsley, C. J., that such an estoppel is a question of ethics, and is allowed to prevent fraud and injustice, and exists wherever a party cannot in good conscience gainsay his own acts or assertions. The case of Preston v. Mann, 25 Conn. 118, is strong to the point that this estoppel, depending on a broad doctrine of equity, cannot be governed in application by narrow and strict rules of construction, such as have prevailed in legal estoppels.

In some if not in most of the cases, in which it is said that if a party makes representations intending to deceive the party that acts on them, the equitable estoppel applies, it was not intended, as I think, to lay down a rule excluding all cases that did not fall within the statement made in reference to the facts of the case then under consideration; that what is said is not to be taken as a rule to limit and define the doctrine and exclude all other cases. They say, if such and such things concur, *this case* will fall within the doctrine; but they do not intend to say no other cases are within it. For example, in Kinney v. Farnsworth, 17 Conn. 361, Storrs, J., says that "admissions which have been the means, *designedly*, of leading others to a particular course of conduct, cannot afterwards be conscientiously retracted by one who has made them." He could not have intended to lay down the rule that one would in no case be estopped by a representation not *designed* to deceive, because the same judge, in Preston v. Mann, says: "The doctrine is not reduced to the limits of any formula," and "whatever the *motive* may be, if one so acts or speaks that the natural consequence of his words or conduct will be to influence another to change his condition, he is legally charged with the intent to induce the other to believe and to act on that belief, if such proves to be the result." So Lord Denman, speaking, in Gregg v. Wells, 10 A. & E. 90, of his judgment in Pickard v. Sears, says: "The principle of that case may be stated even more broadly than it is there laid down."

In this State we have several cases where the general question has been more or less considered. In Wells v. Pierce, 27 N. H. 503, the doctrine of equitable estoppel was traced to its origin in equity, and it was held that if the owner actively encourages the purchase of his property from another, he will be precluded from claiming it, though he was not aware of his interest at the time; which is clearly in conflict with the notion that the representation must be accompanied with an intention to deceive. In Davis v. Handy, 37 N. H. 65, the doctrine of Wells v. Pierce was approved and applied. In the recent case of Drew v. Kimball, 43 N. H. 285, one point directly involved was, whether it was necessary that the party to be estopped should intend to deceive and defraud the individual to whom the representation was made, and who set up the defence; and it was held that it was not necessary. Indeed, it seems to me that it would be trifling with a doctrine depending on equity and good conscience to hold otherwise. So, if a representation was intended to deceive one man, and it in fact deceived and defrauded another. Then, again, if the representation were intended to have one operation, and, as it turned out, deceived and defrauded by another method not contemplated by the party at the time, but still the natural consequence of the representation, it would be quibbling with a doctrine depending for its application on the morality of the act, to hold that the party would not be answerable for the consequences of his false and fraudulent representation, as much as if it had taken effect on the party and in the manner intended. In a case depending on a question of "legal ethics," it would bring down the morality of the law to a very low standard to hold that a party was not liable for the wrong caused by his fraud to one man, because the fraud was contrived against another man.

In Drew v. Kimball the case did not raise the precise point taken in this case. But, on a full discussion of the general doctrine and a review of the authorities, the court adopting the hypothetical case put by PARKE, B., in Freeman v. Cooke, say: "If whatever a man's intentions may be, he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant that he should act upon it, and he did act upon it as true, the party making the representa- would be equally precluded from contesting its truth. In short, the representations are to be regarded as *wilful* when the person making them means them to be acted on, or if, without regard to intention, he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant he should act on it."

There have been several other cases in this State where this equitable doctrine has been considered and applied. Thompson v. Sanborn, 11 N. H. 201; Simons v. Steele, 36 N. H. 73; McMahon v. Portsmouth Ins. Co., 22 N. H. 15; Odlin v. Gove, 41 N. H. 473; Corbett v. Norcross, 35 N. H. 99. 115; Richardson v. Chickering, 41 N. H. 380, 385. Though I do not find that the precise point taken here for the plaintiff has been directly decided in any of our cases, yet the general current of our decisions on the subject tends to a liberal application of the doctrine for the suppression of fraud and dishonesty, and the promotion of justice and fair dealing. No disposition has been shown in the courts of this State to treat this equitable estoppel as odious, and embarrass its application by attempts to confine it within the limits of a narrow technical definition. We are content to follow where the spirit and general tone of these decisions lead; and they lead plainly to the conclusion, that where a man makes a statement disclaiming his title to the property, in a manner and under circumstances such as he must understand those who heard the statement would believe to be true, and, if they had an interest in the subject, would act on as true, and one, using his own means of knowledge with due diligence, acts on the statement as true, the party who makes the statement cannot show that his representation was false to the injury of the party who believed it to be true, and acted on it as such; that he will be liable for the natural consequences of his representation, and cannot be heard to say that the party actually injured was not the one he meant to deceive, or, that his frand did not take effect in the manner he intended.

Our conclusion is, that, on the facts which the verdict has established, the plaintiff was estopped to show his representation that the goods belonged to Charles E. Horn, to be false, though he did not know that the defendant Cole had any demand against Charles E. Horn, and though he had not Cole in his mind as the party whom he meant to deceive.

Judgment on the verdict.

LEGAL GAZETTE.

Friday, February 14, 1873.

JOHN H. CAMPBELL,
EDITOR.
THEODORE F. JENKINS,
ASSOCIATE EDITOR.

Supreme Court, United States.

UNITED STATES v. KELLY.

A soldier, who had deserted, but was restored to duty by order of his department commander, without trial, on condition that he make good the time lost (about two months), and who complied with the condition, and was honorably discharged at the expiration of his term of service, *held*, entitled to bounty money, notwithstanding his desertion.

This was an appeal by the United States from a judgment of the Court of Claims, in favor of one Kelly, late a soldier in the army of the United States, for an unpaid balance of bounty money.

The claim was denied by the pay department, on the ground that the bounty had been forfeited by desertion. The case as found by the court was, that the petitioner had deserted, but was restored to duty by order of his department commander, without trial, on condition that he make good the time lost, about two months; that he complied with the condition, and was honorably discharged at the expiration of his term of service.

Upon this case, Mr *N. P. Chipman*, for the soldier, and in support of the ruling below, made a very full examination of the acts of Congress, and on an exhibit of their provisions, argued that there was nothing in any of them prohibiting the payment of bounty money to a soldier who had deserted, irrespectively of the circumstances of his desertion; that desertion, being sometimes a mere technical desertion, and without cowardice or disaffection to the service, did not, *per se*, so taint the *status* of the soldier, as to render him necessarily and without any judicial proceedings, absolutely disqualified to receive bounty; nor was it, under every circumstance, such an act that his contract with the government was wholly and *ipso facto* dissolved, and that he could never return, and by performance of service, properly thereafter—which service should be accepted—set up a condonation of his offence. "What," said Mr. Chipman, "would be the result in an army of a million of troops, called out as troops were during the rebellion, comprising officers and men of inexperienced years, unacquainted with the laws of war, the rigors of discipline, unused to the restraints which capricious or incompetent superior officials could enforce; not schooled, or proof against the evil influences of depraved associates, and liable, under some physical suffering or discouragement, or inadvertence, to commit an offence, the gravity of which was not comprehended, the penalty for which had not been understood or appreciated." The learned counsel fortified his views by references to the third edition, published in 1868, of the Digest of the present Judge Advocate General of the United States, the Honorable Joseph Holt, Esq., whom he characterized as "the most eminent and able writer on military law, that this country had ever produced."

Mr. *C. H. Hill*, assistant attorney general, contra, submitted the case on the record.

The Chief Justice delivered the opinion of the court.

We do not think, that under the circumstances of the present case, the bounty was forfeited. The able lawyer who fills at present the post of judge advocate general in a case similar to the present, held (Digest of Opinions of the Judge Advocate, p. 146, paragraph 7, title "Discharge"), that "the honorable discharge of the deserter was a formal final judgment passed by the government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a status of honor; that as such, it dispensed altogether with the supposed necessity that the soldier must obtain bounty by removal, by order, of the charge of desertion from the rolls, and amounted of itself to the removal of any charge or impediment in the way of his receiving bounty."

With this opinion we entirely concur. The judgment of the Court of Claims is affirmed.

NICOLSON PAVEMENT COMPANY v. JENKINS.

An assignment of a reissued patent, reciting the date and number of the reissue, and that the original patent had been "given for the term of fourteen years;" reciting that the assignee had agreed to purchase all the right, title, and interest which the patentee had "in the *said invention* as secured by the *said* letters-patent;" and transferring to the assignee all the right, title and interest which the patentee has "in the *said invention and letters-patent*;" "the same to be held and enjoyed by the said party for the use and behoof of him and his legal representatives to the full end of the term for which the said letters-patent *are* or *may* be granted, as fully and effectively *as the same would have been held and enjoyed by the assignor had the assignment never been made*," will transfer an extension and renewal of the patent made under the acts of July 4th, 1836, and of May 27th, 1848; and this though the patent be reissued subsequently to the assignment.

Error to the Circuit Court for the District of California; the case being thus:

On the 8th of August, 1854, Samuel Nicolson obtained letters-patent for an improvement on wooden pavements. On the 1st of December, 1863, he obtained a reissue. He then, December 1st, 1864, made an assignment to Jonathan Taylor, thus:

"Whereas I, Samuel Nicolson, invented a certain new and useful improvement in wooden pavements, of which letters-patent of the United States of America (numbered 1583 of reissued patents, and bearing date the 1st of December, 1863) have been granted to me, giving to me and my legal representatives the exclusive right of making, using, and vending the said invention throughout the said United States; the original patent being dated August 8th, 1854, and given for the term of *fourteen* years.

"And whereas Jonathan Taylor has agreed to purchase from me all the right, title, and interest which I have in and to the *said* invention for and in the city of San Francisco, as secured by the *said* letters-patent, and has paid to me the sum of one dollar, the receipt whereof is hereby acknowledged.

"Now, therefore, this indenture witnesseth, that for and in consideration of the said sum to me paid, I have assigned, sold, and set over, and do hereby assign, sell, and set over, unto the said Taylor, all the right, title, and interest which I have in the *said* invention and letters-patent for and in the said city of San Francisco, but in no other place.

"The same to be held and enjoyed by the said Taylor for the use and behoof of him and his legal representatives *to the full end of the term for which the said letters-patent* are or *may be granted, as fully and effectively as the same would have been held and enjoyed by me had this assignment never been made.*"

Afterwards, August 20th, 1867, Nicolson obtained another reissue of the same letters-patent on an amended specification; and he having died in January, 1868, intestate, the commissioner of patents, on the application of his administrator, on the 7th of July, 1868, renewed and extended the letters-patent for seven years from the 8th of August, 1868, under the well known 18th section of the act of July 4th, 1836, and the act of Congress of May 27th, 1848.

The right (whatever it was) which was vested in *Taylor under the assignment*, being subsequently transferred to the Nicolson Pavement Company, and that company having laid a large extent of the patented pavement in San Francisco, after the expiration of the original patent, one Jenkins, who had obtained from the *administrator* of Nicolson whatever right was vested in *him* under the renewal and extension of 1868, sued the company.

The question, of course, was whether the assignment from Nicolson to Taylor of December 1st, 1864, vested any estate, right, title, or interest in the assignee, in or to the extended or renewed term, which was acquired by Nicolson's administrator under the act of Congress, subsequent to the date of the assignment.

The court below thought that it did not, and gave judgment against the company. From that judgment the company brought he case here.

Mr. *T. T. Crittenden*, for the plaintiff in error:

The commissioner of patents having been authorized by statute to grant extensions for seven years, the original letters-patent then became virtually a patent for twenty-one years. No one can in view of well known decisions of this court deny that the inchoate right of the inventor to the exclusive privileges under an extension of letters-patent is the subject of a sale, and certainly the words of this assignment in the concluding part of it are applicable only to a design to convey both a present and future interest.

Mr. *M. H. Carpenter* (a brief of Mr. J. R. Sharpstein being filed), *contra*:

The recitals in the assignment show that the original patent had been issued for the term of fourteen years, and that before the expiration of the term there had been a reissue of the patent; that Taylor had agreed to purchase a certain interest in said invention, "*as* secured by *said* letters-patent" (the letters-patent recited); that in consideration of the premises he assigned, sold, and set over to said Taylor his interest "in the *said* invention *and letters-patent*," the letters-patent thereinbefore mentioned. Thus far there is no allusion to any term or letters-patent other than the original term of fourteen years, and the letters-patent originally issued, and the reissued letters recited.

These form the entire subject matter of the contract. There can be no doubt as to the intention of the parties, unless certain words in the *habendum* clause, contrary to the ordinary rules of construction, can be construed as extending the contract to a subject matter not before embraced, or referred to, in the recitals or granting portions of the deed. As we have seen, the *habendum* clause is, "the same to be held and enjoyed . . . . to the full end of *the term* for which the *said* letters-patent are or *may* be granted." The words "may be granted" are the only ones in the whole instrument that can be thought to point to an extension that might subsequently be acquired. But they must be read in connection with, and in subordination to, the rest of the instrument, and this very clause refers to "*the term* for which the *said* letters-patent," &c. A single term is referred to, and the *said* letters-patent. The reference is in terms to the term and the letters-patent already mentioned. The phrase "may be granted," seems to be an expression loosely used, and without any definite meaning in the connection in which it is found, unless it refers to other reissues of patents covering the remainder of said term. There had already been one reissue, and the facts show that a second reissue was had for the remainder of the term after this assignment, doubtless to cover some defect. These reissues are authorized by the act of Congress; and often occur. In a certain sense, when the patents thus originally issued are surrendered, and others issued in their place, the whole may be regarded as the same letters-patent. They cover the same term. The reissued patent covers no improvement or extension, but is intended to rectify some error, or remedy some defect, and accomplish the identical object intended to be accomplished by the letters originally issued. In this sense, they are substantially the same letters-patent. In this view, the words "may be granted" may have some significance as used in this instrument, and they are satisfied by applying them to any further letters patent that might be issued for the same term and to accomplish the same objects intended by those already issued. And in this instance, there was a subsequent reissue for the remainder of the term, to which they might in fact apply. But upon a view of the whole instrument, to construe them as referring to a new term, and letters-patent not yet *in esse*, would be doing violence to the language.

Mr. Justice DAVIS delivered the opinion of the court.

An assignment of an interest in an invention secured by letters-patent, is a contract, and like all other contracts is to be construed so as to carry out the intention of the parties to it. It is well settled, that the title of an inventor to obtain an extension, may be the subject of a contract of sale, and the inquiry is whether the instrument of sale employed in this case, did secure to the purchaser an interest not merely in the original letters-patent, but in any subsequent extension of them. It recites the invention and the agreement of Taylor to purchase the right to use it in the city of San Francisco, and then conveys to him all the title and interest which Nicolson had in the *invention*, and letters-patent for and in the said city, to be enjoyed by Taylor and his legal representatives to the full end of the term for which the said letters-patent are, or *may be granted*. There is no artificial rule in construing a contract, and effect, if possible, is to be given to every part of it, in order to ascertain the meaning of the parties to it. Taking this whole deed together, it is quite clear that it was intended to secure to Taylor and his assigns the right to use the invention in San Francisco, as long as Nicolson and his representatives had a right to use it anywhere else. Manifestly, something more was intended to be assigned than the interest then secured by letters-patent. The words "to the full end of the term for which the said letters-patent are or may be granted," necessarily import an intention to convey both a present and a future interest, and it would be a narrow rule of construction to say that they were designed to apply to a reissue merely, when the invention itself, by the very words of the assignment, is transferred. It was easy to have restricted the right to use the invention to the end of the term of the original letters and reissues, but this was not done; and in view of the right of the inventor in certain contingencies to a renewal—which must have been well known to both buyer and seller of this kind of property—we are led to the conclusion that both parties contracted with reference to it. The case of The Rai road v. Trimble is not different in principle from this, although in that case the language used is somewhat broader.

Judgment reversed, and a *venire de novo* awarded.

Supreme Court of Pennsylv'a.

MAYER v. SIMPSON.

Where a building when completed was found to overlap the adjoining lot, the court refused a mandatory injunction to remove the building.

Appeal from a decree of Nisi Prius in equity.

For opinion and decree at Nisi Prius, see Legal Gazette, vol. 4, p. 1.

Opinion by READ, C. J. Delivered February 13th, 1873.

Robert F. Simpson owns a lot of ground at the northwest corner of Arch and Ninth streets, extending in front on Arch street 48 feet, and in length or depth on Ninth street 126 feet, and John Mayer owns a lot adjoining it on the north 18 feet on Ninth street, 48 feet in depth. The defendant, in 1870, erected a building, intended for a museum and theatre, covering the whole of his lot, the north wall of which was an eighteen inch brick party-

wall, which by law should be six and a half inches on the plaintiff's lot. Mr. Shedaker gave to the defendant, or his agent, the true line between the two properties in his capacity as surveyor and regulator of the third district, and the stone foundation of the party-wall was correctly laid. The brick wall was carried up, beginning at stone foundation, as would appear by Mr. Sheldrake's measurement of the 30th and 31st Aug., 1870. three-eighths of an inch over on plaintiff's lot, beyond the limits allowed by law. In extending the wall back on the stone cellar wall, in different parts it overlapped three-quarters of an inch and seven-eighths of an inch, and in the middle of building the wall overhung the lot No. 110, top of first story, two and three-quarter inches, at top of second story, three and a half inches, and four feet above the floor, on the third floor, four and one-eighth inches. A subsequent measurement by John F. Wolf, surveyor and regulator of the fifth district, was more unfavorable to the defendant. Jacob Rush entered into a contract with the plaintiff to erect on his lot, No. 110, a three-story building, with Mansard roof, 18 feet front by 46 feet deep. It was for a certain price; Rush contracting to pay for all party-walls. Defendant's cellar wall was up before the contract was signed, and the excavation for the building on No. 110, was commenced on the 23d June, 1870. Defendant's wall was carried up ahead of the plaintiff's, and Mr. Rush saw the wall was coming over, and notified Mr. John Bingham, who had charge of the work at the time, that the wall was coming over, and that he had better shore it. He did so, but put the shore in the wrong place. Mr. Rush put in the joists in the party wall, and paid for the party-wall according to his contract. The plaintiff having heard of its overhanging, employed Mr. Shedaker to make the measurement already stated, and immediately took measures to have the error corrected, which ended in filing this bill in equity, September 22d, 1870. The wall is up and both buildings are under roof. The usual five days' injunction was issued and dissolved on the 29th of September. The case was then heard on bill, answer and proofs, and the bill dismissed with costs. From this decree this appeal is taken. The occupation unlawfully of a portion of the plaintiff's lot does not convey any title to it to the defendant, nor does it affect the plaintiff's title, or his right to recover damages for the trespass, but as an injunction is a matter of discretion with a court of equity, we do not feel bound to grant a mandatory injunction to tear down the wall, which is the practical meaning of the second prayer of the bill. This case shows the necessity of great care and attention on the part of the owners and contractors in the erection of party-walls, from the time they are commenced until they are finished The party erecting, as in this case, will take care it is plumb, as it is smooth on his side, and it is his interest to get the full use of his lot; but as was the fact here, more careless as to the encroachment on his neighbor's property. The building inspectors should be particularly careful in inspecting party-walls, for their powers are large in correcting all errors in such walls, not built in accordance with law. A full history and discussion of the subject is to be found in Vollmer's Appeal, 11 P. F. Smith, 118. We affirm the decree of the court below, with a modification. The bill is dismissed with costs, without prejudice.

HOUGHTON v. ROWLEY.

A license is personal and not assignable.

Exceptions to master's report.

Opinion by SHARSWOOD, J. Delivered February 8th, 1873.

It has not been seriously maintained in the argument upon these exceptions, that if the construction placed by the master upon the agreement and license of February 17th, 1869, is the right one, that the conclusion at which he has arrived is wrong. Taking both instruments together, I agree that Houghton's exclusive privilege to manufacture the rings for and to supply them to Rowley, was "personal to said Houghton," which he could not assign to any other party; and it follows, that he could not arrange with others to manufacture screw rings "made substantially after the manner of the specimens" annexed—so as in that way to enable him to supply Rowley. If this be so, it is clear, that Houghton, in point of fact, was not able to comply with his contract, and there was a failure on his part, in consequence of which his right, by the terms of the license, ceased and determined.

Exceptions dismissed, and bill dismissed with costs.

AT NISI PRIUS. IN EQUITY.

THE PHILADA. TRUST SAFE DEPOSIT AND INS. CO., Assignee, v. THE FAME INS. CO.

An assignee of an insolvent insurance company which had effected re-insurances, can, before paying the insured bring a bill against the company making the re-insurance for the amount of insurance for which the insolvent company was liable.

Demurrer to bill.

Opinion by SHARSWOOD, J. Delivered February 8th, 1873.

I think there is authority which sustains the jurisdiction of a court of equity in a case of this kind. A contract of re-insurance is a contract of indemnity. The re-insured may go into equity as soon as the claim arises upon him, without waiting to pay the original insured. I do not understand this to be denied by the learned counsel for the defendants. But he maintains that it is not applicable to this case, because by the express terms of the contract, "the losses, if any, are to be payable *pro rata* to the Enterprise Insurance Company, at such time, and in such manner as the latter company may pay." This clause must have such an interpretation as will not entirely defeat the contract. It can evidently have no application where, as in this case, the Enterprise Company have made a general assignment for the benefit of their creditors. If the assignee can only recover from the defendants when and as he pays dividends of the assigned estate to the original insured, it is plain an endless number of suits must be the consequence; and if it had so happened that there was no assigned estate, there could be no recovery at all. I would construe the words "as the latter company may pay," to mean "as the latter company may be liable to pay." It meant that the Fame Company should have all the advantages of the Enterprise Company as to the times and manner of payment; that they should not be called on to pay on the immediate happening of the loss, but whatever condition as to the times and manner of payment might be annexed to the original policy, should be extended to them.

Demurrer overruled.

WENTWORTH v. RAIGUEL.

1. **A. B. & C. were partners in one business, and A. & B. also partners in another. The funds of the former firm were misappropriated to pay the debts of the latter: *Held*, after the dissolution of the former firm, and the settlement of all other accounts between A. B. & C., C. might file a bill against A. & B., and obtain against them a decree *in solido* for his proportion of the funds so misappropriated.**
2. **The act of 1838, giving a remedy at law in actions between different firms, composed in part of the same members, did not take away the previously existing remedy in equity.**

Sur exceptions to master's report.

Opinion by SHARSWOOD, J. Delivered February 8th, 1873.

When this case was before me on exceptions, to the first report of the master, I dismissed all the exceptions but the 22d, 24th, and 25th. The administratrix of Ulp having been made a party, and filed an answer, that defect in the proceedings is supplied. The other two exceptions were grounded upon the objection that the master had reported an account of the plaintiff with the firm of Raiguel & Co., No. 3, of which firm alone he was found to be a member; had recommended a decree in his favor against the other members of that firm, and had not made a final settlement of the partnership, by ascertaining the balances due by and to each partner separately. I saw, then, nothing on the face of the report which ought to vary the rules which seem to be well settled in regard to partnership account, generally. It was accordingly referred back to the master, to reconsider and report as to these matters.

Upon the supplemental report, we find very distinctly, and there is no evidence before me upon which I can re-examine that finding—"that nothing else remains to be settled between the partners, irrespective of the amount due on account of John L. Wentworth's interest in No. 3." He also found that this indebtedness of the firm of Raiguel & Co., No. 3, to John L. Wentworth, arose entirely from misappropriation by the other members of the firm, who were members of the firm No. 2, of the amounts of No. 3, to the payment of the debts of No. 2. He never draws the conclusion that the members of No. 2, who are members of No. 3, are liable to the plaintiff *in solido*. It would follow that justice could be done in no other way than by a decree against the defendant *in solido*, and until one or more of these defendants pay this amount, there can be no decree as between themselves, settling their respective contributory shares. That must be left to a subsequent proceeding.

If these facts were stated in the former report, I failed to extract them from it, or they were not distinctly brought to my notice. They very much affect the view to be taken of the case. To simplify the matter, if the accounts of a firm of A., B. & C. are applied to pay the debts of a former firm of A. & B., without the consent of C., it would seem that as A. & B. would be liable to answer *in solido* to the firm of A., B. &. C. A. & B. must in equity be held liable *in solido* to C., for his share of such debts. Prior to the act of April 14th, 1838, Pamph. L. 457, the firm of A., B. & C. could not have maintained an action at law against the firm of A. & B. The appropriate remedy of C. would have been a bill to account. If, as the master reports, all other accounts between the members of the firm of A., B. & C. have been settled, except what grows out of this misappropriation of the assets of A., B. & C. to the injury of C. I see no objection to such a decree as will do justice between the parties. I observe that the bill distinctly avers the act of this misappropriation. It follows, that until either A. or B. pay this debt for which they are jointly and severally liable, what they respectively owe each other cannot be ascertained and settled. The act of 1838, which gave the remedy at law, did not take away the previously existing remedy in equity.

On the whole, then, I have come to the conclusion to dismiss these exceptions and confirm the report.

Decree accordingly.

MORRIS v. BANCROFT.

When a contract calls for "dollars lawful money of the United States," a tender of gold dollars is good.

Case stated.

Opinion by SHARSWOOD, J. Delivered February 8th, 1873.

It will not be worth while to discuss the question presented by this case, stated on principle. I would find it difficult to do so. But I must consider one thing as settled by the Supreme Court of the United States, that Congress, under the power to coin money and regulate the value thereof, can settle conclusively the value of a dollar, so as at least to reach and bind all subsequent contracts. It is necessary, in order to enable them to do this, that they should have power to say what the relative value of gold and silver shall be in the coinage. The proportional value of gold to silver in all coins, is settled then by the act of Congress of 18th January, 1837. Brightley's Dig. 152. After providing for the weights of the respective gold and silver coins, it provides, that for all sums whatever, the eagle shall be a legal tender for ten dollars; the half-eagle for five dollars; and the quarter-eagle for two and a half dollars. So by the act of March 3d, 1849, Ibid, "for all sums whatever, the double eagle shall be a legal tender for twenty dollars, and the gold dollar shall be a legal tender for one dollar." I cannot, it seems to me, strike out of this contract the words "dollar," and "lawful silver money of the United States," and the acts of Congress have declared, without regard to the weight of the silver dollar—whether it be of the weight provided before January, 1837, or since—that a gold dollar shall, in legal tenders upon all contracts, be equal to it in value.

Judgment for the plaintiff, $692.42, coin, with interest from December 1st, 1872.

MACREADY v. HART.

When an account would cause a long and expensive proceeding, the complainants' right being doubtful, his bill was dismissed *pro forma*.

Sur exceptions to master's report.

HISTORY OF CASE.

This was a bill in equity, brought against the directors of the Quaker City Insurance Company, by certain creditors of, and insured in said company. The bill alleged that the said directors had published false and fraudulent statements as to the assets of the company, and that in consequence thereof, plaintiffs became creditors of, and insured in said company; that they had obtained judgments against the company, which remained unsatisfied. The bill also alleged, that the directors had improperly declared dividends. The answers denied that the statements were fraudulent, and alleged that the directors did not know of the publication.

The case was referred to an examiner to take testimony, and upon his filing his report, he was appointed master. As master, he reported in favor of a decree against the defendants. The defendants filed exceptions thereto.

Opinion by SHARSWOOD, J. Delivered February 8th, 1873.

This is a case in which a decree to account would necessarily be followed by a long and expensive proceeding to ascertain the amount to be paid by the several defendants, if they are at all liable. The preliminary questions, then, as it seems to me, ought to be determined in the first instance, by the court of the last resort.

Exceptions sustained.

Bill dismissed with costs *pro forma*.

Geo. Sergeant, Jos. G. Rosengarten and *Morton P. Henry, Esqs.*, for plaintiffs.

George Biddle, Thomas R. Elcock, George W. Biddle, Esqs. and Hon. *F. Carroll Brewster*, for defendants.

SEVENTH JUDICIAL DISTRICT.

Court of Common Pleas of Montgomery County.

RAMSEY v. RAMSEY.

1. **Where the respondent in a proceeding for divorce has not been personally served with the subpœna, nor appears, nor defends, the libellant is not a competent witness.**
2. **Jurisdiction in cases of divorce is exclusively in that forum in which is the real domicile of the parties, at the time and place of the injury.**

Sub. sur divorce a. v. m. Sur report of examiner.

Opinion by ROSS, P. J. Delivered February 1st, 1873.

One error is patent upon the face of the report of the examiner. He has taken the testimony of the libellant, which was not admissible upon this record. In this case there was no service upon the subpœna, or upon the alias and pluries subpœna, that were awarded upon the sheriff's return of "*non est inventus*." No appearance was ever entered by the respondent to any of the successive writs of subpœna. The testimony was taken before the examiner *ex parte*; and the respondent has,

therefore, been neither served, nor has he entered an appearance, neither has he at any stage of the proceedings participated, either personally or through counsel.

These being the facts, the libellant could not be received as a witness against the respondent, under the enabling act of March 4th, 1870. Ph. L. 70, page 36. That act provides, that the provisions of the act of April 15th, 1869, entitled an act allowing parties in interest to be witnesses, "are hereby extended so as to allow the testimony of either husband or wife to be given in his or her own behalf, in any proceeding for a divorce, in every case *where personal service of the subpœna is made on the opposite party, or said party appears or defends.*"

This is an imperative statutory prohibition, and one it is the duty of the court to enforce. We desire in all cases hereafter, that copies of all the docket entries, certified by the prothonotary, shall, together with the subpœnas and sheriff's affidavits of service, be certified to the examiner with the certificate of his appointment. This will enable him to judge whether the libellant is, or is not competent when she is offered as a witness.

In considering the propriety of pronouncing a decree of divorce in this case, the testimony of Mrs. Ramsey must be rejected.

Throwing it out of the case, there is no proof of a malicious and wilful desertion by the respondent, committed in Pennsylvania or elsewhere, and the case fails for want of proof.

But in order that this case may be terminated by this proceeding, it is proper to say, that, if all that the libellant has sworn to, was proved by a competent witness, it would fail to establish facts upon which this court could pronounce a decree of divorce.

Sometime after this husband and wife were married, they removed to Indianapolis, Indiana, where they settled and lived for some time, nearly five years. They then went to Peoria, Illinois, where the alleged malicious and wilful desertion was perpetrated. Admitting, for the sake of the argument, that the acts of the respondent there constituted a desertion, it is apparent that this court has no jurisdiction over the matter. It is high time that the inferior tribunals should strictly follow the wise and healthy principle declared in Colvin v. Reed, 5 P. F. S. 375; Dorsey v. Dorsey, 7 W. 350; 3 Story's Conf. of Laws, §§ 230 205, N. S.; McDermott's Appeal 8 W. & S. 256; Holister v. Holister, 6 Barr, 451.

This doctrine is stated with his usual clearness, by C. J. Gibson, in Dorsey v. Dorsey, the leading case in Pennsylvania on this subject. In that case the facts were, that the parties had been citizens of Pennsylvania, and had married here, but had both removed to Ohio, where they were domiciled at the time of the alleged desertion of the husband. The wife returned to Pennsylvania, where, after a residence of several years, she presented her petition for a divorce *a vinculo*, which was dismissed for want of jurisdiction. The great chief justice, differing from both the Scotch and English courts, wisely ruled that jurisdiction depended on the real domicile of the parties, at the time and place of the injury. "In all such cases," he said, "the person of the transgressor is not amenable to our jurisdiction, and an attempt to pronounce a decree depriving him of rights, particularly where he had no hearing or notice, is an extravagance. "It follows," said Judge Gibson, "on our own principle, however, that not only does jurisdiction belong to the courts at the place of the domicile, but that the retribution must be meted by their measure. The appellant's case, therefore, appertains to the authorities in Ohio. The forum is there, and the law which declares the offence is there."

So, too, it may be said in this case. The libellant's case, therefore, appertains to the authorities in Illinois, and is not cognizable here.

The English rule upon the same subject, is well stated by Lord Penzance in Shaw v. Atty. Genl., Legal Intelligencer, vol. 29, 14.

This law is in accordance with sound principles. The shifting rules of evidence in the several States, varying with the notions of legal reform, and stages of progress in the various commonwealths; the varied character of redress and protection afforded by the statute law of the several States; the ease with which a new domicile can be acquired by either party, and above all the shameful facility by which divorces can be obtained in some of our sister sovereignties, require an adherence to these principles.

Tested by these standards, this case fails for want of jurisdiction, as well as for want of evidence.

We decline to dissolve the bonds of matrimony existing between this libellant and respondent, and dismiss the libel for want of jurisdiction.

And now, February 1st, 1873, decree of divorce *a vinculo* refused, and the libel is now dismissed, and it is further ordered that the libellant pay the costs which have accrued thereon.

H. A. Brunner, Esq., for libellant.

Recent Decisions.

ENGLAND.

ROLLS COURT. Venn v. Cattell. July 25th, 1872. 27 L. T., N. S. 469.

1. When a contract for sale is entered into, by which it is stipulated that the abstract is to be delivered on a particular day, and it is not delivered within a reasonable time after that day, the purchaser is at liberty to repudiate the contract.

2. The conditions of sale under which a purchase was made, provided that the abstract should be delivered within twenty-one days from the day of sale.

3. When seventy-eight days had expired without any abstract having been delivered, the purchaser gave notice that he declined to complete.

4. After one hundred and eighteen days had elapsed, abstracts of the title to some of the lots were delivered to the purchaser, and the abstract of the remaining lots was delivered a fortnight later, but was returned on the same day on which it was delivered.

5. On a bill to enforce specific performance of the contract, *Held*, that as the vendor had failed to deliver the abstract within a reasonable time after the day named, he could not enforce the contract against the purchaser, and that the bill must be dismissed with costs. *Canada Law Journal*, Jan. 1873.

BOARD OF EXAMINERS.

For February, 1873.

ROBT. N. LOGAN, Ch'n, HENRY S. HAGERT,
GEORGE JUNKIN, EDWARD OLMSTED,
WM. ROTCH WISTER, S. S. HOLLINGSWORTH,
JOHN M. COLLINS, GEORGE L. CRAWFORD,
GEORGE T. BISPHAM, *Secretary.*

The Board will meet on Thursday February 27th, at the office of Henry S. Hagert, Esq., at 3 o'clock, P. M., and statedly thereafter on the last Thursday of each month.

Legal Gazette.

REPORTS OF CASES

DECIDED IN THE

UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA; THE SUPREME COURT OF PENNSYLVANIA AT NISI PRIUS; THE DISTRICT COURT, COURTS OF COMMON PLEAS, QUARTER SESSIONS, OYER AND TERMINER AND ORPHANS' COURTS OF PHILADELPHIA;

AND IN THE COURTS OF THE THIRD, EIGHTH, NINTH, ELEVENTH, TWELFTH, TWENTY-SIXTH, TWENTY-EIGHTH, AND TWENTY-NINTH JUDICIAL DISTRICTS OF PENNSYLVANIA.

Originally Reported in the Legal Gazette,

From July 2, 1869, To January 5, 1872, inclusive.

BY JOHN H. CAMPBELL.

VOL. I. JUST ISSUED.

RECOMMENDATIONS.

From HON. JAMES THOMPSON,
Chief Justice, Supreme Court, Pa.

"I have examined the Legal Gazette Reports which you did me the favor to send me, with great satisfaction. It is well gotten up, and neatly printed and bound. The variety of matter contained in it, emanating indiscriminately from courts in every portion of the State, renders the volume useful in every section to both lawyers and judges, and to them I cheerfully commend it." March 1st, 1872.

From HON. WM. S. PEIRCE,
Court of Com. Pleas, and Orphans' Court, Phila.

"It is presented to the public in good style, and so far as I have had opportunity to examine my own decisions, they are accurately reported, and the syllabi are concise and correct, and I am sure from the known ability of the Reporter, that they are so with respect to the other decisions."
Philada., March 1st, 1872.

From HON. JAMES LYND,
District Court, Phila.

"I have received and examined with interest and pleasure the first volume of Legal Gazette Reports. It contains much valuable matter, carefully edited and handsomely published. As multitudinous as the decisions of the Supreme Court seem to be, the number of quite important points that never reach that tribunal is very large; and the early publication, therefore, of cases disposed of in the courts of first resort is greatly to be commended. Permit me to express a hope that the Legal Gazette Reports will prove as profitable to the publishers as it will be serviceable to the bar and judiciary of our State." Philada, March 2d, 1872.

From HON. JOSEPH ALLISON,
President Judge 1st Judicial District, Pa.

"The work is in all respects most creditable to its Editor and Publishers, not only as to its external merit, but as a valuable addition to the reports of decided cases. The work affords abundant evidence of great care in its preparation, and is every way worthy of a favorable reception by the legal profession." Philadelphia, Feb. 23d, 1872.

From HON. THOS. K. FINLETTER,
Common Pleas and Orphans' Courts, Phila.

"I have examined volume one, Legal Gazette Reports, and am much pleased with the execution of the work. Many of the cases contained therein are familiar to me, as being argued and determined in the courts in which I sit, and I can testify to the fidelity and accuracy with which they are reported. I think that the volume will be a valuable addition to the Pennsylvania Reports." Philadelphia, March 21st, 1872

From HON. JAMES R. LUDLOW,
Common Pleas and Orphans' Courts, Phila.

"Every valuable contribution to our legal literature ought to be a gratification to the profession, for additional knowledge is thereby contributed to the common stock, and is preserved for future use. Your volume contains many important cases, carefully selected, and must be of great service to the profession. Practical experience teaches me the worth of this publication, and its real value should secure for it an extended circulation." Philadelphia, April 13th, 1872.

From HON. THOS. H. WALKER,
Judge 21st Judicial District, Pa.

"I must express my satisfaction with the volume. The entire work does credit to the taste and ability of the reporter; the type is neat, the decisions are carefully arranged and accurately indexed. There are many important opinions collected in the book, and the legal profession will find it a valuable addition to our Supreme Court reports. The chief merit of the Legal Gazette is not only to furnish an early publication of the decisions of the Supreme Court, but also to embrace in a permanent form those of the Common Pleas Judges of our State for constant reference and easy access. The work has been successfully commenced and its continuance is essential to the labor of the bench and bar." Pottsville, Pa., April 13th, 1872.

From HON. SAML. S. DREHER,
President Judge 22d Judicial District, Pa.

"I am much pleased with these reports. They contain much valuable information, and from the high character of the judges whose opinions are reported, I feel safe in following them. The book is well printed, well bound, and so far as I have been able to read it since my return home, I find the syllabi full and accurate." Stroudsburg, Pa., March 26th, 1872.

From HON. GARRICK M. HARDING,
President Judge, 11th Judicial District, Pa.

"In point of mechanical execution the Legal Gazette Reports are not surpassed by any modern legal publication, and in point of useful service to the profession, the Reporter and the Publishers have done a work in every way praiseworthy." Wilkes Barre, Pa., March 2, 1872.

From HON. JOHN DEAN,
President Judge 24th Judicial District, Pa.

"Some copies of the paper have been lost or mislaid, in which were reports of cases of great value to me, and just as I was thinking of writing to you, to ascertain if you could replace them, your present valuable work is received." Hollidaysburg, Pa., March 8th, 1872.

From HON. JAMES A. LOGAN,
President Judge 10th Judicial District, Pa.

"To me this seems an exceedingly valuable volume. Its decisions must prove of great assistance to both bench and bar, throughout the State. I regard as the peculiar excellence of these reports the class of well considered "lower court" decisions, which aside from their great aid to the profession must so largely tend to establish a most desirable uniformity of practice in the different districts in the State." Greensburg, Pa., March 28th, 1872.

From HON. SAML. A. GILMORE,
President Judge 14th Judicial District, Pa.

"I was so well satisfied of the value of the cases reported in the Legal Gazette, that I took care to file away that paper as it came to hand. This was inconvenient for reference, but is now obviated by the Legal Gazette Reports. Most of the cases are important and so well elaborated as to make them quite satisfactory. To a judge who has something to do with all the jurisdictions, the book is very convenient and to the bar we would suppose almost indispensable." Uniontown, Pa., March 27th, 1872.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in February, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1872.

Dec. 27, Charles L. Eberle, Administrator of HENRY B. DUTTON, dec'd.
" 30, John P. Woolverton et al., Administrators of RUNYON WOOLVERTON, dec'd.
" 30, Peter Schwindt, Executor of ELIZABETH BERMANN. dec'd.
" 30, George F. Creutzlurg et al., Executors of JOHN H. CREUTZLURG, deceased.
" 30, Elizabeth Ditsche, Administratrix of XAVIER DITSCHE, dec'd.
" 31, Abraham Levy, Administrator of LEWIS HYMAN, dec'd.
" 31, Thomas B. Wattson et al., Executors of EDWARD L. CLARK, dec'd.

1873.

Jan. 2, Alfred Fassitt, Administrator d. b. n. c. t. a. of WILLIAM PRIESTMAN, deceased.
" 3, Harry E. Battin, Administrator of GEORGE W. SHARP, deceased.
" 3, Susanna Froelich, Administratrix of CONRAD FROELICH, deceased.
" 6, James Campbell et al., Executors of HUGH O'DONNELL, deceased.
" 7, Henry Cramer, Administrator of AUGUSTUS SPRINGER, deceased.
" 7, Augustus C. Leidy et al., Executors of Dr. N. B. LEIDY, deceased.
" 8, Joseph S. Ford et al., Executors of GEORGE W. FORD, deceased.
" 10, Andrew Blair, Executor of CHARLOTTE RAPP, deceased.
" 10, Homer Eachus, Executor of HOMER EACHUS, deceased.
" 11, Hugh English, Administrator of MARTHA J. ENGLISH, deceased.
" 11, Robert England, Executor of JOSEPH ENGLAND, deceased.
" 11, Jacob Pfeiffer, Executor of JACOB GROETZINGER, deceased.
" 13, Benjamin L. Wiley, surviving Administrator of WILLIAM E. WILEY, deceased.
" 13, William G. McCauley, late Guardian of DANIEL C. ODENHEIMER, Minor.
" 13, Elizabeth Myers, Administratrix of ANN HEIRSCHBERG, deceased.
" 13, James H. Heverin, Administrator of CHRISTIAN BEICHTER, deceased
" 14, John S. Cornell, Administrator, d. b. n. c. t. a. of EMELINE CORNELL, deceased.
" 15, William Manson, Administrator c. t. a. of SARAH JANE MANSON, deceased.
" 15, Moses A. Dropsie, Administrator c. t. a. of AARON M. DROPSIE, deceased.
" 15, William J. Benkert, Administrator of LOUIS SCHMIDT, deceased.
" 15, Mary Catharine Zanner, late Muller, et al., Executors of JOHN MULLER, deceased.
" 16, Valentine B. Finn et al., Executors of JAMES C. FINN, deceased.
" 16, John C. Cresson et al., Trustees under the Will of ADAM EVERLY, deceased.
" 16, Mary Kelley, Administratrix d. b. n. of THOMAS EDWARDS, deceased.
" 16, Edward B. Frees, one of the Executors of JESSE EVANS, deceased.
" 16, Thomas P. Campbell, Executor of ELIZABETH MARPLE, deceased.
" 17, Thomas H. Montgomery, Guardian of ARTHUR W. MOSS.
" 17, Samuel Bradbury et al., Executors of JESSE W. CARR, dec'd.
" 17, Casper Williamson, Administrator of JOHN SOUDER, dec'd.
" 18, Alfred Driver, Administrator of JULIA C. SHEPPARD, dec'd.
" 18, Samuel B. Jones, Administrator of MARGARET F. JONES, dec'd.
" 18, The Girard Life Insurance Company, &c., Executors of NATHANIEL P. HOOD, dec'd.
" 21, The Pennsylvania Company for Insurance on Lives, &c., Administrators c. t. a. of WILLIAM W. HARDING, dec'd.
" 21, The Pennsylvania Company for Insurance on Lives, &c., Trustees of FRANCIS MIFFLIN.
Jan. 22, William Millevard, Acting Executor of JESSE BOULDEN, deceased, as filed by Daniel S. Winebrener and John W. Buckman, Executors of said William Millevard, deceased.
" 22, Elizabeth Ervine, Administratrix of ELIZABETH R. ERVINE, dec'd.
" 22, Sarah J. Charlton, Administratrix of JOSEPH A. CHARLTON, dec'd.
" 22, Lorenzo M. Kieffer, Executor of H. F. Kohler, deceased.
" 22, Alex. H. Smith, Guardian of ALEXANDER H. SMITH, Jr., Minor.
" 23, Constant Guillou, Executor of CAROLINE MACKAU, as filed by Victor Guillou, Administrator of Constant Guillou, dec'd.
" 23, John Bowman, Administrator d. b. n. c. t. a. of DOROTHY STUCKERT, deceased.
" 23, The Girard Life Ins. Co., &c., Executors of MARULA NEWBAUER, deceased.
" 23, Ellen C. Morrison, Administratrix of JOHN MORRISON, dec'd.
" 23, Mary L. Yardley, Guardian of MARY S. J. MARTIN and J. WARNER YARDLEY, minors, as filed by her Administrator, Wm. F. Miskey.
" 23, Redwood F. Warner, Guardian of MARY S. YARDLEY, late minor.
" 23, William F. Miskey, Administrator c. t. a. d. b. n. of MARY L. YARDLEY, deceased.
" 23, Edward Peace, Trustee of Dr. CHAS. HOLMES, dec'd.
" 23, John Shaffner et al., Executors of JNO. SHAFFNER, dec'd.
" 24, Thomas Shipley, Executor and Trustee of ELIZA JANE BROWN, deceased.
" 24, John A. Schaeffer, Administrator, &c., of JOHN A. SCHAEFFER, dec'd.
" 25, Levi G. Ulrich et al., Guardians of WILLIAM ULRICH, minor.
" 27, Charles J. Gallagher, Administrator d. b. n. of JOHN McDOWELL, deceased.
" 27, Charles J. Gallagher, Administrator of MARY McDOWELL, deceased.
" 27, William L. Edwards, Executor of ASA THOMAS, deceased.
" 27, Thomas Barry et al., Executors of WILLIAM CLANCY, dec'd.
" 27, Thomas Sterrett, Administrator of JOHN STERRETT, dec'd.
" 28, F. Oden Hortsmann et al., Executors of WILLIAM J. HORTSMANN, dec'd.
" 28, F. Oden Horstmann et al., Trustees under the will of SIGMUND H. HORSTMANN, dec'd.
" 28, Samuel Hood et al., Executors of MARY SIMMONS, dec'd.
" 28, John A. Burton, Administrator of WILLIAM T. CATTO, dec'd.
" 28, Frank Wolfe, Executor of JOHN K. WOLFE, dec'd.
" 28, Alexander Ramsey, Executor of JOSEPH CAIRNS, dec'd.
" 29, The Girard Life Ins. Co., &c., Trustees for CHARLES FRY, late Minor.
" 29, Eli K. Price, Trustee of JOHN W. RULON, under the will of Joseph Archer, deceased.
" 29, William W. Ball et al., surviving Executors of THOMAS GRAHAM, deceased.
" 30, James Linton, surviving Trustee of SARAH KIRK, deceased.
" 30, Edwin Shippen, Administrator c. t. a. of WILLIAM C. MEEDS, dec'd.
" 30, Edwin J. Florence, Executor of HANNAH FLORENCE, dec'd.
" 30, Joseph Patterson et al., Administrators of JOHN REU, dec'd.
" 30, Rachel W. Townsend (late Moore) et al., Executors of JOHN WILSON MOORE, dec'd.
" 30, Mary Ann Price, Administratrix of ABRAHAM B. PRICE, dec'd.
" 30, Paul Jagode, Administrator of C. THEODORE KELL, dec'd.
" 30, Frederick Ladner, Administrator of MAGDALENA ERB, dec'd.
" 30, Albert Hewson, Administrator of HENRY N. HEWSON, dec'd.
" 30, John Bastable, Executor of P. F. TURNER, dec'd.
" 30, Bridget McGoveran, Administratrix of JAMES McGOVERAN, dec'd.
" 30, Lina Reichert, Administratrix of DAVID REICHERT, dec'd.

WILLIAM M. BUNN,
Register.

Jan. 31—4t.

M. THOMAS & SONS, AUCTIONEERS.

REAL ESTATE SALE, FEBRUARY 18.
Will include—

Fourth, (North,) No. 1334—Business Stand—Two-story Brick Tavern and Dwelling, extending through to Lawrence street, 2 fronts. Executors' Sale—Estate of Hugh Barr, dec'd.

Atlantic and Kentucky avenues, S. E. Corner, Atlantic City, N. J.—Business Stand—Three story Frame Hotel, known as the "Constitution House." Same Estate.

Cherry, No. 413—Business Location—Three-story Brick Building, known as the "Cherry Street Police Station House," 32 feet front. By Order of Wm. S. Stokley, Esq., Mayor of the City.

Carter's alley, No. 210—Two-and-a-half-story Brick Dwelling. Assignee's Peremptory Sale in Bankruptcy.

Wallace, Nos. 2209 and 2219—2 Modern Three-story Brick Residences. They have the modern conveniences.

Well-secured Ground Rent, $60 a year.

Twenty-seventh Ward—Lot.

Twentieth, (North) No. 824—Modern Three-story Brick Residence. Has the modern conveniences. Immediate possession.

REAL ESTATE SALE, FEBRUARY 25.
Will include—

Charlotte, No. 1144, South of Canal—Very Valuable Three-story Brick Factory Building, Engine House, &c. 80 feet front, 93 feet deep.

Seventh, (South,) No. 28—Very Valuable Business Stand—Three story Brick Building. Executors' Sale—Estate of David Evans, deceased.

Vine, No. 814—Business Stand—Modern Four-story Brick Store and Dwelling, with a Four-story Brick Building in the rear, fronting on a court, No. 11. Same Estate.

Seventh, (North,) No. 723—Genteel Two-story Brick Dwelling. Same Estate.

Eighth, (North,) No. 1621—Modern Three-story Brick Dwelling. Same Estate.

Francis, Nos. 1710, 1712 and 1714—3 Modern Three-story Brick Residences. They have the modern conveniences. Same Estate.

Franklinville, Whitpain Township, Montgomery County, Pa., 1¼ miles from Gwynedd Station, on the North Pennsylvania Railroad—Business Stand—Valuable Farm, 83 Acres, and Hotel, known as the "Franklin."

Eighteenth, (South,) No. 121—Modern Three-story Brick Residence. Has the modern conveniences. Peremptory Sale

Wissahickon Creek, Montgomery County, Pa., near Fort Washington and Ambler Stations, N. P. R. R.—Very Desirable Country Seat and Farm, 48 Acres.

REAL ESTATE SALE, MARCH 4.
Will include—

Cherry, No. 1015—Modern Three-story Brick Residence. Has all the modern conveniences. Orphans' Court Sale—Estate of Ann Preston, dec'd.

Griscom, Nos. 323 and 325—Valuable Five-story Brick Factory and Three-story Brick Building, with 3 Three-story Brick Dwellings in the rear (between Fourth and Fifth streets, South of Spruce). Orphans' Court Sale—Estate of Charles Brinkman, dec'd (sometimes called Karl Brinkman).

Gwynedd Township, Montgomery County, Pa., 1¼ miles from Penllyn Station on the North Pennsylvania Railroad, ¼ of a mile from Spring House Village—Valuable Farm, 103 Acres.

Twelfth, (North,) No. 1938—Handsome Modern Three-story Brick Residence, with Side Yard—46 feet front. Has all the modern conveniences. Executor's Sale—Estate of Charles S. West, dec'd.

EXECUTORS' SALE—STOCKS AND LOANS.

On Tuesday, February 18th, at 12 o'clock Noon, at the Philadelphia Exchange, will be sold the following Stocks and Loans:

300 Shares Kittanning Coal Co.
500 Shares Barclay Coal Co.
800 Shares Moshannon Land and Lumber Co.
325 Shares Buck Mountain Coal Co.
92 Shares Northern Liberties Gas Co.
1,055 Shares Butler Coal Co.
1,100 Shares Connellsville Gas Coal Co.
$200 Frankford and Germantown Turnpike Co. Mortgage Loan, 6 per cent., registered.
$10,000 ($1000 each) Kittanning Coal Co., 7 per cent., April and October, registered, due 1881.
$3,000 Connellsville Gas Coal Co. Mortgage Loan, 6 per cent., May and November, registered.
$5,000 ($1,000 each) Elmira and Williamsport Railroad Co. First Mortgage, 7 per cent., January and July, registered, guaranteed by the Pennsylvania Railroad Co.
$5,000 ($1,000 each) Cleveland and Mahoning Railroad Co. Coupons, 7 per cent., February and August, gold.
$3,000 ($1,000 each) Camden and Amboy Railroad Co. Coupons, 6 per cent., April and October, due 1875.
$3,700 Catasauqua Manufacturing Co. First Mortgage Coupons, 7 per cent., May and November, due 1879.
$1,000 ($500 each) Northwest Coal and Iron Co. Coupons, April and October.
1,100 Shares Osage Mining Co.
1 Share Amateur Dramatic Association.
1,250 Shares Drake Petroleum Co.
5 Shares Horticultural Hall.
24 Shares Frankford and Germantown Plank Road Co.
1,000 Shares Chippewa Mining Co.
5 Shares Oil Creek and Caldwell Branch Petroleum Co.
For account of whom it may concern.
122 Shares Charleston (S. C.) Mining Co.
112 Shares Charleston (S. C.) Mining Co.

JAMES A. FREEMAN, & CO. AUCTIONEERS.

No. 422 WALNUT STREET.

REAL ESTATE SALE AT THE EXCHANGE, FEBRUARY 19, 1873.

On Wednesday at 12 o'clock noon.

314 North Eleventh street—Desirable Three-story Brick Dwelling, above Vine street. Lot 17½ x 72 feet. Subject to a mortgage of $3,000. Immediate possession. Orphans' Court Sale. Estate of Wm. Fisher Mitchell, dec'd.

1416 Sansom street.—Three-story drinking Saloon and Dwelling with Brick House, 1423 Moravian street. Lot 16 x 100 feet. $3,000 mortgage. Orphans' Court Sale. Estate of Sarah Jane Manson, dec'd.

2109 Montrose street.—Two-story Brick House and Lot 14 x 50 feet. 26th Ward. Orphans' Court Sale. Estate of Wm. J. Moore, a Minor.

810 Wood street.—Business Location. Frame House on Wood street, and 2 Brick Houses in rear. Lot 20 x 70. Executors' Sale. Estate of James Lord, dec'd.

1219 South Twelfth street.—Neat Two-story Brick Cottage, 26th Ward. Lot 15½ x 55 feet. $60 ground rent. Peremptory Sale.

1323 Olive street.—Neat Three-story Brick Dwelling, 7 rooms. Lot 15 x 62 feet. 14th Ward. $1,400 may remain. Sale Peremptory.

Frankford. — 5 Two-story Brick Houses, Melrose street west of Margaret street, 23d Ward, each 14 x 96 feet. Will be sold separately.

3808 Chestnut street.—Genteel Three-story Brick Dwelling, west of Darby Road, 84½ feet front and 59 feet deep. Half may remain.

Eagle Mining Co. of Colorado, interest in 10-92 part in property, Clear Creek County, Territory of Colorado. Assignees' Sale in Bankruptcy. Estate of George H. Bechtel, Bankrupt.

Orphans' Court Sale on the Premises.—Estate of Henry Miller, dec'd. Desirable Dwelling, Martin and Pechin Streets, with Building Lots, Martin street, Manayunk. Saturday Afternoon, March, 1st, 1873, at 4 o'clock, will be sold at public sale without reserve on the Premises.

Stone Dwelling, Corner Martin and Pechin Streets.—Lot of Ground with the Stone Dwelling thereon, situate on the northwesterly side of Martin street, and southwesterly side of Pechin street, in Roxborough, 21st Ward. 40 feet on Martin street, 100 feet on Pechin street.

Lot adjoining, the Building Lot adjoining the above to the westward 20 feet, and in depth 100 feet.

Building Lots, Martin street, opposite.

4 Building Lots southeast side Martin street, southwest of Pechin street, each 25 x about 165 feet.

Assignees' Sale in Bankruptcy, No. 1043 Ridge avenue—Estate of the "Pennsylvania Fire-proof Wrought Iron Blind Manufacturing Co."

Valuable Patent Right and Machinery for Manufacturing Wrought Iron Shutters.

On Wednesday, February 12th, at 10 o'clock A. M., will be sold at Public Sale, on the premises, the exclusive right for the State of Pennsylvania, under letters patent of the United States for certain improvements in the manufacture of "Iron Window Blinds." Also, an "Improvement in Window Blinds." Also, an Improvement in "Frames of Iron Shutter Blinds." Also, an "Improvement in Metal Slats for Shutter Blinds." Also an "Improvement in Tie Rods for Shutter Blinds."

☞ The Blinds manufactured by this Company are an entirely new invention, thoroughly fire-proof, and graceful, and as cheap as the ordinary wooden blinds, completely shutting out light and dust, and freely admitting air.

☞ For particulars concerning the validity of the patent, apply to the Auctioneer.

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Supreme Court, United States.

CROSS v. UNITED STATES.

The government had leased from A. a warehouse for ten years, the rent payable by instalments. A. assigned his lease to B. and died. B. sued the government in the Court of Claims for certain instalments of the rent which became due after the assignment. The Court of Claims dismissed the claim solely on the technical ground that the assignment of the lease was not so drawn as to vest B. with a legal title to the accruing rents. Congress afterwards passed a joint resolution, reciting that B. had "heretofore" filed his petition, &c., on account of rents alleged to be "*due*," and that the court had dismissed the "*said*" petition on the sole ground of an alleged technical defect, and remanding the "*said* cause" to the Court of Claims for a *further* hearing, upon the testimony already taken, "and such *further testimony as either party might take*," and ordering that if, on such further hearing, it should appear that B. was in justice and equity entitled to the rents due on the lease the court should render judgment in his favor: *Provided*, That no money should be paid him from the treasury until after he had given indemnity against any demand which might be set up by the heirs of A., (the original lessor) "*under or by virtue of the said lease or contract.*"

***Held* that B could sue in the Court of Claims for all the rent that became due under the lease; and that the fact that, after the remand, he had filed his second petition for but the same rents for which he had filed his first, did not so exhaust the power of the court under the joint resolution as that he could not file a third one for additional rents; even though they were rents that were due when he filed his second petition and such as he might have included in a claim in it.**

Appeal from the Court of Claims; the case being this:

Daniel Saffarans, in 1851, according to the forms of law, leased to the United States for a term of ten years, at a certain monthly rent, a warehouse, in San Francisco. Alexander Cross advanced the money to complete the building, and was compelled for his own protection to purchase the property and the contract of lease. The lease was assigned to him, and the warehouse occupied by the government for a term of three years, the secretary of the treasury of that day, availing himself of an apparent legal informality in the assignment of the lease, against the written protest of Cross, rescinded the contract.

On the 15th of November, 1856, Cross petitioned the Court of Claims for relief, but failed to obtain it on the ground that the assignment of the lease was defective and insufficient to vest in him a legal title to the accruing rents. This adverse decision, in conformity with the law at that time, was reported to Congress, and while the proceeding was pending there, Congress, on the 2d July, 1864, passed the following joint resolution for his relief:

"Whereas, Alexander Cross *heretofore* filed his petition in the Court of Claims of the United States, praying relief on account of certain rents alleged to be *due* from the United States to him as assignee of one Daniel Saffarans, by virtue of a certain alleged contract of lease between the said Saffarans (who is now deceased) and the United States; and whereas the said Court of Claims, on the 24th of January, 1859, rendered a decision adverse to the prayer of the *said* petition, on the sole ground of an alleged technical defect in the assignment of said lease from the said Saffarans to the said petitioner: Now, therefore,

"*Be it resolved*, &c., That the *said cause* be remanded to said Court of Claims for a *further* hearing upon the testimony heretofore filed therein, *and such further testimony as either party may take;* and if, upon the further hearing of said cause, it shall appear that the said petitioner is the *equitable owner of said lease, and in justice and equity entitled to the rents* (*if any*) *due thereon from the United States, the said court shall be authorized to render judgment therefor* in his favor, notwithstanding any technical defect in the assignment of said lease: *Provided*, That no money shall be paid out of the treasury upon any judgment which may be rendered in favor of the petitioner in said cause, until he shall have filed with the secretary of the treasury a bond, with ample security, in such sum as will fully indemnify the United States against any demand which *may* be set up and established by or on behalf of the heirs or representatives of the said Daniel Saffarans, deceased, *under or by virtue of said contract or lease.*

Cross, accordingly, after the passage of the resolution, by a supplemental petition, asked the Court of Claims to rehear the cause and give him judgment for the instalments of rent claimed in his original petition, embracing the terms of time between the 14th day of August, 1853, and the 14th day of November, 1856. This was done. Two years afterwards he brought another action, to recover the instalments of rent (amounting to $69,515), which were not included in the first suit.

The court below held that this second suit could not be maintained because the power and authority conferred upon it by the joint resolution had been exhausted when it reheard the cause and rendered judgment. From that judgment it was that the present appeal was taken.

The only question in this case related, of course, to the proper construction of the already quoted joint resolution of Congress of July 2d, 1864.

Mr. *G. H. Williams*, attorney general, and Mr. *C. H. Hill*, assistant attorney general, in support of the ruling below:

The joint resolution only applied to the case of the first petition of the appellant in the Court of Claims. This is shown by the preamble: "*Whereas*, Alexander Cross, *heretofore* filed his *petition* in the Court of Claims of the United States, praying relief on account of certain rents alleged to be due from the United States to him;" and "*Whereas*, as the said Court of Claims rendered its decision adverse to the prayer of *said petition;*" and therefore, "*Be it resolved*, &c., That the *said cause* be remanded to said Court of Claims for a *further* hearing, upon the testimony heretofore filed therein, and such further testimony as either party may take and file pursuant to the rules of said court."

This language would seem to refer to the cause of action covered by the first petition, and to none other; and as the Court of Claims could not give relief except so far as it was specially authorized by this act of Congress, its powers must be strictly confined within the language and limits of that act.

But if the resolution is broad enough to cover any claim which the appellant had against the United States under the lease from Saffarans, then the former judgment is a bar to any future recovery by him for the same cause of action. The resolution certainly did not contemplate more than one action, and when the appellant filed his supplemental petition, the rents for which he now sues were due and might have been included by him in that suit. As he did not elect to do so, but brought a suit for a portion only of his claim, he has lost by his laches any right which he might have had under the resolution to recover the amount of the rents which he had negligently omitted to include in his petition.

J. J. Combs, contra, for the claimant.

Mr. Justice DAVIS delivered the opinion of the court.

To uphold the ruling made by the Court of Claims would be, we think, to take a narrow view of the legislative intention in this case and to give substantial effect to the technical defences which have distinguished this litigation. There is no defence now on the merits, nor was there when the case went to Congress. It went there, not because the United States was not bound by the covenants of the lease, but for the reason that, in the opinion of the Court of Claims, Cross had not the legal right to enforce the obligation. Saffarans had undertaken to assign the lease to Cross, and no question was made as to his ownership until the secretary of the treasury attempted to rescind the contract. Then it was discovered that the assignment lacked legal formality, and the government availed itself of this defence, and this only, in the Court of Claims to defeat the action. In this state of the case Congress was called upon to act.

The technical defect in the mode of assignment was the only obstacle encountered by Cross in the prosecution of his claim, yet while it remained it was effectual to prevent a recovery. To remove it and allow a trial on the merits required the assent of Congress, and this was given. That the waiver by Congress of the right of the United States to make this defence was not limited to any particular suit, but was extended to the entire controversy respecting the lease, seems clear enough from the language of the resolution itself. The Court of Claims was told if it found Cross to be the equitable owner of the lease, and in justice and equity entitled to the rents (if any) due thereon from the United States, to render judgment in his favor, notwithstanding any technical defect in the assignment of the lease. And to leave no room for doubt on the subject, the court was directed further, to take bond from Cross to indemnify the government "against any demand which may be set up and established by or on behalf of the heirs or representatives of Saffarans under or by virtue of said contract or lease." Why the extent of this requirement, if the waiver was only applicable to the rents in controversy in the proceeding then pending before Congress? We cannot suppose, without an express declaration to that effect, that Congress intended to legislate in a manner that would enable a creditor of the government to obtain only a *part* of his claim when the *whole* of it was deemed by the court that tried the case to be meritorious.

It is true the lease was at an end when Congress acted and the court reheard the cause, and Cross could by proper amendment to his petition have embraced also that portion of his demand for which he now sues; and that would have been the proper course for him to have pursued, but he was not compelled to take it. In covenant for non-payment of rent, payable at different times, a new action lies as often as the respective sums become due and payable. As this suit is for instalments of rent not due when the first suit was instituted, and as they were not included in it in any stage of the proceeding, the plea of former recovery has no application.

On the finding of facts by the court below, judgment should have been rendered for the claimant for $69,515.

It is, therefore, ordered that the judgment be reversed, and the cause remanded to the Court of Claims, with directions to enter

Judgment for that sum.

DOLTON v. CAIN.

1. Under the limitation laws of Illinois, which declare in substance "that whoever has resided on a tract of land for seven successive years prior to the commencement of an action of ejectment, having a connected title in law or equity deducible of record from the State or the United States, can plead the possession in bar of the suit," it is not necessary that the entire title of the defendant be evidenced by acts of record. If the source or foundation of the title is of record, it is available to every person claiming a legal title who can connect himself with it, by such evidence as applies to the nature of the right set up.
2. If a party to a contract does all that it can be reasonably expected that he will do, he will be considered in equity as having performed his part of the contract so far as to come within the limitation laws above mentioned; as *ex gr.*, if a party bound to pay money to an agent of his creditor, resident beyond seas, offers to pay it to one who was the agent of that creditor, and who declines to receive it only because he had heard rumors of the principal's death, and had always been and still is ready to pay it to any one having authority to call for it.
3. Where A. in A. D. 1823 conveys to B., in trust for C., *habendum* "to the said party of the second part, his heirs and assigns," and B. dies in 1845, and C. conveys in 1848, equity would find a way to protect C.'s grantees against a deed made by B.'s heirs in 1864; supposing such a deed made without undue influence, a supposition hard to make.
4. Where a power of attorney is made by husband and wife, French people resident in France, to sell lands in Illinois—the power, a long French instrument, with the usual verbiage of the *style de notaire*, speaking of the lands as lands which "*Mr.* and *Madame*," &c., own there—there being evidence that the husband owned land there, but none that the husband and wife did, the presumption is that the joinder of the wife was made to alienate some supposed right of dower, and not to describe lands owned by the wife and husband jointly, instead of by the husband alone; this at least in favor of a *bonâ fide* purchaser, long in possession.
5. A mistake in the baptismal name of an obligor to a bond executed by his attorney duly authorized to execute a bond in his right name, does not vitiate the bond, the error being shown to be purely accidental.

Error to the Circuit Court for the Southern District of Illinois; the case being this:

Certain statutes of limitation in Illinois, Revised Statutes of 1845, § 8, chapter 24; Id. §§ 8 and 11, chapter 66, declare in substance that whoever has resided on a tract of land for a term of seven successive years, prior to the commencement of an action of ejectment, "having a *connected title* in law or *equity* deducible of record from the State or the United States," can plead the possession in bar of suit to dispossess him.

These provisions of limitation being in force, Dolton sued Cain, A. D. 1865, in ejectment, to recover a piece of land in the State just named.

The plaintiff showed as title,

1st. A patent, A. D. 1818, from the United States to one Stephenson for the land.

2d. A deed, A. D. 1820, from Stephenson to one McGuire.

3d. A deed, A. D. 1823, from McGuire "to Auguste Thiriat, in trust for René Marie Ferdinand Jacquemart" (a resident

of France), the *habendum* clause being thus:

"To have and to hold the said premises with the appurtenances, unto the said party of the second part, and his heirs and assigns forever."

4th. The death of Thiriat in 1845, and of Jacquemart in 1848; no more particular dates being shown.

5th. Conveyance, A. D. 1864, by the heirs of both Thiriat and Jacquemart, to Dolton (the plaintiff).

Title in Jacquemart having been as above stated, shown by the plaintiff, the defendant relied on:

1st. August 10th, 1847, a power of attorney, "each one for themselves, from *René Marie* Ferdinand Jacquemart and *wife*, to F. R. Tillon and W. L. Cutting, with power of substitution, authorizing them to sell any lands in Illinois "which *Mr. and Madame Jacquemart* at present own; and in which *the said constituents* have interests, of any kind soever to be protected," and to "sign the contracts of sale in the respective names of the constituents."

2d. September 20th, 1847. A substitution by Tillon and Cutting of one Cockle, to their power to sell, &c.

3d. Proof that on the 29th July, 1848, Cockle as attorney for Jacquemart and wife sold the land to Cain, the defendant, for $300; of which $100 was to be paid down, and the residue secured by three notes, one for $68, at one year, and two for $66 at two and three years respectively; that the $100 was paid and the three notes given; that contemporaneous with the sale, he, Cockle, professing to act as attorney of *Jean* Ferdinand Jacquemart (the name of *Jean* instead of *René Marie*, having as Cockle himself testified, been signed by inadvertence and mistake," and "the intention having been to execute the instrument in Jacquemart's true name,") executed and gave to Cain a bond for $600, reciting the sale and the terms of it, and conditioned that if Cain paid the notes on the days specified for their payment, and Jacquemart should upon such full payment of the purchase money execute and deliver to Cain a warranty deed with the usual covenants, then the bond should be void; that the sale was reported within a month to Tillon and Cutting, who approved it; that the first and second notes were paid as they came due, and with the $100 cash were devoted by Cockle to the paying of taxes on other lands of Jacquemart; that Cain offered payment of the third note at its maturity, but that Cockle refused to receive it, replying to Cain's offer to pay it, that it was rumored that Jacquemart was dead; that Cain had always been ready and willing to pay the note, which from the cause mentioned was remaining unpaid, but that he did not know who was entitled to receive the money.

4th. Proof that the defendant took possession of the land very soon after his purchase, and had occupied it continuously by himself or his tenants from that time till the time of the suit brought (A. D. 1865), and for seventeen years had paid taxes on it.

On the facts thus proved, the court below decided that the possession of Cain was protected by the limitation laws of Illinois, already in substance stated, and gave judgment accordingly. From this judgment the plaintiff sued out the present writ of error. The sole question in the case was, whether the defendant, Cain, was within the protection of these laws.

Mr. *B. C. Cook*, for the plaintiff in error:

Cain had no connected title deducible of record, either in law or equity, to the premises. The question of title must be connected; it must be deducible of record. Cain in fact had no *title* in equity at all; though he may have had *interest* in equity. No title in equity could have arisen until he had paid all his notes, for not till then could he have come into chancery and demanded a conveyance. He held, in short, but that inchoate interest which might or might not ripen into an equitable title. Reference by the court to decisions of the Supreme Court of Illinois; Steele v. Magie, 48 Illinois, 397; Stow v. Steel. 45 Id. 328; Nicoll v. Ogden, 29 Id. 377, will show that no other view can be taken consistently with them.

Further. All the claim that Jacquemart had to the land arose from McGuire's deed to Thiriat. That deed conveys to Thiriat, in trust for Jacquemart, indeed, but with a *habendum* whose effect was obviously to give the estate to Thiriat alone. Brown v. Combs, 5 Dutcher, 36.

Then these lands, if Jacquemart's at all, were Jacquemart's alone. His wife did not have any ownership in them. The bond was executed by *him* alone, if by anybody. But the power of attorney does not authorize the sale of the lands of either Mr. or Madame Jacquemart alone, but only the lands owned by them jointly. Dodge v. Hopkins, 14 Wisconsin, 630.

Finally, *René Marie* is quite a different name from *Jean*.

Mr. *Jackson Grimshaw*, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The limitation laws of Illinois, relied on by the defendant, in substance declare that whoever has resided on a tract of land for a period of seven successive years prior to the commencement of an action of ejectment, having a connected title in law or equity, deducible of record from the State or the United States, can plead the possession in bar of the suit.

It is objected, that the entire title of the defendant is not evidenced by acts of record, but this is not necessary. If the source or foundation of the title is of record, it is available to every person claiming a legal or equitable interest under it, who can connect himself with it by such evidence as applies to the nature of the right set up. Collins v. Smith, 18 Illinois, 163; Poage's Heirs v. Chinn's Heirs, 4 Dana, 54.

Is the right set up by Cain, then, within the purview of the statute?

It is conceded to be, if the bond was executed under a valid power of attorney, coupled with full payment of the purchase money, and the obligor had the legal title to the land. This concession was necessary, because it is too plain for controversy, that a union of these elements would constitute a complete equitable title, which a court of chancery, on the proper application, would perfect into a legal title. But there are other principles by which an equitable title can be tested, and, in their application to this case, relieve it of all difficulty. If a party has done all that could reasonably be expected of him to perform his part of the agreement, it will be considered in equity as having been done. Cain is within this condition. He purchased the land from Cockle, paid him all he agreed to pay, except the sum of $66, and this he was ready and willing to pay, but Cockle would not receive it, on the plea that it was rumored his principal was dead. Was not this offer equivalent to payment? What more, under the circumstances of this case, would a court of equity require? It would be a harsh rule to say that the purchaser should lose his land, because he did not institute inquiry in France, to ascertain whether the rumor of Jacquemart's death was well founded or not. There was no revocation of the power, and Cockle was the proper person to receive the money, unless Jacquemart were dead; and there is nothing in the record to show that Cain ever received any information on the subject, except what was contained in the reply of Cockle when he offered to pay him the money. Naturally, a man in the predicament of Cain, would rest in security, until advised by Cockle that he could safely pay the money to him, or until some one having authority called upon him for payment. This was never done; and after sixteen years' residence on the land, he is called upon to surrender it, because he did not employ unusual means to ascertain the proper parties to whom the small balance due on the land should be paid. If there were no limitation law in Illinois applicable to this case, the action of ejectment would, on proper application, have been enjoined until Cain could, through a court of equity, have perfected his title so as to make it available as a legal defence in a court of law. If, then, Cain had such a title as a court of equity would recognize and convert, by its decree, into a legal title, it must be considered a title in equity within the meaning of the statute. Indeed, it is difficult to conceive what the law does mean by a title in equity, if this be not one. It must be something less than a legal title, else these words in the statute can have no effect. The law was designed to protect both kinds of title alike, and unless equal influence is extended to both, there is a practical repeal of a portion of the statute. In no proper sense can it be said that Cain broke his agreement. It is true, he did not formally tender the money to Cockle, but this would have been a useless act, as Cockle told him, on his application to pay, that he could not receive the money. Besides, he had good right to suppose, from what had previously occurred, that the offer to pay Cockle was as valid as the offer to pay Jacquemart.

Why, then, has not Cain, having shown a record foundation, brought himself within the scope of the statute?

It is urged, as an additional reason against this, that Jacquemart did not own the legal title, because one of the *mesne* conveyances made in 1823, was to Thiriat in trust for Jacquemart. This is true, but Thiriat died in 1845, and Jacquemart, the beneficial owner of the land, assumed to have the right to sell it in July, 1848, when he executed his letter of attorney to Tillon and Cutting, with power of substitution. Nothing is heard from the heirs of Thiriat for a period of nineteen years from the death of their ancestor, when, in 1864, they convey, as do also the heirs of Jacquemart, the tract of land in controversy, to the plaintiff. After such a lapse of time, in the absence of any proof on the subject, it is difficult to resist the conclusion, that some undue influence must have been used to procure those conveyances; but, be this as it may, the title of Cain is not less an equitable one on account of them, and if so, the statute will not allow his possession, rightfully obtained and continued the requisite length of time, to be disturbed. Without discussing the effect of the deed of Thiriat's heirs, in its application to this case, it is enough to say, that a court of equity, looking through forms to the substance of things, would find a way to protect Cain's purchase.

It is urged, as an additional reason why this defence cannot prevail, that the bond is in the name of Jacquemart alone, while the power was to convey the joint property of husband and wife. There would be some force in this position, if the original deed to Thiriat had been in trust for the wife as well as the husband; but, as this was not the case, the joinder of the wife could only have been intended to alienate any supposed right of dower in the event that she survived her husband. She had no present title to the land, either legal or equitable; and although Cockle was empowered to use her name, as well as her husband's in any instrument of sale he might execute, the failure to do so cannot, in any event, operate to invalidate the bond for a deed which he gave to Cain.

It is hardly necessary to notice the objection that Jacquemart's name is incorrectly given in the contract of sale. Cockle testifies that this was a mistake, and it is the business of a court of equity to see that Cain is not harmed by it.

On the whole case, we are of the opinion that the defendant is within the protection of the limitation laws of Illinois, which he invoked for his defence, and which he had a right to do for that purpose, although the title used to accomplish this object could not be employed by a plaintiff in an action of ejectment, who can only recover when he has the paramount legal title.

In conclusion, it is proper to state, that we have examined the decisions of the Supreme Court of Illinois, to which we have been referred, as affecting the question at issue, and do not find anything decided, which militates against the views we have presented.

Judgment affirmed.

BLACK v. CURRAN.

1. Under the homestead laws of Illinois, the homestead right is not in an absolute sense an estate in the land. The fee is left as it was before the statute, subject to a right of occupancy, which cannot be disturbed while the homestead character exists.
2. The disposition of the property by judicial sale is accordingly left unaffected, except so far as is necessary to secure a homestead for the family of the occupant.
3. Hence the land in fee can be sold under execution, subject to the homestead right, and the purchaser has the absolute title when the homestead right ceases.

Error to the Circuit Court for the district of Illinois; the case being thus:

The statutes of Illinois (Laws of 1851, p. 25; Chapter 48 Gross's Statutes, p. 327, amended by act of February 17th, 1857; Act of 1857, p. 119), relating to homesteads enact:

"SECT. 1. . . . There shall be exempt from levy and forced sale, under any process or order from any court in this State, for debts contracted, *the lot of ground and buildings thereon*, occupied as a residence and owned by the debtor, being a householder and having a family, to the value of $1,000. Such exemption shall continue after the death of such householder, for the benefit of the widow and family, some or one of them continuing to occupy such homestead, until the youngest child shall become twenty-one years of age, and until the death of such widow, and no release or waiver of such exemption shall be valid unless the same shall be in writing subscribed by such householder and his wife, if he have one, and acknowledged in the same manner as conveyances of real estate are by law required to be acknowledged.

"SECT. 3. If in the opinion of the creditors or officers holding an execution against such householder, the premises claimed by him or her as exempt, are worth more than $1,000, such officer shall summon six qualified jurors of his county, who shall appraise said premises, and if, in their opinion, the property may be divided without injury to the interests of the parties, they shall set off so much of said premises, including the dwelling house, as in their opinion shall be worth $1,000, and the residue of said premises may be advertised and sold by such officer.

"SECT. 4. In case the value of the premises shall, in the opinion of the jury, be more than $1,000, and cannot be divided as provided for in this act, they shall make an appraisal of the value thereof, and deliver the same to the officer, who shall deliver a copy thereof to the execution debtor, with a notice thereto attached that unless the execution debtor shall pay to said officer the surplus over and above $1,000, on the amount due on said execution, within sixty days thereafter, that such premises will be sold.

SECT. 5 In case such surplus, or the amount due on said execution, shall not be paid within the said sixty days, it shall be lawful for the officer to advertise and sell the said premises, and out of the proceeds of such sale to pay to such execution debtor the said sum of $1,000, which shall be exempt from execution for one year thereafter, and apply the balance on such execution, provided that no sale shall be made unless a greater sum than $1,000 shall be bid therefor, in which case the officer may return the execution for want of property."

With this statute in force one Craddock, the head of a family, was from 1853 till 1863, the owner of a lot in Illinois, which constituted his homestead, his house being built on one half, and the other half, exceeding in value $2,000, being used for its necessary purposes, both halves alike, however, constituting, as was assumed by the court, the homestead of himself and family.

In 1858 one Spear obtained a judgment against Craddock, but although the homestead property was sufficient to pay his demand, and set off to the debtor what he was entitled to under the law, Spear did not pursue any of the modes pointed out by the statute of obtaining satisfaction of his property, but caused the western half to be sold at sheriff's sale under his execution, and having obtained a sheriff's deed for this half, conveyed it to one Curran.

Subsequent to this, that is to say, in 1863, Craddock and wife conveyed the whole lot, east and west halves alike, in fee simple, by deed, with full covenants releasing the homestead, and properly acknowleged, to certain persons who subsequently conveyed to one Black. In two weeks after Craddock and his wife thus conveyed the premises, Craddock with his family removed from them and ceased to occupy them afterwards.

In this state of things, A. D. 1866, Curran claiming title through the judicial sale to Spear, brought suit against Black for the west half of the lot; Black defending himself under the title, if any, acquired under the deed from Craddock and wife to his vendors.

The court below relying, as was said here by counsel, on McDonald v. Crandall and Coe v. Smith, decisions in the Supreme Court of Illinois (43 Illinois, 231, and 47 Id. 225), and considering that the sheriff could levy on and sell and convey a part of the homestead lot, while in occupancy of the judgment debtor, and that the deed would take effect if the debtor and his family abandoned the homestead, adjudged that the plaintiff was entitled to the property claimed by him, that is to say, the western half of the lot, in fee simple, and gave judgment accordingly. That judgment was now here for review.

Mr. *Lyman Trumbull* (a brief of Messrs Stuart, Edwards, and Brown being filed on the same side) for the plaintiff in error:

Assuming that the facts show the occupation of the entire lot as a homestead, does the plaintiff show any title to the premises? To recover, he must show a valid execution, a regular levy and an authorized sale. Now, here none of the requisitions of the law were complied with. Assuming the lien to exist and the premises to exceed in value the sum of $1,000, how is this lien to be enforced? The act provides in detail the manner, time, and circumstances under which levy and sale can be made. These provisions are mandatory, prerequisite to the right to sell. They are, by the decision of the Supreme Court, *prohibitory* of a sale in any other way. Bliss v. Clark, 39 Illinois, 596–7.

But by the decisions of the Supreme Court of Illinois, which are the rule in this matter for the Federal court, a judgment and execution do not create a lien against the homestead of the judgment debtor, and the owner may sell or mortgage it free from the lien of the judgment. This is emphatically declared in Green v. Marks, 25 Id. 221, a leading case on this matter, and the doctrine of that case has been affirmed by the Supreme Court of the State in a series of decisions. Bliss v. Clark, 39 Id. 590; Ives v. Mills, 37 Id. 76; Hume v. Gosset, 43 Id. 297; Pardee v. Lindley, 31 Id. 187. As a rule of property it has existed for ten years. Titles to many valuable tracts and lots of land have been acquired on the faith of this construction. The title of the grantors of plaintiff in error was so obtained in 1863. The judgment in this case unsettles these titles and prescribes a different rule. We submit that both on principle and the authorities of every State having homestead laws, the doctrine asserted by the court below (that without complying with any of the terms of the homestead law, and in a mode not pointed out by the law, the sheriff can divide the homestead lot, levy on part, sell and convey it, while in the occupancy of the judgment debtor, and that the deed so made will convey title to take effect when the occupation by the debtor of the lot ceases) is in effect a judicial repeal of the law.

The authority to sell is derived confessedly but from the statute. What is it that is exempt from sale? Not some ideal homestead right estate, leaving another imaginary reversionary interest which can be subjected to the debts of the occupant. The exemption from levy and forced sale, is of "*the lot of ground and buildings.*" The *thing* out of which, about and in which, all the different kinds of estate arise, cannot be levied on or sold except in the mode provided. If the *lot* is exempt from levy and sale, every conceivable estate in and to said lot must also be exempt. It is no answer to say that the exemption is only to the value of $1,000, for the reason that the provisions are by the statute made to apply only where in the opinion of the creditor, the premises exceed in value $1,000; then, and then only, can he demand through the sheriff a jury to ascertain the value and divisibility of the premises, and upon notice to the judgment debtor, after the expiration of sixty days, may he sell. By the proviso to the 5th section, no sale can be made unless more than $1,000 shall be bid. The carefully defined provisions to protect the judgment debtor in his homestead right in a case where, in the opinion of the creditor, the value of the lot exceeds $1,000, the court below has decided are not necessary in the only possible case in which they could have any application.

By making these provisions in all cases essential, no one can be injured. If the premises are only worth $1,000, then nothing can be done. If the creditor at any time conceives them to be worth more, he can instantly secure his claim by proceeding in accordance with the statute. If he chooses to remain inactive until the judgment debtor conveys, the loss is the result of his negligence.

As to the cases of McDonald v. Crandall, and Coe v. Smith, relied on by the court below, it is enough to remark that in the first case the court expressly refer with approval to Green v. Marks, cited and relied on *supra* by us, and that the opinion in the latter, simply refers to the former case as controlling it.

These were cases of voluntary conveyances to grantees of the person claiming the homestead right. The case now before the court involves a sale *in invitum*. This distinction would of itself be sufficient to demonstrate the inapplicability of these decisions.

But the court in these cases did by no means decide that a deed failing to release the homestead was, or could be, by and of itself, a valid conveyance of the title by virtue of which the grantee might maintain ejectment against the grantor, or his grantees occupying the premises under conveyances from him. They decide only that the irregular deed and the *surrender* of the premises to the *grantee* of that deed, constituted an abandonment of the homestead to *that grantee*, so as to estop the claims of the grantor and all claiming through him. It was the concurrence of the voluntary deed and voluntary surrender, that operated to the destruction of the right.

In the case now before the court, the possession was surrendered to the grantees of the deed under which plaintiff in error claims, and he was in possession thereunder when this suit was commenced.

[The learned counsel then went into an examination of decisions in New York, Iowa, Wisconsin, New Hampshire, and Minnesota, to show that the law as conceived by them was the law in every State where exemptions similar to those in Illinois existed.]

Mr. *Jackson Grimshaw*, contra.

Mr Justice DAVIS delivered the opinion of the court.

The rights of the parties to this suit depend upon the construction to be given the homestead laws of Illinois. These laws exempt from forced sale on execution, the lot of ground and the buildings thereon, occupied as a residence and owned by the debtor, being a householder and having a family, to the value of $1,000. And the owner of the homestead, if a married man, is not at liberty to alienate it except with the consent of the wife, and there must be an express release and waiver of the exemption on the part of both, to render the conveyance operative. A mode is provided for dividing the property, if divisible, in case its value exceeds $1,000, and of selling it, if indivisible, and applying the proceeds in a particular manner. As Spear did not pursue these modes of obtaining satisfaction of his judgment, although the homestead property was sufficient to pay his demand and set off to the debtor what he was entitled to under the law, the inquiry arises whether the proceedings which he did take operated to pass the title after the homestead was abandoned.

It is conceded that this inquiry must be answered, if possible, by the decisions of the Supreme Court of Illinois on the subject, for these decisions constitute a rule of property by which we are to be governed. Although the exact point in dispute has not been adjudicated by that court, yet certain general principles have been announced, which in their application to this case we think relieve it of difficulty. The embarrassment encountered in the administration of this law, has been chiefly owing to the fact that the exemption was confined to real estate of a limited value. If the exemption had extended to the entire lot of ground occupied as a homestead without regard to its value, it is easy to see that many troublesome questions which have arisen would have been avoided.

In order to reach a proper conclusion in this case, it is necessary to understand what is the nature of the homestead right. It cannot in an absolute sense be said to be an estate in the land; the law creates none and leaves the fee as it was before, but in substance declares that the right of occupancy shall not be disturbed while the homestead character exists. While this continues, the judgment creditor cannot lay his hands on the property, nor the husband sell it without the consent of his wife, and not then without an express release on the part of both, of the benefits of the law. The purpose of the Legislature was to secure a homestead for the family, and the disposition of the property either by judicial sale or voluntary conveyance, was left unaffected except so far as was necessary to accomplish this object. As long as the property retained its peculiar character, it was within the protection of the law, but the exemption from sale under execution or by deed (except with homestead waiver) could be lost by abandonment or surrender; that is to say, by acts *in pais*.

The Supreme Court of Illinois have recognized and applied these principles in several recent cases, where the effects of voluntary conveyances by the owner of the homestead, were the subject of consideration.

In McDonald v. Crandall, 43 Illinois, 231, it was held that where a conveyance is made not waiving the homestead, it passed the fee, but its operation was suspended until the grantor abandoned the premises or surrendered possession, and that the homestead, when occupied by the debtor as such, is not subject to the lien of a judgment. But the case decides that where the homestead exceeds $1,000 in value, a judgment becomes a lien and may be enforced against the overplus, and that the homestead act has not created a new estate, but simply an exemption.

In Coe v. Smith, 47 Id. 225, the facts of the case were these: The owner having a homestead right in the lot, made in 1858, a mortgage without waiver of the homestead, and then in 1860 made another mortgage with waiver; afterwards, in 1861, he abandoned the premises. The court held that the first mortgage was the prior lien.

In Hewitt v. Templeton, 48 Id. 367, it was decided that upon the abandonment of the homestead by the grantor, the grantee in a deed in which the homestead right has not been waived, is entitled to immediate possession, the homestead right being annihilated. The court in commenting on the decision in McDonald v. Crandall, which they say governs this case, uses this language: "We there held, although a judgment was no lien upon a homestead, where the premises were worth less than $1,000, and a lien upon the surplus where they were worth more than that sum, yet, where the owner conveys the same by an absolute deed or mortgage legally executed, the fee in the premises conveyed, *no matter what their value*, passes to the grantee, subject only to the right of occupancy on the part of the grantor in case the homestead has not been relinquished, and when such occupancy terminates, the homestead right is annihilated, it not being an estate in the premises which can be transferred as against a former conveyance that has passed the fee.

If a conveyance by the occupier of the homestead without the release of his right as required by the law has the effect to pass the title, regardless of the value of the premises conveyed, and can be enforced so soon as the occupation of the homestead ceases, it is difficult to see why the conveyance by the officer of the law, instead of the debtor, should not have the same effect.

And if, as between two voluntary grantees, the first takes the land discharged of the homestead after its abandonment, although the second conveyance contains a release of the homestead and the first does not, why should not the same rule obtain when the property was sold on judicial process, before the debtor conveyed it? The junior grantee takes nothing, because there was no estate to pass, it having been transferred by the first conveyance. On the same theory, there was no estate to convey after the sheriff had sold the land. The only difference between a conveyance made by the judgment debtor who has a homestead, and by the sheriff under a sale or execution against his land, is, one is the act of the party, the other of the law—one a voluntary, the other an involuntary conveyance. It is certain that the owner of a tract of land of more than $1,000 in value, on which there is a judgment, cannot sell it freed from the judgment, and although the homestead as such cannot be sold under execution, nor is a judgment a lien on the homestead as such, but as the land can be sold by the owner subject to the homestead, so a judgment is a lien on the land subject to the homestead, and the land or fee can be sold under execution subject to the homestead, and the purchaser, as in the case of a deed by the debtor without the waiver, has the absolute title when the homestead right ceases.

If these views of the law on this subject are correct, and we think they are fairly deducible from the decisions in Illinois, they are conclusive upon the rights of the parties to this suit.

On the hypothesis that there was no judgment against Craddock, it is clear that if he had conveyed the lot or any part of it in 1858 (the date of the judgment against him), without the waiver of the homestead, and then in October, 1863, conveyed it with the waiver (as he did), and then left the premises (as he did), the deed of 1858 would bind the land.

It follows equally, that the deed of 1863 with the clause of the waiver, did not convey the absolute title to the west half of the lot, because there was a deed made by the law under a judgment of 1858, and which operated (just as a deed made by Craddock himself would have operated) upon the west half as soon as it ceased to be a homestead—that is by abandonment. And this is true while conceding that on neither hypothesis, that is deed without the waiver and sale under the judgment, could Craddock's homestead right be disturbed—his occupation of the lot.

Judgment affirmed.

LEGAL GAZETTE.

Friday, February 21, 1873.

JOHN H. CAMPBELL,
EDITOR.
THEODORE F. JENKINS,
ASSOCIATE EDITOR.

DISTRICT COURT.

The Court in Banc will be held on Monday, 24th instant, to hear rules returnable on Saturday, and motions for judgments.

Our thanks are due to Hon. Joseph B. Hancock, a member of the Legislature from this city, for a diagram showing the proposed alteration of the walls surrounding Girard College, and change in the plan of the streets in that section of the city, so as to permit the opening of Twenty-second street through the grounds. Accompanying the diagram is a printed statement of how the proposed changes are to be effected. We would desire still further information upon the subject, especially from the opponents of the measure, before we could agree to the necessity of the alteration at this time, or to the manner in which it is proposed to make it. The statement, which shows that the alteration can be made without much serious inconvenience, is as follows:

"It is proposed to obviate and overcome any inconvenience of communication occasioned by the division made by running Twenty-second street through the College grounds, by placing two carriage-way gates opposite each other (say halfway between Girard and North College avenues) in the walls on the east and west lines of Twenty-second street, and by the erection of two sets of granite steps, to be built firmly in and running north and south parallel with the walls and inside the enclosure on east and west sides of Twenty-second street; the said steps to lead from the ground to the top of the walls as above mentioned, and constructing a handsome iron bridge, extending from top landing of steps or walls and crossing Twenty-second street, in the same manner as the bridge across Poplar street, connecting the old and new Houses of Refuge on the north and south sides of said Poplar street. If the system of steps and bridge is considered objectionable, communication can be made by excavating (say eight feet deep and ten feet wide across and under Twenty-second street) from the eastern to western enclosure, and building a handsome marble or granite lined tunnel, ascending and descending from and to the ground, from the bottom of the tunnel by stone steps, or by walks of a descending grade, either paved or gravel laid. The length of the tunnel will be only sixty feet, which can be kept perfectly dry by drainage into a culvert sufficiently deep, now constructed on the ground near by."

PUBLICATIONS RECEIVED.

ILLUSTRATED ANNUAL OF PHRENOLOGY AND PHYSIOGNOMY FOR 1873. By S. R. Wells. 12mo., pp. 72. New York, Samuel R. Wells, Publisher, 389 Broadway.

THE TABLE. Vol. 1, No. 2. A monthly publication devoted to the refinements of the table. New York, M. Doolady, February, 1873.

SCRIBNER'S FOR MARCH.

The illustrated articles in Scribner's for March, include an interesting description of "Life in the New Diamond Diggings of South Africa;" "Professor Morse and the Telegraph," with an account of the sending of the first telegram, of which a fac-simile is given, as well as a fac-simile of the first daguerreotype of the human face ever made in America: "Napoleon II., King of Rome and Duke of Reichstadt," with several portraits of the son of the first Napoleon, and curious particulars of his life: and "Folk-Life in German By-Ways," with a number of interesting pictures. In the present instalment of Dr. Holland's "Arthur Bonnicastle," there is a description of a "revival" in a ew England village, and "Aunt Flick," makes her first appearance. There are two short stories, "The Woman who Saved me," by Fannie E. Hodson, and "A Ghost who Made Himself Useful," also a remarkable essay by Augustus Blauvelt, entitled "Christ's Miracles Scientifically Considered." Mr. Stedman gives some "Stanzas for Music," from an unfinished drama; and from George MacDonald we have another translation from "Novalis." Dr. Holland, the editor, discusses in the "Topics of the Time" The Reading of Periodicals, Professional and Literary Incomes, and The Complicity of Justice With Crime. The Old Cabinet contains a notice of the recent Census, and some verses entitled "The Poet to His Poem." In Home and Society, Household Art, Co-operative Housekeeping, Ladies at Sea, Hyper-gentility, and the Games of Children and the Gambling of Men, are treated.

THE CANADA LAW JOURNAL commences its ninth volume by an increase in the number of pages and various other improvements, greatly adding to its usefulness and value to the profession. It also issues the Canada Law Journal Almanac, containing lists of the judges of Canada, England, etc. We congratulate the Journal on its increasing prosperity.

THE UNDERWRITER. Philadelphia, February, 1873.

THE HISTORY OF THE CONSOLIDATION OF THE CITY OF PHILADELPHIA. By Eli K. Price. Philadelphia, 12mo., pp. 140. J. B. Lippincott & Co., 1873. Received from the publishers.

This is a very excellent little work, the author of which is so well known to the Philadelphia Bar and the public, that it is merely necessary to draw attention to the fact that he has written it, to insure its careful perusal by all citizens who take an interest in the history and progress of this great city, and who earnestly desire to reform the evils from which it now suffers.

The publication of this work, at the present time, when a Constitutional Convention, which will have as one of the subjects before it, the regulation of our municipal government and its connection with the State, is in session here, is most opportune.

The work was prepared by Mr. Price at the request of the Historical Society of Pennsylvania. It contains the first and second charters of the city, a historical account of the measures that preceded and produced consolidation, the passage of the act and the festivities and proceedings consequent upon that passage. It concludes with a portrayal of the advantages of the consolidation, and a prayer that those advantages may long be preserved. We commend the work to our readers.

THE ELECTRA OF SOPHOCLES. Translated by J. G. Brinckle. Published by John Campbell & Son, No. 740 Sansom street. Philadelphia, 1873.

This translation, from the short and imperfect examination we have as yet been able to make, appears to possess great merit. It exhibits close fidelity to the best texts, correct and varied versification, and a good ear for the melody of our language.

It is remarkable for its conciseness, which is shown conspicuously by the correspondence in the lines of the translation and the original, the number being precisely the same, and the figures in the margin of the English corresponding all the way through with those in the original.

The translator has introduced no epithets, expletives and adjectives of his own, but has followed the original closely and scrupulously, almost word for word, and has shown a decided preference for our own sharp Anglo-Saxon monosyllables. This peculiarity is particularly observable in the dialogue pictures, to which it gives great force and sprightliness. We have no doubt that this work will add to the reputation of the translator, and prove a credit to the taste and scholarship of our country.

We take a special pleasure in noticing this translation, as it is the work of a member of the Philadelphia Bar. The name of the printer, Mr. Henry B. Ashmead, is a sufficient guaranty that the mechanical part of the book is of the highest excellence.

Recent Decisions.

NEW HAMPSHIRE.

[Head notes of decisions in Supreme Court of New Hampshire, to appear in Vol. 52, N. H. Reports. Received from John M. Shirley, Esq., State Reporter.]

STATE v. RUM, WHISKEY AND GIN.

Section 23, chapter 99, of the general statutes, provided that intoxicating liquors kept for sale in violation of law may be seized, and upon due proceedings adjudged forfeited, but omitted to point out the mode in which such liquors should be disposed of after the decree of forfeiture. *Held*, that upon proper preliminary proceedings, and proof of an illegal keeping for sale, a valid decree of forfeiture might pass; and that the liquors thus forfeited might legally be disposed of according to the provisions of an act passed subsequently to the seizure.

RICH v. ERROL.

Selectmen have not authority, *ex-officio*, without a vote of the town, to borrow money upon the credit of the town.

Selectmen, without being authorized by a vote of the town, borrowed money, representing that it was for the use of the town, and gave a note in the name of the town therefor. *Held*, that a *bona fide* endorsee of the note could not recover upon merely proving the borrowing of the money and the giving of the note by the selectmen.

STATE v. RAND.

The purchaser of liquor sold in violation of the statute is not guilty of a criminal offence, and cannot be excused from testifying as to the purchase.

CHARTIER v. MARSHALL.

Equity will not decree the specific performance of a contract to convey real estate, when it is proved that the vendor has no title to the estate in question.

When the plaintiff's bill is dismissed for that cause, no costs will be allowed against the plaintiff.

ADAMS v. ADAMS.

Courts have power to set aside or vacate decrees of divorce for fraud or imposition, as in the case of other judgments, and will exercise that power where such fraud or imposition is clearly established.

GLEASON v. EMERSON.

A divorce *a vinculo* bars dower.

BIXBY v. MOOR et al.

The defendants kept a billiard saloon, and a bar for the sale of liquor. The liquor traffic was illegal. The plaintiff was employed by the defendants to work generally in and about the saloon; there was no special agreement that he should or should not sell liquor, or as to what particular duty he should do; but he was accustomed to work generally in and about the saloon, taking care of the room, building the fires, taking care of the billiard tables, tending at the bar, and waiting upon customers; in the absence of the defendants, he had the whole charge of the business. The plaintiff, at the time he entered into the service of the defendants, knew what business was carried on there. In assumpsit upon a *quantum meruit*,—*held*, that the plaintiff could not recover compensation for any portion of his services.

UNITED STATES COURTS.

ILLINOIS.

U. S. DISTRICT COURT, N. D. OF ILLINOIS.

1. In an action by the assignee of a corporation organized under the Illinois statutes, against a stockholder, to recover the amount unpaid on his stock, it is not a sufficient defence that the corporate proceedings have not been strictly in accordance with the statute. Upton, Assignee, v. Hansbrough, 5 Ch. Leg. News, 242.

2. Where an insurance company has attempted to increase its capital, and filed papers for that purpose, received subscriptions for and sold stock under such increase, and incurred liabilities upon policies of insurance bearing upon their face evidence of such increase, this is sufficient to constitute the company a corporation *de facto*, so that neither it nor its stockholders can object that it is not a corporation *de jure*. Id.

3. A provision in the subscription and the stock certificate, that the balance was to be paid on the call of the directors, *when ordered by a vote of a majority of the stockholders themselves*, does not prevent this power being effectually exercised by this court. The claim that a stockholder could not be made liable except after such a call, would be nothing more nor less than that a party might legally and morally owe a debt, and yet so frame a contract, that its payment shall be wholly discretionary, and not subject to be enforced in the courts without his consent. Id.

4. The fact that the agents and officers of the company represented to the stockholders at the time of their purchase, that no assessment would ever be made, and

that the stock was in fact non-assessable, or made other false and fraudulent statements in regard to the condition of the company, are inadmissible as evidence, and constitute no defence as against the creditors of the company. Id.

5. The attempt to set up such a defence as against the creditors of the company, who have entered into contracts with it without knowledge of such provision, and whose only means of obtaining payment is by compelling stockholders to pay the balance due upon their stock, cannot receive the sanction of any court, and is without parallel in judicial proceedings. Id.

6. Persons indebted to an insolvent corporation, cannot withhold from its creditors the assets which in equity and good conscience should be applied to the payment of their debts, and courts of equity by virtue of their inherent jurisdiction, will enforce the proper application of the capital stock. Id.

. Such a secret arrangement is a palpable fraud, and it cannot be maintained, that being good as between the company and stockholders, it is also good as against the assignee. The assignee represents the interests of the creditors, and is a trustee for their benefit, and any defence not good as against them in an equitable suit, is not maintainable as against him. Id.

1. *Correction of mistake.*—Where personal property is correctly described in a chattel mortgage, but the lot of ground upon which it is situated is misdescribed, such misdescription will be rejected as surplusage, and equity will not take jurisdiction to make a useless correction of the mortgage. Spaulding v. Mozier, 57 Ill. 148.

2. *Parol.*—In such a case, parol evidence would be admissible to establish the identity of the property, and in this the law affords a full and complete remedy, and it must be sought on the common law side of the court. Ib.

3. *Mortgaged chattels on execution.*—Where creditors hold an execution against the mortgagor of chattels, they may sell such chattels subject to the lien of the prior mortgage, and equity will not enjoin such a sale. Ib.

1. *Whether a deed, absolute upon its face, is a mortgage—Proof necessary to show.*—In a proceeding in chancery, to redeem a certain lot of ground from a mortgage, alleged to have been executed on the premises, to secure the payment of a debt owing by the grantor to the grantee, the deed being in form absolute, to change its character to that of a mortgage, it was *held*, to require clear proof that it was really but a security for the payment of the debt. (Opinion by Sheldon, J.) Cummings v. Ehrenfels, 57 Ill. 195.

2. And evidence of loose declarations of the grantee in regard to his intentions, was regarded as a dangerous species of evidence upon which to disturb the title to land, being extremely liable to be misunderstood or perverted, and the allowance of it for that purpose not in accord with the policy of the law requiring written evidence to attest the ownership of real property. Ib.

3. The kind of parol evidence properly receivable, to show an absolute deed to be a mortgage, is that of facts and circumstances of such a nature as in a court of equity will control the operation of the deed, and not of loose declarations of parties touching their intentions and understandings. Ib.

4. It has been held, that evidence of such declarations alone, is insufficient proof to show an absolute deed to be a mortgage. Ib.

WISCONSIN.

WEBER et al. v. ZEIMET et al.

Where mortgaged lands are conveyed subject to the mortgage, the grantees (and all claiming under them) undertake that the land shall be the primary fund for the payment of such debt; and a subsequent reconveyance of *a part* of said lands to the mortgagor does not relieve the remainder from their equal liability for such debt.

HAGAN v. THE STATE. IN ERROR.

1. In this State, murder is treated as a common law offence, and not merely as a statutory offence.

2. Under an indictment for murder (regular in other respects), which avers that the killing was committed by defendant "feloniously, wilfully, and of his malice aforethought," but does not aver that it was committed "with premeditated design to effect the death" of any person, the accused, upon a proper verdict, may be convicted of murder in either the *second* or *third* degree, as defined by our statute. Tay. Stats. 1826.

OREGON.

U. S. CIRCUIT COURT, DISTRICT OF OREGON.

1. The attorney of a party has the exclusive control of the conduct and management of a suit, and neither the party nor his agent or attorney in fact has authority to sign a stipulation for a continuance. Nightingale et al. v. Oregon Central Railway Co. et al., 5 Ch. Leg. News, 243.

2. Counsel in a suit is not authorized to represent his client except in the argument or hearing before the court. Id.

3. A printed name of counsel is not his signature. Id.

Supreme Court of Pennsylv'a.

SAMUEL v. BLAYLOCK.

1. Evidence of the relation existing between the parties to a written agreement, and of the circumstances leading to it is always admissible, and may be considered in its construction.

2. B. agreed that if he purchased certain property at sheriff's sale, he would hold it in trust, to sell it for the payment of the debts of the firm of H. & S., and divide the surplus, if any, between S. and himself. B. purchased at said sale in the name of Z. The debts of H. & S. being paid and settled, Z. was ordered to execute a conveyance of the property to B., in fee, upon the trust expressed in said agreement.

Appeals by plaintiff and defendant from the decree of the Court of Nisi Prius.

Opinion by SHARSWOOD, J. Delivered February 13th, 1873.

Upon a careful examination of the testimony, I am unable to discover anything which varies the agreement in writing set forth as the ground of the bill. The evidence before the examiner was given without objection, and was entirely proper as explaining the relation between the parties, and the circumstances which lead to the agreement. These facts are always admissible, and may be considered in the construction of a written instrument. It appears that the verbal understanding originally was that Hirst was to have an interest of one-third in the premises, if purchased by Blaylock, but with his acquiescence that was changed, and the final arrangement was as expressed in the writing, that if Blaylock became the purchaser of the sheriff's sale, he was to hold the property in trust to sell, and after paying incumbrances, to apply the proceeds to discharge the debt of the firm of P. Hirst and Samuel, and to divide the surplus, if any, between Blaylock and Samuel. It is in evidence, and is not a matter in dispute, that all the debts of the firm of P. Hirst and Samuel have been settled and paid, so that Hirst has no longer any interest in the controversy. It clearly appears, also, that Hirst and Samuel had performed their part of the contract, by procuring the consent of David Samuel to accept the bond and mortgage of Blaylock for his judgment. It is true that Blaylock did not covenant to become the purchaser; but it is equally true, that if he did purchase, he could not throw aside the obligation of the agreement, by paying David Samuel in cash, instead of giving his bond and mortgage. If he bought, he must hold the property upon the trust for which he had agreed to hold it in that event. The master reports, that Blaylock was in fact the purchaser, though in the name of Zeigler, to whom he loaned or furnished the money to pay for it, and, we think, that he is fully sustained in that finding by the evidence, for the reasons he has stated. The testimony of Blaylock and Zeigler themselves, with the circumstances as detailed by other witnesses, lead the mind to the conclusion and overcome the answers. This being so, Zeigler's legal title is equally affected and bound by the trust. Blaylock had no right to constitute another person as trustee, without the consent of Samuel. So much, therefore, of the decree below as declared the trust to exist, and ordered Zeigler to execute a conveyance in fee to Blaylock, to hold in trust as expressed in the agreement, was certainly right. But, we think, it should have stopped there. There is no right or equity in Samuel to be paid one-half the net income. Until the sale takes place the rents are applicable, in the first instance, to the reimbursement of the amount advanced by Blaylock. When the sale takes place, Blaylock must, of course, account for the rents. The bill does not pray for an account, or for a sale, and the prayer that a conveyance should at once be made to Samuel of a moiety of the property, subject to the amount of $10,800 paid by Blaylock, and the prior incumbrances, is clearly inadmissible, because its effect would be to destroy the power of sale, and abrogate the very agreement which is made the basis of the relief prayed in the bill. The only equity which the complainant had upon his bill, was to enforce the agreement, by a decree that the legal title should be transferred to and vested in the trustee named in it.

The decree below is reversed, and now it is ordered and decreed that George W Zeigler shall execute a conveyance, in fee, of the premises described in the bill to Lewis Blaylock, in trust, as expressed in the written agreement set forth in the bill, and that he be enjoined from conveying or incumbering said premises, and from executing any deed therefor other than is herein ordered; that the said trustee shall not sell the premises at private sale without the consent and approbation of the said Samuel, in writing, nor at public sale, without reasonable notice thereof beforehand, to be given to him, and that the parties to these appeals shall respectively pay their own costs, and the defendants, Blaylock and Zeigler, pay the costs in the court below, except the costs of the second reference to the master, and the costs subsequent thereto, which shall be paid by the complainant, Samuel.

In the Court of Common Pleas of Venango County.

LOCKHART & FREW v. BONSALL, KING & CO.

1. L. & F., upon a contract for the delivery of 5,000 barrels of petroleum, tendered to B, K. & Co., a lot of 5,981, in gross; 5,000 on contract with B., K. & Co., and the surplus, 981, on a distinct individual contract, of different date, with B. alone, but which matured at the same time, L. & F. making no attempt to set apart the 5,000 from the 5,981, but required B. K. & Co., to make the separation themselves. *Held*, That L. & F. utterly failed to perform or make a valid offer or tender of performance.
2. A party tendering a larger quantity of merchandise than called for by a contract, cannot require the purchaser to take a larger quantity, measure and take out his portion, and give the surplus to another party.
3. A purchaser has the right to decline an actual tender made by a seller, if such tender is clogged with a demand which the seller had no right to make.
4. He is not bound to give a reason for the refusal; the reason is in the tender itself.

Sur motion for a new trial.

HISTORY OF THE CASE.

On April 27th, 1870, the plaintiffs and defendants entered into the following contract for the sale and purchase of oil:

Joseph P. Wood,
Duquesne Way.

No responsibility taken, unless by special agreement.

Pittsburgh, April 27, 1870.

10 cent stamp.

Sold to Messrs. Bonsall, King & Co., for account of Messrs. Lockhart & Frew, five thousand (5,000) barrels good, green, merchantable crude petroleum, forty gallons to the barrel, gravity forty to forty-six (40 to 46) degrees, at a temperature of 60° Fahrenheit, to be delivered at buyers' option, at any time on or before thirty-first (31) day of December, 1870—buyers giving ten (10) days' previous notice to sellers—in bulk cars, or bulk boats, at Pittsburgh. If delivered by Allegheny Valley or Western Pennsylvania Railroads, the buyer may designate any other point of delivery on line of said roads. If delivered by water, then at any good landing in or near Pittsburgh buyer may direct. Payment to be made cash on delivery, at the rate of fourteen and one quarter (14¼) cents per gallon, on lots as gauged and delivered.

Brokerage, 11-20 per cent. by seller.

JOSEPH WOOD,
Broker.

Accepted.
Lockhart & Frew.

On December 21st, 1870, the defendants gave the plaintiffs notice to deliver the oil on December 31st, 1870.

On December 31st, 1870, the plaintiffs tendered to the defendants, 70 tank cars, containing 5,981 5-40 barrels of oil. 5,000

were stated to be on the contract for the defendants, and the balance on another contract between the plaintiffs and Sterling Bonsall alone, bearing a different date, and at a different price. The plaintiffs did not separate one lot from the other, nor designate the cars which were to go to one or the other. They tendered them in the aggregate, jointly, upon both contracts, and left the duty of the separation of the oil, under each contract, upon the defendants. The plaintiffs, subsequently, upon the same day, tendered to Sterling Bonsall, upon his individual contract, 48 cars, containing 4,076 38–40 barrels, and demanded payment for the same, together with the 981 5–40 barrels, previously tendered to the defendants, and also demanded payment for 58 3–40 barrels surplus.

The defendants declined to receive the oil, and the plaintiffs sold it at auction for a less price, and brought this suit to recover the difference.

The defendants offered no evidence, but went to the jury upon the plaintiff's evidence.

After the charge from the learned court, the jury found a verdict for the defendants, and the plaintiffs moved for a rule for a new trial.

The opinion of the court was delivered by TRUNKEY, P. J.

On April 27th, 1870, the plaintiffs contracted to sell Bonsall, King & Co., 5,000 barrels of crude petroleum, to be delivered at buyers' option, at any time on or before the 31st day of December, 1870—buyers giving ten days' previous notice—in bulk cars, or bulk boats, at Pittsburgh. Payment to be made, cash on delivery, at 14¼ cents per gallon, on lots as gauged and delivered. The purchasers gave no notice till December 21st, and then claimed the oil on the 31st. In the notice they named no place for delivery. On the morning of the 31st, they designated the "Anchor Works." There was no time or room for delivery at that place on the day of its designation. Prior to that the plaintiffs had sought to have the defendants name a place. Hence, if the plaintiffs delivered the oil at Pittsburgh, the defendants cannot complain. The plaintiffs had over 10,000 barrels of crude petroleum at Pittsburgh, on the 31st, December, 1870. Before that date they had offered none. They had made no attempt to deliver a part and obtain payment in lots at the specified rate.

They allege they offered the whole on the 31st December, and that the defendants refused to accept. They do not rest the case on the ground that they had a large quantity of crude petroleum at the place, ready and willing to measure out, or set apart the precise quantity, and were prevented because the defendants were not there to receive it, or because they refused the precise quantity before the time for delivery. Was the oil delivered or offered, in performance of the contract? The parties met at an office several miles from the tank cars containing the oil. In the morning, when Bonsall was asked by Lockhart to examine the oil, he did not say he would or would not; he would not talk. Between 4 and 5 P. M., says Frew, I tendered 5,000 barrels on contract of Bonsall, King & Co., and a surplus of 981 barrels tendered on a contract of different date with Bonsall, which matured on same date. I presented the entire 5,000 barrels at one time; Sterling and Charles T. Bonsall were present; spent some time looking over the papers; and declined to accept the oil, and gave no reason for the declination. A short time after I made another tender on the other contract, and then handed them a receipt from the A. V. Railroad, for the whole amount due on both contracts and the surplus. In another part of his testimony he speaks of charging them for the surplus.

The gauger's certificates tendered and in evidence show there were 5,981 barrels, these certificates gave the numbers of the cars, but not the quantity of oil on each car; they show the aggregate quantity of oil on a number of cars. On their face it is impossible to select cars containing 5,000 barrels of oil. The plaintiffs made no attempt to set apart cars or certificates for 5,000 barrels. They tendered the whole; the surplus of 981 barrels, to apply on another contract with another party; no division was made by themselves, but that act was required of the purchasers. Bonsall, who although a member of the firm of Bonsall, King & Co., had his distinct individual contract of a different date, and for aught that appears, the defendants had no more to do with it than if it had been with an entire stranger. Bonsall was reticent, and by his acts showed in the clearest manner that the defendants were standing upon their contract, with no intention of receiving the oil, unless so tendered as to be a performance, or offer of performance by the sellers. The plaintiffs knew this; they were not misled. They undertook to tender the oil. They made a tender of a much larger quantity, and demanded that the surplus be given by the defendants to another purchaser, who held another contract. There is no pretence of any other or different tender, or offer of performance by the plaintiffs. Even when they made a tender to Bonsall on his contract, they took into account the 981 barrels surplus, which they had previously tendered to the defendants.

The tender was made as the execution of a contract for delivery of 5,000 barrels of oil. As part of their tender, the plaintiffs endeavored to force the defendants to take a larger quantity, then measure and take out their own, and give the surplus to another party. The purchasers were under no such obligation. The plaintiffs utterly failed to perform or make a valid offer or tender of performance. The opinion in Stevenson v. Burgin, 13 Wright, 36, settles the principles applicable to the evidence in this case. It is useless to consider whether the exceptions to the general rule as to tender of chattels, stated by Parsons, in his work on Contracts, 2d vol., 159, exist in this State, under the law as stated in Stevenson v. Burgin. If such exceptions do exist, I am unable to so understand the evidence, as to submit it to a jury. Instead of proof of an exception to the general rule, it seems to me that the proof is express of an actual tender, clogged with a demand which the plaintiffs had no right to make. The defendants had a right to decline to take 5,981 barrels of oil thus offered. They were not bound to render a reason for the refusal. The reason was in the tender itself.

My views of the evidence and law applicable thereto, impel me to overrule the motion; but if found erroneous by the court of last resort, I shall be gratified.

THIRD JUDICIAL DISTRICT.

Court of Common Pleas of Lehigh County.

JONAS RAUCH & CO. v. PETER A. GOOD.

The writ of attachment under the act of March 17th, 1869, will lie upon a demand for an alleged breach of contract, where the damages are unliquidated.

Sur motion to dissolve the attachment.

Opinion of the court by LONGAKER, J. Delivered February 18th, 1873.

This proceeding was commenced under the attachment act of March 17th, 1869, and the defendant moves to dissolve the writ for the reason that the plaintiff's affidavit shows the demand to be an alleged breach of contract for unliquidated damages.

By the first section of this act, the affidavit must set forth the nature and amount of the indebtedness; by the third section, the defendant may enter into a bond in double the amount of the *debt* or *demand claimed*, conditioned, &c., and retain the possession of the goods attached; and by the fourth section, in case of personal service, residence, or appearance, the court shall proceed in the case in like manner as in a case of summons for debt regularly issued and duly served. In these several sections occur the words *indebtedness*, *debt* or *demand*, and the phrase "*the case shall proceed as in a case of summons for debt regularly issued and duly served*," and all of them become the subject of interpretation.

A more inartistic act, and one more confusing in its terms, could not well be drawn. An action of debt is well defined by the general practice, and debt itself, in a restricted sense, has a well defined and a certain meaning, but debt as defining the relation of parties having claims against each other, and which is sought to be enforced by suit, is not restricted to an action of debt alone; while demand has a most comprehensive signification. Debt, in its restricted sense, is "a sum of money due by certain and express agreement; as by bond for a determinate sum, a bill, note, a special bargain, or a rent reserved on lease, where the amount is fixed and specific; and does not depend upon any subsequent valuation to settle it;" 3 Bl. Com. 154. In its enlarged sense, Hubbard, J., 3 Metcalf's Rep. 522–526, says: "The word debt is of large import, including not only debts of record, or judgment, and debts of specialty, but also obligations arising under simple contract to a very wide extent; and in its popular sense, includes all that is due to a man under any form of obligation or promise." Demand, according to Judge Coke, is one of the most comprehensive terms in the law: Co. Litt. 291. Beardsly, J., 1 Denio's R. 257–261. It is of much broader import than debt, and embraces rights of action belonging to the debtor, beyond those which may appropriately be called debts. 2 Hill's (N. Y.) R. 220–223. A release of all manner of demands is the best release that a man can have, and shall enure most to his advantage. Litt., sect. 508.

Giving the proper legal import to each of these sections construed together, so that each shall be operative in its particular sphere, it becomes apparent that the legislative intent was to give a right of action in all cases of demands arising *ex contractu*. This act is to be construed liberally, as were the foreign attachment acts of 1705 and 1836. By the act of 1705, the writ was to be levied upon the goods and chattels of non-residents; yet, in McClenachan et al. v. McCarty, 1 Dallas, 377, and Ludlow v. Bingham, 4 Dallas, 55, it was held that a levy upon real estate was good. These cases are approved by Schacklett & Glyde's Appeal, 2 Harris, 329.

There are some *dicta* that foreign attachment, founded upon claims *ex contractu*, will not lie for unliquidated damages, nor in actions *ex contractu* sounding in tort; but no adjudicated case is found in which it has been denied in actions *ex contractu*. In the Girard Fire Ins. Co. v. Field, 9 Wright, 131, it was held to lie against a policy of insurance for loss occasioned by fire, before the amount due had been ascertained by an assessment of the damages. In Strock v. Little, 9 Wright, 418, it was sustained in an account render. In Thornton v. Bonham, 2 Barr, 102, it was held to lie for the penalty of a bond to the sheriff for an appearance. In Franklin Fire Ins. Co. v. West, 8 W. & S. 350, it was held to lie for a claim, uncertain at the time of the attachment, but rendered certain at the time of the answers to the interrogatories.

Construing the acts of 1869 by the aid of these authorities, it must be held, that an attachment will lie upon a demand of unliquidated damages for an alleged breach of contract.

The motion to dissolve is therefore denied.

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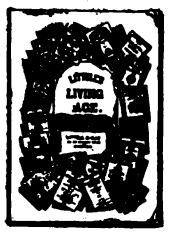

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The Company is by law empowered to act as Executor, Administrator, Trustee, Guardian, Assignee, Receiver or Committee; also to be surety in all cases where security is required.

MONEY RECEIVED ON DEPOSIT AND INTEREST ALLOWED.

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REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in February, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1872.

Dec. 27, Charles L. Eberle, Administrator of HENRY B. DUTTON, dec'd.
" 30, John P. Woolverton et al., Administrators of RUNYON WOOLVERTON, dec'd.
" 30, Peter Schwindt, Executor of ELIZABETH BERMANN, dec'd.
" 30, George F. Creutzlurg et al., Executors of JOHN H. CREUTZLURG, deceased.
" 30, Elizabeth Ditsche, Administratrix of XAVIER DITSCHE, dec'd.
" 31, Abraham Levy, Administrator of LEWIS HYMAN, dec'd.
" 31, Thomas B. Wattson et al., Executors of EDWARD L. CLARK, dec'd.

1873.

Jan. 2, Alfred Fassitt, Administrator d. b. n. c. t. a. of WILLIAM FRIESTMAN, deceased.
" 3, Harry E. Battin, Administrator of GEORGE W. SHARP, deceased.
" 3, Susanna Froelich, Administratrix of CONRAD FROELICH, deceased.
" 6, James Campbell et al., Executors of HUGH O'DONNELL, deceased.
" 7, Henry Cramer, Administrator of AUGUSTUS SPRINGER, deceased.
" 7, Augustus C. Leidy et al., Executors of Dr. N. B. LEIDY, deceased.
" 8, Joseph S. Ford et al., Executors of GEORGE W. FORD, deceased.
" 10, Andrew Blair, Executor of CHARLOTTE RAPP, deceased.
" 10, Homer Eachus, Executor of HOMER E CHUS, deceased.
" 11, Hugh English, Administrator of MARTHA J. ENGLISH, deceased.
" 11, Robert England, Executor of JOSEPH ENGLAND, deceased.
" 11, Jacob Peleiffer, Executor of JACOB GROETZINGER, deceased.
" 13, Benjamin L. Wiley, surviving Administrator of WILLIAM E. WILEY, deceased.
" 13, William G. McCauley, late Guardian of DANIEL C. ODENHEIMER, Minor.
" 13, Elizabeth Myers, Administratrix of ANN HEIRSCHBERG, deceased.
" 13, James H. Heverin, Administrator of CHRISTIAN BEICHTER, deceased.
" 14, John S. Cornell, Administrator, d. b. n. c. t. a. of EMELINE CORNELL, deceased.
" 15, William Manson, Administrator c. t. a. of SARAH JANE MANSON, deceased.
" 15, Moses A. Dropsie, Administrator c. t. a. of AARON M. DROPSIE, deceased.
" 15, William J. Benkert, Administrator of LOUIS SCHMIDT, deceased.
" 15, Mary Catharine Zanner, late Muller, et al., Executors of JOHN MULLER, deceased.
" 16, Valentine B. Finn et al., Executors of JAMES C. FINN, deceased.
" 16, John C. Cresson et al., Trustees under the Will of ADAM EVERLY, deceased.
" 16, Mary Kelley, Administratrix d. b. n. of THOMAS EDWARDS, deceased.
" 16, Edward B. Frees, one of the Executors of JESSE EVANS, deceased.
" 16, Thomas P. Campbell, Executor of ELIZABETH MARPLE, deceased.
" 17, Thomas H. Montgomery, Guardian of ARTHUR W. MOSS.
" 17, Samuel Bradbury et al., Executors of JESSE W. CARR, dec'd.
" 17, Casper Williamson, Administrator of JOHN SOUDER, dec'd.
" 18, Alfred Driver, Administrator of JULIA C. SHEPPARD, dec'd.
" 18, Samuel B. Jones, Administrator of MARGARET F. JONES, dec'd.
" 18, The Girard Life Insurance Company, &c., Executors of NATHANIEL P. HOOD, dec'd.
" 21, The Pennsylvania Company for Insurance on Lives, &c., Administrators c. t. a. of WILLIAM W. HARDING, dec'd.
" 21, The Pennsylvania Company for Insurance on Lives, &c., Trustees of FRANCIS MIFFLIN.
Jan. 23, William Millevard, Acting Executor of JESSE BOULDEN, deceased, as filed by Daniel S. Winebrener and John W. Buckman, Executors of said William Millevard, deceased.
" 22, Elizabeth Ervine, Administratrix of ELIZABETH R. ERVINE, dec'd.
" 22, Sarah J. Charlton, Administratrix of JOSEPH A. CHARLTON, dec'd.
" 22, Lorenzo M. Kieffer, Executor of H. F. Kohler, deceased.
" 22, Alex. H. Smith, Guardian of ALEXANDER H. SMITH, Jr., Minor.
" 23, Constant Guillou, Executor of CAROLINE MACKAU, as filed by Victor Guillou, Administrator of Constant Guillou, dec'd.
" 23, John Bowman, Administrator d. b. n. c. t. a. of DOROTHY STUCKERT, deceased.
" 23, The Girard Life Ins. Co., &c., Executors of MARULA NEWBAUER, deceased.
" 23, Ellen C. Morrison, Administratrix of JOHN MORRISON, dec'd.
" 23, Mary L. Yardley, Guardian of MARY S. J. MARTIN and J. WARNER YARDLEY, minors, as filed by her Administrator, Wm. F. Miskey.
" 23, Redwood F. Warner, Guardian of MARY S. YARDLEY, late minor.
" 23, William F. Miskey, Administrator c. t. a. d. b. n. of MARY L. YARDLEY, deceased.
" 23, Edward Peace, Trustee of Dr. CHAS. HOLMES, dec'd.
" 23, John Shaffner et al., Executors of JNO. SHAFFNER, dec'd.
" 24, Thomas Shipley, Executor and Trustee of ELIZA JANE BROWN, deceased.
" 24, John A. Schaeffer, Administrator, &c., of JOHN A. SCHAEFFER, dec'd.
" 25, Levi G. Ulrich et al., Guardians of WILLIAM ULRICH, minor.
" 27, Charles J. Gallagher, Administrator d. b. n. of JOHN McDOWELL, deceased.
" 27, Charles J. Gallagher, Administrator of MARY McDOWELL, deceased.
" 27, William L. Edwards, Executor of ASA THOMAS, deceased.
" 27, Thomas Barry et al., Executors of WILLIAM CLANCY, dec'd.
" 27, Thomas Sterrett, Administrator of JOHN STERRETT, dec'd.
" 28, F. Oden Hortsmann et al., Executors of WILLIAM J. HORTSMANN, dec'd.
" 28, F. Oden Horstmann et al., Trustees under the will of SIGMUND H. HORSTMANN, dec'd.
" 28, Samuel Hood et al., Executors of MARY SIMMONS, dec'd.
" 28, John A. Burton, Administrator of WILLIAM T. CATTO, dec'd.
" 28, Frank Wolfe, Executor of JOHN K. WOLFE, dec'd.
" 28, Alexander Ramsey, Executor of JOSEPH CAIRNS, dec'd.
" 29, The Girard Life Ins. Co., &c., Trustees for CHARLES FRY, late Minor.
" 29, Eli K. Price, Trustee of JOHN W. RULON, under the will of Joseph Archer, deceased.
" 29, William W. Ball et al., surviving Executors of THOMAS GRAHAM, deceased.
" 30, James Linton, surviving Trustee of SARAH KIRK, deceased.
" 30, Edwin Shippen, Administrator c. t. a. of WILLIAM C. MEEDS, dec'd.
" 30, Edwin J. Florence, Executor of HANNAH FLORENCE, dec'd.
" 30, Joseph Patterson et al., Administrators of JOHN REU, dec'd.
" 30, Rachel W. Townsend (late Moore) et al., Executors of JOHN WILSON MOORE, dec'd.
" 30, Mary Ann Price, Administratrix of ABRAHAM B. PRICE, dec'd.
" 30, Paul Jagode, Administrator of C. THEODORE KELL, dec'd.
" 30, Frederick Ladner, Administrator of MAGDALENA ERB, dec'd.
" 30, Albert Hewson, Administrator of HENRY N. HEWSON, dec'd.
" 30, John Bastable, Executor of P. F. TURNER, dec'd.
" 30, Bridget McGoveran, Administratrix of JAMES McGOVERAN, dec'd.
" 30, Lina Reichert, Administratrix of DAVID REICHERT, dec'd.

WILLIAM M. BUNN,
jan. 31—4t* Register.

Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, FEBRUARY 28, 1873. No. 9.

PRINTED EVERY FRIDAY,
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ONE COPY FOR ONE YEAR, THREE DOLLARS.

Supreme Court of Missouri.

BRIGGS v. EWART.

1. No one can be made a party to a contract without his own consent. In the execution of instruments of writing, such as contracts, deeds, e c., the mind must act intelligently, and the instrument must not only be signed but delivered by the party, as and for what he intended it.
2. If the mind is drawn away by fraud or otherwise, and the party is induced to sign an instrument, as and for another, different from what it purpor s to be, then there is no consent given and no delivery made or authoriz d to be made of the paper so signed. If such paper purports to be a negotiable note, it is void as to the payee, and all other holders, whether innocent purchasers or not.

Appeal from Pettis Court of Common Pleas.

Opinion by ADAMS, J.

This suit originated before a justice of the peace, and was founded on the following note:

"$150. SEDALIA, February 24, 1870.

"On or before the 10th day of June, 1870, for value received, I, the subscriber, of Mt. Sterling Township, county of Pettis, State of Missouri, promise to pay S. R. Squier, or order, one hundred and fifty dollars, without discount or defalcation, and with interest at 10 per cent. from date, at Sedalia, Mo., P. O."

"DAVID EWART."

A judgment was rendered against the defendant by the justice, from which he appealed to the Common Pleas Court.

On the trial in the Common Pleas, evidence was given conducing to show that the defendant's signature to the note was obtained by Squier, the payee, in the following manner: He went to defendant's house late in the evening and proposed to sell his son a patent pump; he had been there before for that purpose and the defendant had advised his son not to purchase. Squier brought a model of the pump with him and proposed to appoint the defendant's son agent for the sale of the pumps, and the son agreed to take the agency. The defendant agreed to vouch for his son, and a contract of agency was produced by Squier, by which Squier made the son agent, and the son, with the defendant, signed the agency contract to account for the proceeds of sale, etc. This was after dark and a lamp was lighted. Squier then produced a printed order, with necessary blanks, for the defendant to sign and keep as the form of an order for pumps to be sent to the agent. The defendant read over this form and signed and retained it. Squier then rose to his feet and seemed in a great hurry to start, and drew out what he said was a copy of the order, and that the defendant must sign it to send off at once to New York for the pump—that he would take it right into town with him and mail it that night. He said the papers were just the same. They looked just alike. He hurried up defendant, had his own pen and ink with him, and defendant signed the paper as and for an order for a pump. Defendant in his evidence stated he never signed the paper as a note but as an order. That he never delivered any paper to Squier as a note, and the only papers he intended to make were the agency contract and the order for a pump. That Squier took his paper off with him as an order for a pump.

On the part of the plaintiff it was in evidence that he purchased the note from Squier for $125, without any knowledge or notice of the alleged fraud in obtaining the signature of the defendant. That Squier sold it to him a short time after its date and before maturity.

This suit was brought by plaintiff as assignee of the note.

The defendant asked the court to declare the law to be that "although the court should find from the evidence that the defendant did write his name on or to the paper herein sued upon, yet if the court further finds from the evidence that the signature of defendant was obtained thereto without the fault or negligence of defendant on the fraudulent representations of the payee, that the paper to which it was put was a mere duplicate of the order read in evidence, and that the defendant neither knew it was a note, nor intended to sign a note, but supposed it was such a duplicate, and that the plaintiff did not pay therefor a full and valuable consideration, then the court will find the issues for the defendant."

Other instructions not covering the point raised by this one, were given and refused, and some were given for plaintiff in conflict with this instruction. The verdict and judgment were for plaintiff. The instruction above set forth raises the only point necessary for us to consider.

It may be assumed as an axiom too well settled to be disputed, that no one can be made a party to a contract without his own consent. Although his signature may be put to the writing, and may have been written by himself, yet if he did not know what he was signing, but acted honestly under the belief that he was signing some other paper and not the one he really signed, he ought not to be bound by such signature. In the execution of instruments of writing, such as contracts, deeds, etc., the mind must act intelligently, and the instrument must not only be signed but delivered by the party, as and for what he intended it for.

Commercial paper is no exception to this rule, only that in some cases a party knowingly putting his name to such paper, may by his own negligence be estopped from disputing the execution as against an innocent holder for value.

For instance, if a person knowingly signs a negotiable note and it is stolen from him and gets into the hands of an innocent holder before maturity, he must suffer the consequence of his own negligence. In such case he knows that he has signed a note, and that it only needs delivery to constitute a valid instrument, so when it is delivered, no matter by whom, to an innocent holder, he is estopped by his own negligence from denying that he authorized its circulation. It was his own folly to sign the note and leave it in existence. But if a party is compelled by duress to sign a note, or is insane when he signs it, or signs a blank paper for no purpose at all, and leaves it on his table, and a note be written over it and put into circulation without his knowledge, I know no principle of commercial or other law that will compel him to pay it, whether in the hands of an innocent holder or not. The point is that the mind must act in the execution of the paper. It must be executed as and for the paper it purports to be. If the mind is drawn away from it by fraud or otherwise, and the party is induced to sign it as and for another instrument different from what it purports to be, then there is no consent given and no delivery made or authorized to be made of the paper so signed. If such paper purports to be a negotiable note, it is void as to the payee, and all other holders, whether innocent purchasers or not.

Parties dealing in commercial paper must ascertain whether it was knowingly signed or authorized to be signed by the payer, and this is the only inquiry an innocent purchaser is bound to make.

If the evidence given on behalf of the defendant be true, his name was obtained to the note without his consent. He did not know that it was a note, but believed it to be a mere order for a pump, and signed and delivered it as such, and not as a note.

I have not been able to find any direct authority in conflict with these views. In the case of Clark v. Johnson, 54 Ills. 296, the court held that a party executing a note for a plowing machine was bound to pay it to an innocent holder, although he intended to add a condition to the note after it was written and signed, and before he could do so the payee snatched it from him and sold it to an innocent purchaser. This seems to be carrying the doctrine beyond its proper limits. The case does not appear to have been well considered. No authorities are cited either by the counsel or by the court, except the case of Shiply v. Carroll et al., 45 Ills. 285, where the maker was held liable on a stolen note in the hands of an innocent purchaser. In the case of Shiply v. Carroll, it was intimated that if the execution of the note had been obtained by fraud, it would have been void under their statute, which allows the maker of a note to set up fraud and circumvention in the execution of a note as a defence. This statute, in my judgment, is only declaratory of the common law. What greater fraud could have been practiced than to induce a party to draw a note, and before its delivery, and before a condition was added to make it complete, to snatch it and run away with it! But that was not a parallel case with the one at bar. In Nance v. Lany, 5 Alabama, 370, the court held that where one writes his name on a blank piece of paper, of which another takes possession, without authority, and writes a promissory note above the signature which he negotiates to a third person who is ignorant of the circumstances, the former is not liable as the maker of the note.

In Foster v. Mackinnon, 4 Law Reports (English Common Pleas), 704, which is very much in point and seems to have been well considered, the court held, that where a defendant was induced to put his name upon the back of a bill of exchange, by the fraudulent representation of the acceptor that he was signing a guarantee, he was not liable as an endorser at the suit of a *bona fide* holder for value.

The Supreme Court of New York, in the case of Whitney v. Snider, 2 Lansing, 477 (a case directly in point), held, that in an action on a negotiable promissory note, brought by a purchaser thereof before maturity, in good faith, and for a valuable consideration, against the maker, the latter may prove as a defence that when he signed it, it was represented to him and he believed it to be a contract entirely different in character. The court distinguished this case from a note fraudulently obtained and which the maker intended to make.

In Gibbs v. Linabury, 22 Mich. 479, a case precisely in point—except that was a hay-fork and this a pump—the court held that when the defendant unwittingly signs an instrument in the form of a negotiable note, relying upon false representations made to him at the time, that the instrument he is signing is the mere duplicate of a contract just previously signed by him, making him an agent for the sale of a patent hay-fork, under circumstances devoid of any negligence on his part, and when fraudulent means are taken to prevent him from noticing the body of such pretended duplicate, and he delivers the same in ignorance of its true character, believing it to be the mere duplicate contract which he supposed he had signed, such instrument is to be regarded as a forgery, and cannot be enforced even in the hands of a *bona fide* purchaser.

These cases were all well considered, and lay the rule down as it should be in regard to the execution of commercial

paper, without in the least impugning the well settled doctrine that no inquiry can be allowed as to the consideration of such paper as between the maker and an innocent endorser for value.

I think, both upon reason and authority, the instruction under view ought to have been given and those in conflict with it refused.

Let the judgment be reversed and the cause remanded. The other judges concur.

—1 *Law News*, 188.

Supreme Court, United States.

DIRST v. MORRIS.

1. A plaintiff in ejectment, claiming under a deed made on a sale on the foreclosure of a mortgage, may properly put in evidence the record of the proceedings in foreclosure, even though the defendant claims by a deed absolute made by the mortgagor, prior to giving the mortgage under which the foreclosure took place. Showing title from a party previously seized, the plaintiff has a right to exhibit it subject to such decision with regard to its effect as might become necessary after all the evidence is in.
2. Even more obviously has he a right to introduce it as evidence in chief, and when the prior deed, absolute under which the defendant claims, has not yet been offered in evidence, for in such a stage of the proceeding, the proceedings in foreclosure give apparently a valid title.
4. Under the act of Congress of March 3d, 1865, authorizing the trial of facts by the circuit courts, and enacting that the findings of the court upon them shall have the same effect as the verdict of a jury, this court, sitting as a court of error, cannot pass, as it does in equity appeals, upon the weight or sufficiency of evidence. If the court chooses to find generally for one side or the other, instead of making a special finding of the facts, the losing party has no redress on error, except for the wrongful admission or rejection of evidence.

Error to the Circuit Court for the Northern District of Illinois, the case being this:

Russell being the owner of a large number of lots of land in different counties in Illinois, conveyed one in May, 1837, to Josiah Breese. This deed was not recorded until the year 1864.

In December, 1837, Russell being a debtor to the United States, mortgaged the same lot, with all the several others that he owned, to the then solicitor of the treasury, to secure this debt, and the mortgage was promptly put on record. There was no evidence that the existence of the deed to Breese was known to the agents of the government *at the time when this mortgage was taken by it.*

On the 1st of September, 1841, the United States filed a bill to foreclose the mortgage. The bill was in ordinary form against Russell, but it contained a clause alleging that Francis Peyton, Gordon Hubbard, *Josiah Breese*, H. S. Fuller, Augustus Garrett, Frederick Faylor, and several others named, "commissioners of school lands, have or pretend to have some interest or claim upon the above described premises, as judgment creditors or otherwise;" and process was accordingly prayed against them.

A summons with subpœna issued accordingly, the record saying—

"Which said subpœna went into the hands of the marshal to be executed, and was returned by him into the said clerk's office, *executed upon all of the defendants, by delivering to each of them true copies thereof.*"

The marshal's return, however, on the summons itself, which it was shown by the fee bill on file in the case was the only summons issued, while making return that certain of the defendants named had been served, stated that Breese and the rest had not been found in his district.

An order taking the bill *pro confesso* against the defendants was subsequently entered, reciting "that the said defendants have been duly served with process and have failed to appear."

Final decree having been entered and sale made, the lands were bought in by the United States, whose title by means of a deed from the solicitor of the treasury, in whose name the title had been made, became subsequently vested in W. W. Corcoran, who conveyed to W. B. Morris.

The title of Breese, under the deed of 1837, of Russell to him, became, on the other hand, vested in one Dirst, and he in 1864, having taken possession of the land, which till then had been unoccupied, Morris brought ejectment against him.

The case was tried by the court, under the act of Congress of March 2d, 1865, 12 Stat. at Large, 501, authorizing the circuit courts on written stipulation of the parties to try issues of fact without the intervention of a jury, and enacting that "the *findings of the court upon the facts shall have the same effect as the verdict of a jury.*"

On this trial before the court, the plaintiff, having first put in the mortgage to the government, offered in evidence the record of the foreclosure suit, to which the defendant objected, on the ground (amongst others) that Breese had not been served with process in the cause. To prove this, he referred to the record itself, and also proved by parol that Breese was not in Chicago in 1841, but was in New York; and further produced the original subpœnas and files in the cause. As already stated, the papers showed that Breese had been made a party to the bill, and that his name had been included in the *subpœna;* and the record recited that the *subpœna* was returned by the marshal into the clerk's office executed upon all the defendants, but the return of the *subpœna* did not show any service on Breese. Nevertheless, the court admitted the record in evidence, and the defendant excepted.

The plaintiff also offered in evidence the deed from the solicitor of the treasury (representing the government) to Corcoran, the plaintiff's grantor. The defendant objected to it, on the ground that it did not appear thus far in the proceedings, that the United States had any title to the premises in controversy, except as mortgagee, and that as the deed did not purport to assign or convey to the grantee any part of the mortgage debt, and as the defendant maintained that it did not appear that the mortgage had been foreclosed as against Breese, the owner of the equity of redemption, therefore, that the said deed did not pass to the grantee any legal title or estate to the premises. The court, however, received the deed, and the defendant excepted.

The defendant, on his part, produced Breese's deed and *mesne* conveyances to himself, and evidence to show that under this title, in 1864, he had taken possession of the property, which till then was unoccupied. He now insisted that his right was paramount to that of the plaintiff. But the court decided that the plaintiff was entitled to recover, notwithstanding the possession taken by the defendant, and found the issues generally in the plaintiff's favor. This ruling of the court at the close of the trial was alleged by the defendant as an additional error.

Mr. *S. W. Fuller*, for the plaintiff in error:

1. Breese being the owner and holder of the equity of redemption in the mortgaged premises, no effectual foreclosure of the mortgage could be made without his being made a party defendant to the foreclosure suit, brought into court, and subjected to its jurisdiction. This is familiar law.

2. Taking the record in the foreclosure suit and the parol testimony, it affirmatively appears that Breese was not served with process, or otherwise brought into court in that suit. It is not pretended that he entered an appearance.

Of course, every presumption should be indulged to uphold the validity of judicial proceedings; and they will be upheld where the records are consistent with themselves, and where the recitals or presumptions contained in one part of the record are not rebutted by positive proof in other parts. But they are rebutted here. The summons shows explicitly that it was not served upon Breese; the whole record taken together, shows that but one summons was issued. There is no pretence of his appearance having been entered. The proof outside the record shows that he could not have been served. If the summons was not preserved in the record with the return of the officer, showing who were and who were not served, then the recital of service in the decree would be *prima facie* evidence that all the defendants were served, as was held by this court in Comstock v. Crawford, 3 Wallace, 403, and in Secrist v. Green, Ib. 751. But this is not either of those cases. It is the case of Sibley v. Waffle, 16 New York, 189, where, notwithstanding the recital that "*due service*" had been made upon all the defendants, it appeared, by reference to the notice of publication, that the notice had *not* been published for the length of time required by law, and so the Court of Appeals decided that no jurisdiction was acquired, and that the recital did not aid the matter. The doctrine of that case is declared in many other cases. Tunis v. Withrow, 10 Iowa, 308; Harris v. Hardeman et al., 14 Howard, 338; Lessee of Walden v. Craig's Heirs et al., 14 Peters, 152; Bodurtha and another v. Goodrich, 3 Gray, 508; Bloom et al. v. Burdick, 1 Hill, 130; Clark v. Thompson, 47 Illinois, 27; Pardon v. Dwire et al., 23 Illinois, 572; Comstock v. Crawford, 3 Wallace, 396. Its correctness is obvious.

Most of the cases on the whole subject are collected and classified, with excellent discrimination, in the seventh edition of Smith's Leading Cases, vol. 1, part 2, pp. 1009 to 1025. We select and cite only those which involve the precise point raised upon this record, that is to say, that while in the absence of the summons and return from a record, a recital in the judgment or decree, of service of process upon the parties, or that they entered their appearance, is sufficient *prima facie* evidence of that fact, yet when the original summons and return are contained in the record, the latter shall prevail, and the recitals go for nothing.

Setting out with this as a settled and obvious principle, the recital in the order of court taking the bill *pro confesso* that *the defendants* had been "duly served," must be construed as including only the defendants who appeared by the officer's return to have been served; the only construction consistent with law, the record and justice.

3. The deed from the United States to Corcoran was improperly admitted, for the reasons assigned at the trial.

The rule on this subject is probably not uniform in the State courts, but it is believed to be settled in *this* court and for all the Federal circuits by Hutchins v. King, 1 Wallace, 58. It is there said:

"The mortgagee cannot by conveyance transfer any interest in the premises without a transfer of the debt secured; his interest is not subject to attachment or seizure on execution, he cannot remove the buildings on the premises, nor the fixtures attached, nor can he subject the premises to any uses but such as may furnish the means for the payment of the debt secured, without impairing the value of the estate."

4. As to the equities, though Corcoran paid his money to the United States for the deed which he received, and also paid the taxes on the land in controversy until 1864, yet, on the other hand, Dirst paid *his* money and took possession of the premises in 1864 (the same being then and having always been vacant and unoccupied), under the chain of title derived from Breese, the first grantee of Russell, believing that Breese and his grantees had the better title. His title was a paramount title.

On the whole case the judgment should have been for the defendant. How the court decided that the plaintiff was entitled to recover, notwithstanding the possession taken by the defendant, and found the issues generally in the plaintiff's favor, it is difficult for us on the evidence to see. This court, we submit, must reverse that judgment.

Messrs. *Carlisle* and *McPherson* (a brief of Mr. Thomas Dent being filed on the same side), contra.

Mr. Justice BRADLEY delivered the opinion of the court.

We think that there was no error in admitting in evidence the record of the foreclosure suit, whether Breese was served with the *subpœna* or not. If he was not served, and could show that fact, he was not bound by the decree. But the decree and sale formed a link in the plaintiff's chain of title from Russell, and at this stage of the cause the deed from Russell to Breese had not been given in evidence. So far as yet appeared, the evidence was not only admissible, but effective to transfer the title. But it was admissible in any view, for it tended to show title from a party formerly seized, and the plaintiff had a right to exhibit it, subject to such decision with regard to its effect as might become necessary after all the evidence was in.

The same remarks apply to the admission of the deed from the solicitor of the treasury to the plaintiff's grantor.

The only other alleged error necessary to be noticed, is the ruling of the court at the close of the trial.

The particular reason why, or ground on which the court decided that the plaintiff was entitled to recover, notwithstanding the possession taken by the defendant, and found the issues generally in the plaintiff's favor, is not specified. The court was exercising the functions of both court and jury, and whether, as matter of fact, it regarded the proof sufficient to show that Breese had been served with process in the foreclosure suit, or whether as matter of law, it regarded that fact as not material, or what other view of the case it may have taken, does not appear, and therefore no error can be asserted in the decision. This court sitting as a court of error, cannot pass, as it does in equity appeals, upon the weight or sufficiency of the evidence; and there was no special finding of the facts. Had there been a jury, the defendant might have called upon the court for instructions, and thus raised the questions of law which he deemed material. Or, had the law which authorizes the waiver of a jury, allowed the parties to require a special finding of the facts, then the legal questions could have been raised and presented here upon such findings as upon a special verdict. But, as the law stands, if a jury is waived and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence.

However, as there was no proof that the government agents, when the mortgage was given, had any notice of Breese's unrecorded deed, and as the mortgage in such case would have the superior efficacy, and would entitle the mortgagee or his assigns to possession of the land on non-payment of the money at maturity, we do not see on what possible ground the defendant could have claimed to succeed.

No error appearing on the record, the judgment of the court below is affirmed.

NOTE—At the same time with the preceding case was heard another from the same Circuit Court, and similar to it in all respects, with, however, one additional feature. It was the case of

COLLINS v. RIGGS.

To redeem property which has been sold under a mortgage (as is alleged irregularly) it is not sufficient to tender the amount of sale. The whole mortgage money must be tendered, or if suit be brought, be paid into court.

In this case, Riggs had brought ejectment in the court below against Collins to recover a lot, one of the several ones mentioned in the preceding case as having been mortgaged by Russell to the United States, and bought by Corcoran from the United States after the foreclosure by the

government of their mortgage, and the purchase in by them of all the several lots included in it. Riggs was the grantee of Corcoran.

The lot in controversy in this case, like that in controversy in the preceding case, had been conveyed previously to the mortgage, by a deed not put on record, to Breese.

On the trial the defendant made the same objections to Riggs's title, that in the preceding case he had made to Morris', to wit, that Breese as grantee of Russell, of the lot, prior to the date of the mortgage to the United States, and so owner of the equity of redemption, had not been brought into the foreclosure suit; and assuming this to be true, the defendant inferred and assumed that the mortgage was still, therefore, in existence. He then offered to prove that during the pendency of the present suit in ejectment, he had tendered to Riggs the amount for which this *particular lot now in controversy had been struck off* at the marshal's sale, together with the taxes, interest, and costs; informing the plaintiff at the time of this tender, that he, the defendant, was willing to treat him, the plaintiff, as the equitable assignee of *so much* of the mortgage as had been paid at the sale for the land in controversy, and that he wished to redeem the said land, and that he, the defendant, made the tender for that purpose; which tender the plaintiff declined to receive; the defendant offering to prove, further, that the said sum of money was then paid into court as a tender to redeem the land in controversy from the mortgage.

The court below decided, simply, that the evidence as presented was not competent or sufficient to constitute a defence to the action, but upon what ground this decision was made did not appear.

Mr. *B. C. Cook*, for the plaintiff in error (iterating and enforcing, as to the other parts of the case, the arguments of Mr. Fuller, already presented in the report of the preceding case) argued upon this new point that Breese not having been brought in, and the mortgage being so still in existence, Corcoran was but an assignee of part of *it*, and Riggs *his* assignee, nothing more; that the defendant could, therefore, properly tender payment of it; that the only question was as to amount; that as to this, Riggs's right in the mortgage was to secure only such a proportion of the whole as the value of this tract represented, which value or amount was shown by the marshal's sale; that this sum, with costs, taxes, and interest, had been tendered and was now in court.

Messrs. *Carlisle* and *McPherson* (a brief of Mr. Thomas Dent being filed on the same side) argued contra, that the defendant, by his tender, substantially confessed that he could not resist the mortgage, but that his willingness to liquidate it *pro tanto*, by showing a tender of a sum of money to the plaintiff some time after the commencement of the suit, was no valid tender, that the amount was insufficent, and that the whole mortgage money should be tendered. Independently of this, that such an attempt to avoid an action of ejectment was unheard of; that after condition broken, the mortgagor's rights were purely equitable, and that he could obtain relief only in chancery.

Mr. Justice BRADLEY delivered the opinion of the court.

It is clear that the criterion by which the amount tendered was gauged, was incorrect. To redeem property which has been sold under a mortgage for less than the mortgage debt, it is not sufficient to tender the amount of the sale. The whole mortgage debt must be tendered or paid into court. The party offering to redeem, proceeds upon the hypothesis that, as to him, the mortgage has never been foreclosed and is still in existence. Therefore he can only lift it by paying it. The money will be subject to distribution between the mortgagee and the purchaser, in equitable proportions, so as to reimburse the latter his purchase money and pay the former the balance of his debt.

Judgment affirmed.

GREGG v. MOSS.

1. A judgment will not be reversed for the rejection of testimony, whether it was in strict principle admissible or not, where the rejection worked no harm to the party offering it.
2. Whether the evidence before a jury does or does not sustain the allegations in a case, is a matter wholly within the province of the jury, and if they find in one way, this court cannot review their finding.
3. A. lent to B. & C. a certain sum of money, whether for themselves or for a firm of which all parties were members, was a matter not clear. The money was, however, in fact, put in the firm by B. & C. An agreement was subsequently made, by all the partners, reciting that some had advanced money beyond their shares, and agreeing that each should make a statement of what he *had* advanced, and that the accounts so rendered and agreed upon should remain capital stock, and *that* partner's stock in the partnership. On the trial, evidence being given, on the one hand, tending to show that in a statement furnished by A. in professed pursuance of the agreement, he had not included this money lent to B. & C., and on the other that at the time of the agreement, he had agreed that he *would* put it in, an instruction was held to be correct, which told the jury, that if at the time of the agreement between the partners, A. had assented to treat this money as an advance and to fund it, B & C. would not remain personally liable on the original loan, if it had in truth been made to them personally; and that the fact that A. did not include the amount in his *statement* of advances made was not material, provided, as already said, that at the time of the agreement he had in fact *agreed* to include it.

Error to the Circuit Court for the Northern District of Illinois; the case, as assumed by the court from a bill of exceptions covering thirty 8vo. pages, in long primer type, without any assignment of errors, having been thus:

Richard Gregg sued W. S. Moss *in assumpsit*, on this instrument; Kellogg, the party signing it with Moss, having been wholly insolvent.

PEORIA, December 23, 1856.

RICHARD GREGG, ESQUIRE,

DEAR SIR:—Mr. Elder is here, and wants to take the funds with him to pay drafts due to-morrow. It is not right that he should be forced to pay this money for our accommodation. If you will send us two drafts at sixty days, $5,000 each, we will return you the money before the expiration of the sixty days. It must be done, as we cannot get along any other way. Mr. E. wishes to leave in the cars.

Yours truly,
W. KELLOGG,
W. S. Moss.

The defendant pleaded *non assumpsit*, &c.

On the trial no question was made but that the money asked for in the letter, or its equivalent, had been advanced by the plaintiff. But it seemed that there existed at that time in Peoria, where the transaction occurred, and where all the parties resided, a partnership formed, to build a railroad, styled Kellogg, Moss & Co., of which the plaintiff and defendant, and Kellogg and others were members, and that the money furnished by Gregg had been used for the benefit of this partnership, which had now spent its funds and failed in its enterprise. The defendant alleged that the money had been advanced by the plaintiff to the *partnership*, and on *its* credit, and not on the individual credit of Kellogg and Moss; and that if this were not so at the time, that the plaintiff afterwards (on the 1st of December, 1857) had agreed that this sum, with others advanced by him to the partnership should become capital in the partnership business, and thus increase his share of the capital.

The plaintiff proved the signatures to the letter, and that the sum mentioned in it was received by Kellogg, partly in money and partly in drafts, which answered the purpose; and, in the further progress of his case, offered to prove by a competent witness that only a few minutes after Kellogg had obtained the money, he told the witness that he had received the money from the plaintiff, and had "fixed Elder off," and that Elder had gone home. On objection by the defendant, the court excluded the testimony, and the exclusion was the subject of the first bill of exceptions.

Testimony was given on both sides, on the point above stated to have been the grounds on which the defendants chiefly put the case; to wit, that the $10,000 had been advanced originally to the partnership, and on its credit; and if not, that by the agreement of 1st December, 1857, the plaintiff had agreed that it should become capital in it. It was not denied that all the partners of the firm of Kellogg & Co., had on the 1st of December named, made an agreement reciting that some of the members had advanced money and funds beyond their shares in the partnership, and agreeing that "each and every member of the said firm should make a statement of . . . advancements made to said firm, together with 10 per cent. interest from the dates of them, which after the said 1st of December, 1857, should remain as the capital stock of the firm, and represent the capital stock of each individual member of the firm, and fix their interests therein respectively and *pro tanto*." But Gregg swore that he had never funded this debt; that he had made out the statement in accordance with the agreement of December 1st, 1857, and that this $10,000 was not included in that account. Other testimony, however, tended to prove that when the agreement of 1st December was made, Gregg did *agree* to put in this $10,000, and that it was one condition on which other partners signed it.

The evidence being closed, the court charged fully, saying among other things, to the jury:

"If the evidence satisfies you that the plaintiff, at the time the agreement of the 1st of December, 1857, was made, assented to treat this $10,000 as a part of his advances to the firm of Kellogg, Moss & Co., and to have the same funded, as contemplated in said agreement, such assent on his part is binding upon him, and releases Kellogg & Moss from their promise to pay the said sum, or see the same paid. It is a substitution of the liability of the new firm to ultimately reimburse this amount as a part of the capital put into the old firm by the plaintiff for the individual liability of Kellogg & Moss to him. But it is for you to say, under the evidence, whether such assent or agreement to fund was, in fact, made or not. If made, the defence is made out.

"Nor is it material whether the plaintiff afterwards included this amount in his statement of advances to the old firm or not. It is enough that he agreed to do so. Granting that Kellogg & Moss were liable to make it good to him in December, 1857, still, if the plaintiff agreed that the sum for which they were so liable should be carried over to his capital stock with Kellogg, Moss & Co., then the agreement is binding on the plaintiff, because this sum had already clearly been put into the affairs of the firm, and either the plaintiff or Kellog & Moss were entitled to have it charged up as part of the assets furnished and sunk in the past business of the firm."

Verdict and judgment having gone for the defendant, the case was now brought here, where it was submitted on a printed brief of Mr. *O. Jackson*, for the plaintiff in error; a like brief by Messrs. *Harding* and *McCoy*, for the defendant in error; a reply by Mr. *Jackson*, and an answer by Mr. *Harding* to the same. The argument of the counsel of the plaintiff in error was directed to prove,

1st. That there was error in the exclusion of the testimony to show what Kellogg had said a few minutes after obtaining the money; that this ruling was erroneous, because the plaintiff had a right to prove the admission of one of the joint promisors as to the receipt of the money, made about the time of or immediately after the transaction took place; a position which the learned counsel sustained by an able argument; relying on Lowle v. Boteler, 4 Harris & McHenry, 346; Bachman v. Killinger, 55 Pennsylvania State, 416; Cady v. Shepard, 11 Pickering, 400, and other cases in Massachusetts and elsewhere, though he admitted that the rule was different in New York, and perhaps in some other States.

2d. Because, as a matter of fact, the testimony did not show with sufficient certainty, either that the plaintiff had originally advanced the money to the partnership, or that he had subsequently, on the 1st of December, 1857, agreed to fund it.

3d. That the charge on this branch of the subject (and quoted *supra*) was erroneous.

Mr. Justice MILLER delivered the opinion of the court.

This cause has been submitted to us on printed arguments on each side, with replies and counter-replies, none of which contains any regular assignment of errors, as required by the twenty-first rule of this court. The record presents a bill of exceptions of thirty printed pages of testimony, which is certified to be all that was given on the trial, and the arguments address themselves to the entire merits on this evidence.

We have felt very much inclined to dismiss the writ of error, or affirm the judgment without an attempt to look up the questions of law which might possibly be involved in the record, for the number of cases coming to this court in which the bill of exceptions embodies all the evidence offered, and counsel, tempted by this, argue before us the whole case as if the verdict concluded nothing, requires a decisive remedy.

As far as we are able to see there are but two questions of law raised by the record.

The first relates to the exclusion of a single item of evidence offered by the plaintiff, and the second to the charge of the court.

The plaintiff having proved the signatures to the letter of December 23d, 1856, and that the sum mentioned in it was received by Mr. Kellogg, offered in the further progress of his case to prove by a competent witness, that only a few minutes after Kellogg had obtained the money, he told the witness that he had received the money from the plaintiff, and had "fixed Elder off," and that Elder had gone home. The exclusion of this testimony is the occasion of the first bill of exception.

We have a learned argument on the vexed question of the admissibility of the declarations of one partner, or joint obligor, against the other. But we are of opinion that the ruling of the court presents no error which should reverse the judgment, because its rejection worked no harm to the plaintiff. The execution of the paper was not denied, nor was it controverted, except by the general form of the pleading, that Kellogg had received the money. It had already been proved by several other witnesses and was at no time made a point in the case. The whole controversy before the jury turned on the question whether the money so received was advanced by Gregg on the credit of Kellogg and Moss alone, and if so, whether he had afterwards agreed to convert it into capital. The admission of Kellogg that he had received the money from Gregg gave no light on either of these questions. The judgment should not be reversed for the rejection of this testimony, whether it was in strict legal principle admissible or not.

The brief of the plaintiff proceeds to argue that the evidence before the jury does not sustain either of the allegations of advancing the money to the partnership, or the agreement of the plaintiff, to convert it into the capital of the partnership. With this we can have nothing to do. It was the province of the jury to determine whether either of these allegations was proved, for either of them was a valid defence to this action, and they have found in favor of defendant.

It is argued, however, that the instructions of the court on this branch of the subject were erroneous—to the prejudice of the plaintiff.

We have examined carefully the points of the charge objected to, as well as the other parts of it, and, without elaborating the matter, we are of opinion that it puts this, the turning-point of the case, to the jury on fair grounds, and we can see no objection to the legal propositions stated by the court and excepted to by counsel.

Judgment affirmed.

LEGAL GAZETTE.

Friday, February 28, 1873.

JOHN H. CAMPBELL,
EDITOR.
THEODORE F. JENKINS,
ASSOCIATE EDITOR.

At a meeting of the members of the Schuylkill County Bar, held at the court house, in Pottsville, February 20th, 1873, in respect to the memory of Hon. Charles Frailey, deceased, the Hon. Thomas H. Walker presided; Hon. Jacob Kline, and Nicholas Seitzinger were appointed vice presidents, and Wm. R. Smith, Esq., acted as secretary.

Judge Walker stated the object of the meeting, and spoke with feeling of the many virtues of the deceased, and of the high esteem in which he was held in the community.

On motion, the president appointed Messrs. B. W. Cumming, John W. Ryon, and Chas. N. Brumm, a committee to report resolutions expressing the sense of the meeting.

The committee reported a set of resolutions, which were unanimously adopted. The meeting then adjourned.

THE LAWYERS AND THE CENTENNIAL.

The lawyers of this city and State are taking an active part in the meetings now being held in reference to the Centennial Exibition in 1876. At the meeting held in the hall of th Constitutional Convention in this city on the 19th inst., admirable addresses were made by Hon. John H. Walker of Erie Co., Hon. Wm. H. Armstrong of Lycoming Co., Hon. Chas. R. Buckalew of Columbia Co., and ex-Governor Andrew G. Curtin, all of them well known lawyers. At the Academy of Music meeting on Saturday evening last, Hon. John Scott of Huntingdon Co., and Hon. A. A. Purman of Greene Co., both lawyers, made speeches, while John Goforth Esq., of the Philadelphia Bar officiated as secretary. We are glad to perceive this active interest taken by members of the bar, as it will materially aid in making the celebration a grand success.

THE CONSTITUTIONAL CONVENTION.

The following is the substance of a paper entitled "The Work of the Constitutional Convention," read on the evening of the 20th inst., by Mr. A. Sydney Biddle, before the Social Science Association of Philadelphia:

Mr. Biddle began by explaining the importance of the subject, and the deep stake which the humblest member of the community had in the successful solution of the problem of good State government. He thought, that, in the present anomalous condition of political society, which was proved to exist by the need of a written constitution, framed to restrict the action of the legislative body, as much as to define the spheres of the different branches of the government, a constitution should not deal only in generalities; specific restrictions and directions should be introduced where the acts forbidden or declared obligatory were within the just sphere of the Legislature, unless that body through ignorance or wilfulness had proved its incapacity to provide the necessary measures. Mr. Biddle then deprecated the prevailing popular idea that written constitutions are a kind of panacea for all political diseases where the ingredients are properly mixed. He believed that in the long run nothing but an increasing vigilance in regard to elections, and more especially nominations, would be of any service in raising the standard of politics.

In the present constitution the corrupt condition of politics should be distinctly recognized, and its various clauses framed so as to cure as far as possible existing disorders. In this task the convention should especially be guided by the experience of other States.

Mr. Biddle then asked the question, "To what are the abuses in our system owing?" and proceeded to answer it by showing that one cause was the undue influence of the Federal upon the State elections, and the joining of municipal with State elections. The convention has already sought to obviate this evil by changing the time of the municipal elections to February, and by so arranging the terms of office of members of the Legislature that no State election shall occur in the same year with a Federal election.

Another abuse, more difficult to deal with, was the low character of the average legislator, and this Mr. Biddle believed was owing to the small inducements offered by any community to its lawmakers. He showed that no salary that the State could afford to give would ever be enough to tempt the best men in the community to give up lucrative employment for the sake of serving an ungrateful constituency, and that therefore the position should be rendered as attractive as possible. This could never be done to a reasonable extent while Harrisburg remained the State capital, and he therefore advocated a proviso in the constitution declaring that Philadelphia should be henceforth the capital. He then advocated a similar proviso to the effect that the Supreme Court should sit in Philadelphia only, showing the great importance of the influence of our homogeneous bar upon that court.

From this topic he approached another of greater interest, and warmly advocated the advantages of an appointed judiciary. Some remarks by Mr. Binney were quoted in support of this position, and a plan was suggested by means of which the choice of able men for that high office would be made a matter of necessity. This was to create a council as in Massachusetts, of whom two-thirds must approve every nomination for any office made by the governor. This council was to be composed of retired members of the Supreme Court, drawing pensions, and incapacitated from practising at the bar after leaving the bench. This council might also try all legislative contested election cases, while the Court of Common Pleas should have sole cognizance of contested elections of county officers.

It was shown that in England, Parliamentary election cases are no longer tried by the House of Commons, but by the courts, and that this is a change of very recent date. Mr. Biddle then suggested a liberal annual pension for retired judges equal to one-half of their annual salary, if they had served for ten years, two-thirds if for fifteen, and the same as the salary if for twenty.

He hoped that the Legislature would pass a bill fixing $10,000 as the minimum yearly salary of judges of the Supreme Court, but permitting the Legislature to increase it. The proviso of our present constitution, giving the office of chief justice to the *puisne* judges in succession was censured.

The general practice of giving increased legislative executive powers to the judiciary, incompatible with their regular functions, was deprecated, and its dangers predicted. The branches of the government should be distinctly separated, and each should have that which properly appertained to it. The appointment of prothonotaries and other court officers formed an exception to the general rule, and should be made by the court.

The character and office of justice of the peace was then discussed, and the following changes suggested. That this officer should receive a fixed salary, payable by the State. That he should be appointed by the unanimous consent of all the judges of the county in which his jurisdiction existed; and that he should not only be a member of the bar, but should be compelled to pass a rigid examination by the board of examiners before being entitled to act. Power of summary removal should be lodged in a majority of all the judges who appointed him, and in the governor.

The constantly increasing evil of the delay of justice was then commented on, and it was shown that this year the Supreme Court would probably be unable to finish last year's Philadelphia cases, and would thus be a whole year in arrears. It was shown that, if the judges received handsome salaries, and the employment of assistants, they could do two or three times as much as at present, as in England. A system of costs was also advocated, by which certain counsel fees graded by the amount involved should be paid by the losing to the winning party, whenever a case was appealed, and the decision of the court below affirmed. Mr. Biddle suggested that the district attorneys should also be appointed by the governor with the consent of his council, and should hold office during the governor's term.

He then discussed, at considerable length, the various systems of minority representation, and after showing the theoretical injustice of the limited vote and the cumulative vote, used many arguments in favor of the Gilpin system of proportional representation. The machinery of which he advocated the use, was that now employed in England under the new ballot bill, and was similar to that reported by the committee on elections, to the convention a few days ago. Mr. Biddle then spoke in conclusion of special legislation, and of the tyranny of corporations, suggested among other remedies a proviso abolishing all laws limiting the amount to be recovered against corporations in case of death or injury arising from their negligence or carelessness. He touched on the question as to how far carrying companies should be permitted to engage in other operations, and without expressing any views on the subject, recommended the subject to the close attention of the Legislature.

Some of the suggestions of Mr. Biddle are excellent, but we differ most emphatically with him in the propriety of *appointing* judges of the courts and justices of the peace; with his views in reference to the cumulative and "free vote" systems of casting votes, and on some other points. We believe that all judges should be *elected* and that the "free vote" is the best of the reformed systems of voting, now advocated. The paper of Mr. Biddle, however, is interesting and suggestive, and deserves attentive perusal.

PUBLICATIONS RECEIVED.

THE EXCHANGE AND MARKET, February, 1873. New York.

THE FEDERALIST, February 8th, 1873, New York.

Supreme Court of Pennsylv'a.

YOUNGMAN v. WALTER.

An affadavit of defence, alleging that a promissory note was, by mistake, given for a greater amount than was due, and that before suit was brought two-thirds of the amount of the note was paid, is sufficient.

Error to the Common Pleas of Union county.

Opinion by MERCUR, J. Delivered February 24th, 1873.

The alleged error is that the court entered judgment for want of a sufficient affidavit of defence.

The plaintiff claimed upon a note executed by John Youngman, under seal, payable to Jesse M. Walter, guardian of Rosanna, Margaret and Sarah Jane Walter, for $865.66, being for one-half the sum which said Jesse, as guardian, had received for himself and said Youngman.

The obligation was assigned to said Sarah Jane before suit was brought.

The original affidavit of defence filed, was not drawn with great clearness or precision. Rejecting much irrelevant matter therein contained, we understand the defendant to aver, that he and the plaintiff were, at the time of the execution of the note, and still are copartners; that he was induced to sign the note under the representation of the plaintiff, that he had received twice that amount of his ward's money, for the use of their said firm; but now he gives some reasons why he does not believe the firm received the sum alleged, thus substantially affirming, that he was induced to execute the note under a false statement of existing facts, which might establish a partial failure of consideration. He further averred, that two-thirds of said note had been paid in cash by said firm to said plaintiff.

In his supplemental affidavit, he distinctly avers, that the note was given for more than was due; and that two-thirds of the amount of the note had been paid to the plaintiff by the defendant, in cash, before the bringing of the suit, and prior to the assignment of the note to the equitable plaintiff, all of which he expected to be able to prove upon the trial.

It appears by the certificate of the learned judge, that he did not have the supplemental affidavit before him when he directed judgment to be entered. Considering the original affidavit insufficient, he ordered judgment to be entered against

the defendant for the full amount of plaintiff's claim. In this, we think the court erred. The rules of court require only "an affidavit of defence setting forth the nature and character of the same." The defendant does swear, that he has a defence to the whole of the plaintiff's claim. The nature and character thereof is an absence, in part, of consideration for the note, and an actual payment in cash of two-thirds of the note. While the extent of the failure of consideration is vague and indefinite, yet the averment of the amount paid upon the note in cash, is sufficiently positive and specific, if proved, to establish a defence against two-thirds of the amount of the claim.

Judgment reversed, and a *procedendo* awarded.

YOUNGMAN v. WALTER.

Error to the Common Pleas of Union county.

Opinion by MERCUR, J. Delivered February 24th, 1873.

In this case, the legal parties are the same as in the one in which the opinion has just been read. These two cases were argued together. The facts in each are substantially the same, and for reasons given in the preceding case

Judgment is reversed, and a *procedendo* awarded.

PERCIPHOR BAKER v. CHESTER GAS COMPANY.

The owner of land, against which there was a mortgage and a judgment, opened streets through it. Under a *levari facias* upon the mortgage, a portion of the land was sold, fronting it on the streets as laid out. Subsequently, by a *vend. exponas* on the judgment, the land covered by the streets was sold. *Held*, The sale under the *levari*, the lots being bounded on the streets, passed the title to the middle thereof, and divested the lien of the judgment from the land over which the streets ran.

Error to the Common Pleas of Delaware county.

Opinion by MERCUR, J. Delivered February 24th, 1873.

The plaintiff assigns for error the entry of judgment in favor of the defendant upon the case stated.

This depends upon the validity of the right claimed by the defendant to close up a portion of Evans street, in the city of Chester.

The land covered by this street is part of a larger lot, bounded westerly by Welch street, which was purchased June 28th, 1854, by Carnog & Evans. Upon the same day they executed a mortgage to the vendor to secure the payment of a part of the purchase money. They purchased the land with a view of dividing it and selling it for building lots. They laid out three streets, to wit, Evans, Crosby and Porter, and fifty lots, and made a plot or draft thereof.

October 23d, 1854, the plaintiff purchased of them, by deed, one of said lots, having a frontage of 110 feet on Evans street; bounded west by Welch street and south by Evans street. Upon the same day the mortgagee released this lot, as described in the deed, from the lien of the mortgage. Judgment having been subsequently entered upon the mortgage, a *levari facias* issued thereon to November Term, 1855, and the remaining lots were sold by the sheriff. In the writ they were described as "all of those 49 several lots." Fifteen of said lots, "bounded north by Evans street," and extending along the same 312 feet, were purchased by Campbell. Ten of the lots on the northerly side of Evans street, east of and adjoining the plaintiff's lot aforesaid, with a frontage of 20 feet each on Evans street, were purchased by plaintiff. Prior to this sale, the streets and lots had been designated by marks upon the ground. May 1st, 1856, Campbell conveyed his said 15 lots to the defendant, bounding them by Evans street.

It appears, however, that upon the 16th September, 1854, one Steel obtained a judgment against said Carnog & Evans and one Hannum. Whether the plot or draft of the lots and streets had then been made is uncertain.

The proceeds of the sale upon the mortgage were insufficient to reach this judgment. A *vend. exp.* issued thereon to August Term, 1856, by virtue of which the sheriff sold to said Hannum the lot situate at the northeast corner of Welch and Evans streets, which had been conveyed to plaintiff in October, 1854, as aforesaid; and to one George Baker, another lot, part of said mortgaged premises bounded by Crosby street. Under an *alias vend. exp.* issued on the same judgment to November Term, 1857, said Hannum purchased the land covered by each Evans, Crosby and Porter streets. The former being described as "a lot of land called Evans street," measuring 45 by 313 feet, and bounding it on the north and on the south by lots previously sold at sheriff's sale as aforesaid.

By virtue of divers mesne conveyances, all the title which Hannum acquired by his purchase of Evans street for the distance of 110 feet easterly from Welch street, became vested in said defendants. They therefore closed up the street, putting a fence or gate at each end of the 110 feet, thereby denying the plaintiff's passage through the street, and he has no other way of access to his said ten remaining lots.

Thus it appears at each sale, both public and private, made prior to the sale of Evans street, it was distinctly recognized as a street. The lots lying north and south of it, were bounded by it. The sale upon the judgment united with the sales upon the mortgage, in proclaiming it to be a street. Every lot which the defendants own, when sold at sheriff's sale, was bounded upon it. This description is directly in the line of their title. Each deed showed it to be a street dedicated to the public. The fair presumption is that a larger sum was realized from the sale of the property in lots, than if it had been sold in one body.

Upon a sheriff's sale of land, the general rule prescribed by public utility is, that different lots of ground should be sold separately. The reason is that the competition is thereby much increased. Many persons might desire to purchase *one*, who would not, or could not, purchase several. The primary object of selling at sheriff's sale is not to transfer the title, but to collect the money. A common incumbrance creates no reason for selling the lots together. 1 Trou. & Haley, part 2d, page 1001.

Upon an application to the court whence the execution issued, a sale will be ordered, by such sub-divisions as will be most likely to produce the largest sum. In this case, without an order of court, the sales were made, it is fair to presume, in the manner the court would have ordered if application had been made thereto.

The lots having been thus sold, without objection from the defendants in the execution, or from any of the lien creditors, and purchasers having invested their money therein, the titles thereby acquired must now be held to be of like force and effect as if the sales had been made in pursuance of a prior order of court. Great injustice would be done to the purchasers of lots bounded by Evans street, to now hold that their titles extended no farther than the edge of the street, and that a subsequent sale of the ground covered by the street excluded them therefrom. Conceding, then, what the case stated does not admit, that the lien of the judgment attached prior to the making of the plot, dedicating the street to public use; yet we think the learned judge erred in holding that the sale of the lots bounded by Evans street did not divest the lien of the judgment upon the land covered by the street. By these sales the title to the whole land passed, and nothing remained to be sold.

The law is well settled, that upon a sale of a lot bounded by a street, the title passes to the centre of the street. Paul v. Carver, 12 Harris, 207; Idem, 2 Casey, 223; Greer v. Sampson, 3 Casey, 183.

Even if the lot be bounded by the *side* of the street, the grantee takes title to the centre thereof, if the street is not expressly or by clear implication reserved. Cox v. Freedley, 9 Casey, 124.

We are of the opinion that the plaintiff was entitled to recover.

Judgment reversed, and judgment is entered in favor of the plaintiff upon the case stated.

Recent Decisions.

IRELAND.

COURT OF COMMON PLEAS. LOUGHMAN v. BARRY et al.

1. It is not necessary that a fraud by the vendee of chattels should be indictable, in order to entitle the vendor to rescind the contract of sale by reason thereof.

2. The drawing and giving of a check upon a bank, in payment, amounts to an implied representation that the drawer has authority to draw upon the bank, against assets *eo instanti* applicable towards payment.

3. The giving of an unproductive check in payment on a sale of chattels for ready money, by a vendee, then knowing there are no assets in a bank against which he has authority to draw, at the time of the cheque being taken by the vendor upon the faith that there are immediate funds applicable towards payment, amount to a fraudulent misrepresentation by the vendee, and such misrepresentation will entitle the vendor to rescind the contract and resume the goods, notwithstanding that the vendee, upon reasonable grounds, believes at the time, that there would be funds in bank to pay the check when presented, and though he were not indictable for obtaining the goods by false pretences. —*Ir. L. T. Rep.*, Dec. 21, 1872, p. 186.

NOVA SCOTIA.

SUPREME COURT OF NOVA SCOTIA. BOWEN et ux. v. SHEARS.

1. In 1831, C. gave the plaintiff's wife a piece of land, part of a farm. In 1833, the plaintiffs went into actual possession, C. helping them to build the house, and so continued until 1870, when defendant entered. Plaintiffs brought trespass, and defendant set up title in himself under the will of C. (made in 1859), by which the farm, "then owned and occupied by the testator," was devised to the defendant. In 1838, the plaintiffs conveyed to C., in trust, to preserve the right, title and interest of plaintiff's wife, for their free use, from the father's debts, &c., the rents and profits to the wife during her life, and after her death, to the support and maintenance of the daughter. By this deed, C. had power to call for and receive the rents and profits. Before his death, C. recognized in a survey he made, the fact that he had given the land in dispute to plaintiff's wife.

2. *Held*, That although the plaintiffs were estopped by the deed made in 1838, from claiming title by possession, before that time, they were entitled so to claim, being in effect a tenant at will, after the lapse of one year from that date; and the plaintiffs could maintain their action against defendant as a wrongdoer, having held adversely to him for more than twenty years.—*Canada Law Journal*, February, 1873.

Supreme Court, United States.

PHILPOT v. GRUNINGER.

1. In the matter of a contract, a distinction sometimes exists between a motive which may induce entering into it and the actual consideration of the contract. *Ex. gr.*, A person, in virtue of some benefit passing to him, may be bound to give for it his promissory note for a certain sum and payable at a certain time, and yet refuse to give the note. Now if upon an expectation of some particular results in another transaction, into which expectation he is led by his creditor in the original transaction, he gives the note, the original benefit to him, and not the expectation, must be regarded as the consideration of the note.
2. A promise by one party being a good consideration for a promise by another, a jury will not, in a case where such mutual promises are shown, and no dependence exists between them, be held to have been misinstructed by a direction which makes a distinction between motive and consideration, such as taken in the paragraph above, even if the distinction be one not well founded. The instruction could do no harm.
3. A consideration moving to A. and B., with whom C. afterwards enters into partnership, and of which consideration C. thus gets the benefit, will support a promise by C.
4. On an issue between a partnership and third parties as to the day when the partnership was formed, the mere articles of partnership are not evidence in favor of the partnership. It must be shown by extrinsic evidence, that they were made on the day when they purport to have been made.

Error to the Circuit Court for the Northern District of Illinois; the case being this:

On the 19th of October, 1864, Gruninger, by articles of agreement, sold, or agreed to sell, to B. Philpot and H. Picket, residing at Titusville, Pennsylvania (who, with George Sherman, of Philadelphia, had been speculating in oil wells), a well "on the Blood Farm," near the town named; Philpot and Picket agreeing by the articles to pay Gruninger $3,500 within thirty days. The money was not thus paid. Gruninger, after the sale, went to Massachusetts, but by the 24th of February, 1865, had returned to Titusville. On the day just mentioned, Picket writes to him expressing satisfaction at his return, and acknowledging the

receipt of a letter from him "some time since; an answer to which had been neglected on account of press of business until it had passed out of mind," and saying: "I think we can fix up that Blood Farm matter satisfactorily, when you come up."

By the 21st of April, 1865, Philpot, Picker, and the Sherman already named, had become interested as partners, under the name of Philpot, Sherman & Co., in the well on Blood Farm (if, indeed, Sherman had not been partner with the other two from the first) in other oil wells; and on the day the partnership, under the firm name, along with several other projectors in oil (not, however, including Gruninger) entered into an agreement to form a joint stock company; Philpot, Sherman & Co. agreeing to put into the company certain wells, but not this one, which they had bought, or agreed to buy, on the Blood Farm.

On the 6th of May, 1865, Gruninger also agreed to put in a certain well which he still owned; one on the Smith Farm; and on the same day, by deed, witnessed and acknowledged, "in consideration of the sum of $3,000," which was acknowledged to have been to him "paid, and the receipt of which he acknowledged," conveyed to Philpot, Sherman & Co., the already mentioned well on the Blood Farm. On that same day, but without reciting on account of what transaction, Philpot gave the firm note for $3,000, payable to Gruninger on demand.

The joint stock company apparently fell through. Gruninger, at any rate, would not put in his well on Smith's Farm.

On the 5th July, Picket, one of the persons to whom Gruninger had agreed to sell the well on the Blood Farm, and a member of the now admitted firm of Philpot, Sherman & Co., writes to Gruninger, from Titusville, signing the firm name.

"We have learned that the note given you by our firm has been sent to Philadelphia for collection. All *I* can say is, we are, at present, unable to pay it. The change in times has so contracted our means as to make it doubtful if we are able to pay your note in cash at all. We will be glad to settle with you by letting you have some good property any time; but money, at the present time, is out of the question with us. Let us hear from you soon."

And on the same day Philpot, in Philadelphia, writes to him from there:

"The note given by me to you has been presented by a collector for payment. We think this a strange proceeding under the circumstances the note was obtained, and a part having been paid. We have your name to a contract assigning us your interest in well on the Smith Farm, and we would recommend that you withdraw that note, and, as soon as convenient, meet us in Philadelphia, when a satisfactory adjustment of the whole can be arrived at. If you push that note, we shall assuredly demand that interest which we have you bound for, and proceed accordingly."

Gruninger replies, two days afterwards, by a single letter addressed to the firm:

"Yours of July 5th was received with one also of same date. You write me that the note given by you to me was presented to you by a collector for payment, and you think it a very strange proceeding. I myself can't see anything strange in it. You know that the note ought to have been paid this long time. I am in need of money, and must have it

"I am sorry to see you mention in your letter about a contract I assigned to you, and you would 'recommend me to withdraw that note as soon as convenient,' &c.; and that if I push that note you shall demand the interest, which, you say, you have me bound for, and proceed accordingly. If you think *this* kind of talk goes with me, you better try it. I am sorry that you have wrote so. And the note I have given to collect must and shall be collected, if—. I am sorry to answer you in *this* way, but you commenced it."

No arrangement being made, Gruninger sued all three persons as partners on the note. Philpot and Picket pleaded jointly and Sherman separately and alone. The defence was, in substance, that the note was given by them to Gruninger in consideration of the *agreement* of Gruninger that he would become a member of the proposed oil company, and put certain property in it, and also in consideration of the transfer to them of the well on the Blood Farm; and that he had failed and refused to perform his agreement, and that the well had no value.

Gruninger, on the other hand, asserted that it was given in consideration alone of the transactions of October 19th, 1864, and of an existing debt.

The controversy thus involved was, of course, what the consideration of the note really was.

On the trial the defendants offered in evidence articles of partnership dated 8th November, 1864, and between them, in order to show that the partnership between the three was not in existence when the articles of agreement of October 19th, 1864, were made; but they did not offer or propose to offer any other evidence of the same fact.

The court rejected the articles.

The plaintiff and defendants each gave evidence tending to show on the one side that the well on the Blood Farm was worth what it cost, on the other that it was worthless.

In charging, after adverting to the various letters already quoted, including that of July 5th, by Picket, in the firm's name, in which no objection is taken to the validity of the note, and the cause of its non-payment is stated to be that the firm was *then* unable to pay it in *money*, and after adverting to some other evidence the court said:

"If, in point of fact, the note was given in consideration of past transactions, of obligations already accrued or accruing, then, of course, the defence fails.

"If, on the other hand, the note was given in consideration of the agreement, on the day, 6th of May, made by Gruninger, to enter into the company; and also, in consideration of the transfer of the said well, and he did not enter into the company, but failed to comply with his agreement, and there was no value in the well, as stated in the plea, then the defence is made out."

The court, however, said further:

"But it is proper for you to consider whether or not *this* might have been the state of the case; that there were transactions between the parties; that there was a claim on one side, and which may have arisen, or did arise, in consequence of these transactions. Now, was there a present, existing indebtedness from Philpot and Picket, or from Philpot, Sherman & Co., to Gruninger, and was the execution of this agreement by Gruninger, on the 6th of May, *simply a motive* for the giving of the note and not *the consideration* of the note? It *may* be that that was held out as an inducement to the defendants to give the note, as a motive for putting the debt in the shape of a note rather than let it remain in its then present form. If that were so, then the defence would fail, because that proceeds upon the ground, as I understand, that the actual consideration of the giving of the note, not the motive for putting the claim in that form, was the signing of this agreement of the 6th of May, and the transfer of the well on the Blood Farm.

"It may well happen that A. may owe a valid debt to B., and B. may say to A., 'If you will put the debt in the shape of a note I will do some act for you;' and then, when it is done, the promise to put the debt in that shape is not the consideration of the note, but the debt which is due from one to the other."

The jury found for the plaintiff, and judgment was given accordingly. On exceptions to the portion of the charge last above quoted, and to the rejection of the partnership articles, and on some other matters not necessary in any part to be reported, the case was now here.

Messrs *S. B. Gookins* and *J. H. Roberts*, for the plaintiffs in error.

I. The jury were misled in view of the evidence in this case—

First. By the distinction made by the court between the *motive* or *inducement* for giving the note, and the *consideration* of the note; and,

Secondly. (If the distinction were a sound one) in applying it to the contingency of a present existing debt from Philpot and Picket *or* Philpot, Sherman & Co., whereas it should have been confined to a present existing indebtedness from Philpot, Sherman & Co.

As to the latter proposition—

Assuming that the jury might have fairly found that there was a debt of $,500 from Philpot and Picket only for the well purchased on the 19th of October, 1864, yet, as to Sherman, who did not owe the debt, what possible *motive* could he have for becoming liable to Gruninger for this debt? "The execution of this agreement by Gruninger," says the court. Then, if without that agreement *he* would not have been induced to put the debt in that shape, it follows that such agreement was, *as to him*, the consideration of the note.

As to Sherman, therefore, especially, this distinction between the motive or inducement and the consideration, if well founded in any case, was inapplicable to the facts in evidence, and was, therefore, well calculated to, and in fact did, mislead the jury.

Then, as to our first proposition, that the distinction made by the court, in view of the evidence in this case, between the *consideration* of the note and the *motive* or *inducement* operating to cause defendants to give it, misled the jury.

There was obviously controversy between Gruninger and defendants just previous to and at the time this note was given, as to the sale of the well on the Blood Farm. Concede that the evidence is insufficient to show that it was worthless, and that on the whole the defendants were lawfully indebted to Gruninger $3,500 for it, but in good faith thought otherwise, and refused payment, or would only consent to pay or execute the note in question, provided Gruninger would agree to go into and put his property into the proposed new company.

Now, says the court to the jury:

"It may well happen that A. may owe a valid debt to B., and B. may say to A., 'If you will put the debt in the shape of a note I will do some act for you;' and then, when it is so done, the promise to put the debt *in that shape* is not the consideration of that note, but the debt which is due from one to the other."

This was put by way of illustration, to show the distinction between the consideration and the motive or inducement. If this distinction is known to the books, it can only apply to such a case as this put by the court where A. owes a *valid* debt to B., and does not dispute it, but it could never apply to a case where, although A. owed a valid debt to B., he believed otherwise and denied it, and B., in order to induce A. to give him an acknowledgment of it in the shape of a promissory note, promises on his part to do some other thing. In such case, while the valid debt may be in part the consideration of the note, it is not the whole consideration, and to allow B. to repudiate his promise and sue and recover *on that note*, would be to encourage fraud.

II. We submit, also, that the court erred in excluding from the consideration of the jury the articles of copartnership between Philpot, Sherman, and Picket.

Mr. *O. K. Hutchings*, contra.

Mr. Justice STRONG delivered the opinion of the court.

That a part of the consideration of the note was the debt due for the oil well which Gruninger had sold six months before to Philpot and Picket, or that the note was intended as an adjustment of that debt, is but faintly denied; but the plaintiffs in error insist that a part at least of the consideration was the agreement of the promisee to contribute to the formation of the proposed company, an agreement which they allege he has failed to perform; and they complain that the jury were misled by an instruction that they might consider whether the signing of the agreement, or the undertaking of Gruninger to put into the company the interests mentioned, was anything more than an inducement to the making of the note by the defendants, furnishing a motive for giving it, but constituting no part of the consideration.

It is, however, not easy to see how the jury could have been misled, to the injury of the plaintiffs in error, by calling attention to a possible distinction between the motive which may have induced giving the note and its consideration, even if no such distinction can be made. For if it be assumed, as was claimed, that the promisee's undertaking to unite in the formation of a joint stock company was a part of the consideration, it could not aid the promisors. It would not be a step toward showing that the consideration had failed. Gruninger's neglect or refusal to perform his agreement is not to be confounded with the agreement itself. The latter was the consideration, not its performance. He might be answerable in damages for non-performance, but his undertaking to perform would have been the price of the defendants' promise. That undertaking they still have, and with it the full consideration. Nothing is more common than a promise in consideration of a promise, and the defendants' pleas in this case aver that Gruninger's undertaking was the price of their stipulation. Were it then conceded, as the defendants' claimed, the jury would not have been warranted in finding that the consideration of the note had failed.

It is, however, not to be doubted that there is a clear distinction sometimes between the motive that may induce to entering into a contract and the consideration of the contract. Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking. An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is "the cause or meritorious occasion requiring a mutual recompense in fact or in law." Dyer, 306 b. Surely a creditor may do a favor to his debtor, or may enter into a new and independent contract with him, induced by which the debtor may assent to giving a note for the previously existing indebtedness. Without the favor or the new contract there is in such a case a full consideration for the note, and the parties may not have contemplated that the favor or the new contract was to be paid for. To regard them as entering into the consideration of the note would be to make a contract for the parties to which their minds never assented.

It is argued that if Sherman did not owe the debt due from Philpot and Picket to Gruninger (as the jury might have found), there was no motive or inducement, much less even consideration, for his becoming a joint promisor in the note, unless it was Gruninger's agreement, and hence it is inferred that the jury were misled in being allowed to consider that agreement as merely a motive or inducement to his assumption. But he was then a partner of Philpot and Picket, and a joint owner with them of the property for which the debt had been contracted. A consideration moving to his co-promisors was enough to support his promise. The note was given for a smaller sum than the price for which the property had been sold to them. It was accepted as a settlement of the promisee's claim, and a conveyance of the property was made to all the defendants, including Sherman. There was, then, adequate consideration for his promise apart from Gruninger's agreement to put other property into the proposed company. For these reasons, we think, there was no error in the instructions given by the court to the jury.

The second assignment is that the court erred in excluding articles of copartnership between the defendants, dated No-

vember 8th, 1864. They were offered to show that the partnership did not commence until after the sale of the oil well was made to Philpot and Picket, which was on the 19th of October, 1864, and therefore that Sherman was not a debtor to Gruninger at that time or when the note was afterwards given. The proposed evidence seems to have been intended to show that the debt due for the well was not the consideration of Sherman's promise, and to raise the inference that Gruninger's agreement to join in forming the stock company was. We have already considered that, and from what we have said it appears that the rejection of the evidence did not injure the defendants. That there was error in the rejection has not been seriously contended.

Judgment is affirmed.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in March, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

Jan. 31, Hannah P. Quigg, Administratrix of ANN QUIGG, dec'd.
" 31, Thomas A. Mullin, Guardian of MULLIN'S minors.
Feb. 1, Maria M. Wharton et al., Executors of GEORGE M. WHARTON, dec'd.
" 1, Charles F. Linton, Administrator of CHARLES H. FOWLER, dec'd.
" 4, Helen L. Harrington et al., Executors of MAURICE A. HARRINGTON, deceased.
" 5, Jos. S. Kennedy, Executor of SUSAN JONES, dec'd.
" 5, James Brady, Executor and Trustee of LAWRENCE BLOOMER, dec'd.
" 7, John S. Derr, Executor of JOHN DERR, dec'd.
" 7, Franklin B. Colton, Executor of VIRGINIA M. HARRIS, dec'd.
" 7, Franklin B. Colton, Administrator of JOHN BERNADOW HARRIS, deceased.
" 7, Wm. D. Lewis, Administrator of Wm. D. LEWIS, Jr., dec'd.
" 7, James Hull, et al, Exec'rs of NANCY W. CRAIG, dec'd.
" 7, Wm. Harper, Jr., et al., Executors of WILLIAM HARPER, dec'd.
" 8, Robert Wilson et al., Executors of PETER D. LEWIS, dec'd.
" 10, Annie Yeager, Administratrix of WM. YEAGER, dec'd.
" 10, Thomas Shaw, Administrator of THOS. SHAW, Sr., dec'd.
" 10, John Selser, Executor of MATTHEW PLEIS, dec'd.
" 11, Joshua H. Morris, Guardian of EDWARD M. WISTAR, late minor.
" 11, Samuel Welsh et al., Acting Trustees of John M. Boyd, under the will of ISAAC BOYD, deceased.
" 11, Catharine Wurfflein et al., Administrators of ANDREW WURFFLEIN, deceased.
" 11, Robert Patterson et al., Executors of HELLEN H. PATTERSON, dec'd.
" 11, Samuel Christ et al., Executors of SUSAN A. WAYLON, dec'd.
" 12, Washington Bastian et al., Executors of GEORGE BASTIAN, dec'd.
" 12, John McCandless, Administrator of DAVID McCANDLESS, deceased.
" 12, Joseph Lake et al., Executors of BERNARD GOCKELN, dec'd.
" 13, Francis R. Cope, Administrator of ELIZABETH S. BROWN, dec'd.
" 13, Thomas W. Ayers, Administrator of SAMUEL W. AYERS, Jr., dec'd.
" 13, Robert Patterson, Executor of ELIZABETH SNYDER, dec'd.
" 13, Benjamin H. Kauffman, Administrator of FITZSIMMONS CALHOUN, deceased.
" 14, Franklin Shoemaker, Executor of MARY ANN WILLIAMS, dec'd.
" 14, Wm. McGeorge, Jr., Guardian of CARRIE E. V. C. MERSHON, late minor.
" 14, WM. McGeorge, Jr., Guardian of HORACE DEAN, late minor.
" 14, Alexander C. McCurdy, Administrator of DR. ANSON H. PLATT, deceased.
" 15, Henry C. Streler, Administrator of ANTON SEIBEL, dec'd.
" 15, David Winebrener, Guardian of ALLEN W. ARMSTRONG, late minor.
" 15, Philip Wagner, Trustee under the will of LAVINIA CARTER, dec'd.
" 17, Collins W. Walton et al., Executors of SAMUEL D. WALTON, dec'd.
" 18, Frances Robinson, Administratrix of JAMES ROBINSON, dec'd.
" 19, Jenneta Henning, Administratrix of GEPHART HENNING, dec'd.
" 20, Mary Ann Ehrlen, Administratrix of CHRISTIAN EHRLEN, dec'd.
" 20, Theodore Kitchen et al., Executors of JOHN S. KITCHEN, dec'd.
" 20, J. G. Rosengarten, Administrator of FRANZ STOCK, dec'd.
" 21, Frederick Schneider et al., Administrators of GOTTLEIB FREDERICK BLUMHARDT, dec'd.
" 21, Henry Mohr, Executor of ANNA MARIA SCHAFFER, dec'd.
Feb. 21, Henry Closking et al., Executors of JOHN BURK, dec'd.
" 21, William J. Thomason, Administrator d. b. n. c. t. a. and Trustee of WILLIAM PILLING, dec'd.
" 24, Robert Biddle, Acting Executor and Trustee of FRANCIS MILLER, deceased.
" 24, Sarah Potts et al., Executors of WM. POTTS, dec'd.
" 24, Louisa Loudenslager, Administratrix of CHRISTOPHER H. LOUDENSLAGER, dec'd.
" 24, Charles H. Hutchinson et al., Executors of J. PEMBERTON HUTCHINSON, dec'd.
" 24, Theophilus Harris, Exec'r of MARY GENTRY, dec'd.
" 24, Catharine Brugger, Administratrix of JOHN BRUGGER, dec'd.
" 25, Mary Twells, Administratrix of EDWARD TWELLS, dec'd.
" 25, George Trotter, Surviving Trustee of MARY JANE TROTTER, under the will of Thomas Hart, dec'd.
" 25, George W. Schenck et al., Administrators of MARY SCHENCK, dec'd.
" 25, The Girard Life Ins. Co., &c., Acting Trustee of ENOCH LANING, deceased.
" 25, George Foster, Executor of MARY HAYS, dec'd.
" 25, Uselma C. Smith, Guardian of DUVAL, minors.
" 25, James Markoe, Guardian of WALTER and HERBERT COX and MARY FIELD, minors.
" 26, John P. Thompson, Surviving Executor and Trustee under the will of ABRAM SHALKOP, dec'd.
" 26, A. P. Spinney, Executor of JOHN S. DYE, dec'd.
" 26, Matilda Bigot, Administratrix of ALPHONSE BIGOT, dec'd.
" 26, James Alexander, Administrator of REBECCA VINCENT, dec'd.
" 26, The Girard Life Ins. Co., &c., Administrators of EDWARD MAGARGE, deceased.
" 26, The Girard Life Ins. Co., &c., Executors of WM. COFFIN, dec'd.
" 26, Benjamin Homer et al., Executors of HENRY HOMER, dec'd.
" 27, Richard Peltz, Administrator of JOHN T. JONES, dec'd.
" 27, J. H. Butler et al., Executors and Trustees of E. H. BUTLER, dec'd.
" 27, Elijah Cox, Guardian of A. COX, minor.
" 27, Susan Murphy, Executrix of THOS. MURPHY, dec'd.
" 27, Eli K. Price, Trustee of MARY L. RAMBORGER, under the will of Mary E. Heartle.
" 27, Elizabeth B. Hopkins, Administratrix c. t. a. of ELIZABETH J. HOPKINS, dec'd.
" 27, Robert Guy, Administrator of SAMUEL ROGERS, dec'd.
" 27, Henry Vollmer, Executor of WM VOLLMER, dec'd.
" 27, Thomas Neilson et al., Trustees under the will of ROBERT NEILSON, deceased.
" 27, Thomas Neilson et al., Trustees for DAVIS COLCORD et al., under the will of Robert Neilson, dec'd.

WILLIAM M. BUNN,
feb 28-4t Register.

THE JUROR: BEING A GUIDE TO citizens summoned to serve as jurors. Containing information as to the manner of drawing and selecting jurors; their rights, privileges, liabilities, and duties; reasons for exemption from service, and mode of arriving at and rendering verdicts. By Andrew Jackson Reilly, officer of the District Court for the city and county of Philadelphia. Revised by E. Cooper Shapley, Esq., of the Philadelphia Bar, and secretary of the Board for Selecting and Drawing jurors for the city of Philadelphia. Philadelphia John Campbell & Son, Law Booksellers and Publishers, 740 Sansom Street, 1873.

In connection with "THE JUROR" it is proposed to have an appendix containing a directory of the principal practising attorneys of the State of Pennsylvania, as information needed by jurors when favorably impressed with the learning, skill or eloquence of those before them. The circulation of this work is already assured to the extent of five thousand copies the ensuing year, in different parts of the State. Members of the Bar will please

Address A. J. REILLY,
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F. A. DONY,
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MAUCH CHUNK, PA.
☞ Sollections promptly made. oct 27-tf

NOTICE TO MEMBERS OF THE BAR. The Circuit Court of the United States direct the Clerk to announce that no cases will be entered upon the Trial or Argument Lists of said Court for April Sessions, 1873, unless specially ordered by counsel on or before MONDAY, the 24th of March.

SAMUEL BELL,
Clerk Circuit Court United States,
feb 28-3t E. D. of Pa.

M. THOMAS & SONS, AUCTIONEERS.

REAL ESTATE SALE, MARCH 4.

Will include—

Cherry, No. 1015—Modern Three-story Brick Residence. Has all the modern conveniences. Orphans' Court Sale—Estate of Ann Preston, dec'd.

Griscom, Nos. 323 and 325—Valuable Five-story Brick Factory and Three-story Brick Building, with 3 Three-story Brick Dwellings in the rear (between Fourth and Fifth streets, South of Spruce). Orphans' Court Sale—Estate of Charles Brinkman, dec'd (sometimes called Karl Brinkman).

Gwynedd Township, Montgomery County, Pa., 1¼ miles from Penllyn Station, on the North Pennsylvania Railroad, ¼ of a mile from Spring House Village—Valuable Farm, 103 Acres.

Twelfth, (North,) No. 1928—Handsome Modern Three-story Brick Residence, with Side Yard—46 feet front. Has all the modern conveniences. Executor's Sale—Estate of Charles S. West, dec'd.

Thirteenth, (North,) No. 646—Modern Three-story Brick Residence. Has the modern conveniences. Executors' Peremptory Sale—Estate of Rev. John S. Jenkins, dec'd.

Morris, between Otsego and Dutton, First Ward—6 Desirable Lots. Trustees' Peremptory Sale.—Estate of Wm. F. Hughes, dec'd.

Otsego, South of Morris—5 Desirable Lots. Same Estate.

Tenth, (North,) No. 533—Modern Two-story Brick Residence. Has the modern conveniences. Executors' Sale.

Third, (South,) No. 430—Desirable Three-story Brick Dwelling.

Fifth, (North,) No. 870—Genteel Two-story Brick Dwelling.

Aspen, between Arch and Race, and Twenty-first and Twenty-second streets—Lot.

Third, (South.) No. 403—Three-story Brick Residence.

ADMINISTRATOR'S SALE.

$1,000 Pennsylvania Railroad Co., Second Mortgage Coupons, 6 per cent.
27 Shares Lehigh Valley Railroad Co.
20 Shares Philadelphia and Reading Railroad Co.
24 Shares Pennsylvania Railroad Co.

REAL ESTATE SALE, MARCH 11.

Will include—

Coates, No. 2607—Business Stand—Three-story Brick Store and Dwelling. Orphans' Court Peremptory Sale—Estate of Bayard Robinson, dec'd.

Park avenue, No. 1713—Modern Three-story Brick Residence. Has the modern conveniences. Same Estate.

Gratz, Nos. 1701, 1703, 1705, 1707, 1709 and 1711—6 Three-story Brick Dwellings. Same Es.

Uber, Nos. 1723 and 1727—2 Three-story Brick Dwellings. Same Estate.

Huntingdon, E. of Sixteenth—2 Lots. Same.

Lancaster road, Radnor Township, Delaware County, Pa., 10 miles from Philadelphia—Very Superior Farm, 105 Acres.

Delaware River, Bensalem Township, Bucks County, Pa., at Eddington Station on the Philadelphia and Trenton Railroad—Valuable Country Seat and Farm, 158 Acres.

REAL ESTATE SALE, MARCH 18.

Will include—

Vine, No. 1607—Modern Three-story Brick Residence. Has the modern conveniences. Immediate possession.

Lombard, No. 1113—Modern Three-story Brick Dwelling. Orphans' Court Sale.—Estate of Henry B. Bobb, dec'd.

Main, Riverton, Burlington County, N. J.—Very Desirable Cottage Built Residence. Near the Delaware river, and easy of access to the city. Residence of Mr. Robert B. Knight.

FOR SALE.—Elegant Private Residence, 408 South Ninth street, below Pine, four minutes' walk from Chestnut street. Conveniently situated for any one in business near the centre of the city. House in thorough repair every way, with every modern convenience—Large Saloon, Drawing Room, Stationary Wash Stands in every chamber, good Heaters—Fine large kitchen, Stationary Stone Wash Tubs, Baths and Water closets on 2d and 3d floors.—House in thorough order. Can be bought low, if applied for soon, on terms to accommodate. Apply to

C. F. GUMMEY,
mar 1 No. 733 Walnut street.

JAMES A. FREEMAN, & CO. AUCTIONEERS.

No. 422 WALNUT STREET.

REAL ESTATE SALE AT THE EXCHANGE, MARCH 5, 1873.

On Wednesday at 12 o'clock noon.

Orphans' Court Sale.—Beach street. Brick Smith Shop, Engine and Boiler and Manufactory Building, above Montgomery avenue, 18th Ward. Lot 58 x 115 feet. Estate of David J. McMullen, dec'd.

Executors' Peremptory Sale.—1409 North Twelfth street. Modern Three story Brick Dwelling with Back Building and conveniences. Lot 20 x 100 feet. $4000 may remain. Estate of Ashton Roberts, dec'd.

Executors' Peremptory Sale.—1534 North Tenth street. Very Desirable Modern Three-story Brick Residence, with back Building and every convenience. 27 x 70 feet. $4500 may remain. Estate of Ashton Roberts and Anna R. Johnson, dec'd.

Sale to Close a Partnership.—Twenty-second and Locust streets. Very Valuable Lot of Ground at S. E. corner Twenty-second and Locust streets, 185½ feet on Locust street, and 245 feet on Twenty-second street, and 245 feet on Albion street. Only one-third cash required.

Orphans' Court Sale.—Twentieth and Pemberton streets. Business Stand. Three story Brick Lager Beer Saloon and Dwelling, at S. E. corner Twentieth and Pemberton streets, 26th Ward. Lot 18 x 60 feet. Estate of James McFarland, dec'd.

Orphans' Court Sale.—No. 1204 Canby street. Four-story Brick House. Lot 18 x 50 feet. 8th Ward. Estate of Ann Herschberg, dec'd.

Orphans' Court Sale.—$60 silver Ground Rent, Well-secured out of lot Fourth street above George. Estate of Jane Benezet, dec'd.

Orphans' Court Sale. $60 Ground Rent, Well secured and promptly paid, lot on Addison street, west of Eighteenth street. Same Estate.

1312 Marshall street.—Genteel Three-story Brick Dwelling, above Thompson street. Lot 19 5-6 x 99 feet. Has conveniences.

104 Vanhorn street.—Two-story Frame House and Lot 21 2-3 x 80 feet. 16th Ward.

Christian street.—2 Desirable Building Lots, Nos. 2719 and 2723 Christian street, west of Grays' Ferry Road, each 16 x 116 feet to Riggs street.

Orphans' Court Sale on the Premises.—Estate of Henry Miller, dec'd. Desirable Dwelling, Martin and Pechin Streets, with Building Lots, Martin street, Manayunk. Saturday afternoon, March 1st, 1873, at 4 o'clock, will be sold at public sale without reserve on the Premises.

Stone Dwelling, Corner Martin and Pechin Streets.—Lot of Ground with the Stone Dwelling thereon, situate on the northwesterly side of Martin street, and southwesterly side of Pechin street, in Roxborough, 21st Ward. 40 feet on Martin street, 100 feet on Pechin street.

Lot adjoining, the Building Lot adjoining the above to the westward 20 feet, and in depth 100 feet.

Building Lots, Martin street, opposite.

4 Building Lots southeast side Martin street, southwest of Pechin street, each 25 x about 165 feet.

Assignees' Sale in Bankruptcy, No. 1043 Ridge avenue—Estate of the "Pennsylvania Fire-proof Wrought Iron Blind Manufacturing Co."

Valuable Patent Right and Machinery for Manufacturing Wrought Iron Shutters.

On Wednesday, February 12th, at 10 o'clock A. M., will be sold at Public Sale, on the premises, the exclusive right for the State of Pennsylvania, under letters patent of the United States for certain improvements in the manufacture of "Iron Window Blinds." Also, an "Improvement in Window Blinds." Also, an Improvement in "Frames of Iron Shutter Blinds." Also, an "Improvement in Metal Slats for Shutter Blinds." Also an "Improvement in Tie Rods for Shutter Blinds."

☞ The Blinds manufactured by this Company are an entirely new invention, thoroughly fire-proof, and graceful, and as cheap as the ordinary wooden blinds, completely shutting out light and dust, and freely admitting air.

☞ For particulars concerning the validity of the patent, apply to the Auctioneer.

Machinery, including rolling, pressing and drilling machines, shafting, pulleys, etc., for manufacturing the same. Including one wood machine and three cutters, iron vice, work-bench, etc., pair of shears, ruling machine, pressing machine, drilling machine, saw bench, wire inserting machine, punching machine, binding machine, rounding machine and lathe, cutting machine and wire cutter, pulleys, shafting, belting, wrought iron shutters, office furniture, etc.

$1,000 to be paid on the patent right when struck off.

Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, MARCH 7, 1873. No. 10.

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SEVENTH JUDICIAL DISTRICT.

Court of Common Pleas, Montgomery County.

LORAH, Surviving Partner v. TOD.

Where one member of a firm agrees to sell goods to a third person, who is to pay for them by medical services, rendered to that partner and his family, and the other member of the firm does not consent to such an arrangement, such contract with one partner does not enable the person rendering such services, to set off their value against the partnership account.

Opinion of the court by Ross, J. Delivered February 1st, 1873.

The question presented by the case stated is involved in a conflict of authority; and a different rule prevails in Pennsylvania, from that which exists in England, and many of the States. If the question were an open one, we should adopt the conclusion of Prof. Parsons, in his learned work on Partnership, page 210, note J., where it is said, "one partner has an undoubted right to sell the goods of the partnership, or to contract for its services; and he may take pay therefor, in behalf of the partnership, in either specific articles or money; and, as an appropriation by him of such articles or money, once received for the partnership, to his private use, would not subject the party from whom he received them, to an action by the firm, the nature of the case is not changed, if the party, thus dealing with one partner, knows at the time, that what he pays for labor, materials, etc., furnished him by the partnership is intended to come to the use of the partner alone. The disposition of the articles or money received by one partner, for benefits conferred by the partnership, is a matter entirely between the different partners."

This is the rule adopted in New Hampshire (Greeley v. Wyeth, 10 N. H. 15); in Alabama (White v. Toles, 7 Ala. 559); in Vermont (Shong v. Fish, 13 Vt. 277); in Georgia (Perry v. Butt, 14 Ga. 699); in Massachusetts (Arnold v. Brown, 24 Pickering 89, 93); in Connecticut (13 Conn. 185).

In England it has been held, that a suit at law cannot be maintained in the names of all the partners, for a debt from which one of the joint plaintiffs has already discharged the defendant, although such discharge may have been a fraud upon the firm in which the released debtor was participant; as where it has been given in consideration of one partner's receiving a discharge from his private and separate debt. Jones v. Yates, 9 Barn. & Cress. 532, 539. Lord Tenterden, in entering the nonsuit against the plaintiffs in this case, said, it was done "because if the defrauded partner should die, the action, if permitted, would survive to him who had been guilty of the fraud, who might sue alone, and thus for his own benefit, avoid his own act by alleging his own misconduct."

But in Pennsylvania and New York a different rule prevails. It is said by Judge Bell in Purdy v. Powers, 6 Barr, 494, but "with us it is settled beyond controversy, that a partner has no power to bind his fellows by such a transaction, without their knowledge and assent. The act is simply void, it does not operate to discharge the debt, or to change the relative liabilities of the partners. Nor is it permitted to interfere with the form of action by law." Vide Noble v. McClintock, 2 W. & S. 152; Tanner v. Hall and Easton, 1 Barr, 417. In New York, the same ruling has been followed. Cunningham v. Ensunthy, 7 Wend. 326; Graw v. Stewart, 5 Cowd. 489. In Texas also, the Pennsylvania rule has been adopted. Good v. McCartney, 10 Tex. 193; and so also in North Carolina; Norment v. Johnson, 10 Wendell, 89.

In commenting upon this conflict of authority, Judge Bell, in Powers v. Purdy, *supra*, says: "It is difficult to reconcile the American with the English decisions, so far as a remedy is involved. But should they be thought to clash, we prefer the rule sanctioned by our own cases, as better calculated to subserve justice and advance right."

It is our duty, regardless of our individual view of what should be the law, to follow the decisions of the court of last resort, and subordinate all our conclusions to conformity with its judgments. It is plain, therefore, that unless it appears from the case stated, that Lorah, the other partner, knew and assented to the arrangement between Ullman and Dr. Tod, such arrangement is simply void, and the latter cannot avail himself of a set-off accruing from it. It is agreed by the case stated "that Lorah, the other partner, knew that the said defendant was buying goods on these conditions—Lorah, however, was not a party to the agreement, *and did not consent thereto.*" The clause italicized, under the rule, declared by Judge Bell, states a fact which is fatal to the defence, and obeying that rule we are reluctantly compelled to direct judgment to be entered in favor of the plaintiff. And now February 1st, 1873, judgment is directed to be entered upon the case stated, in favor of the plaintiff, for the sum of $40.33.

H. K. Weand, Esq., pro plaintiff.
J. V. Gottwallz, Esq., pro defendant.

Forty-six out of the seventy-four members of the new United States Senate are lawyers.

THIRD JUDICIAL DISTRICT.

Court of Common Pleas of Northampton County.

SCOTT & SONS v. REYER, BRO. & CO.

1. **The expression of an opinion by a juror, made during the progress of a trial, that the defendants will lose the case, is not good cause for a new trial; nothing less than a pre-judgment will be good cause.**
2. **A pre-judgment is that condition of mind which has formed a conclusion so irrevocably fixed as not to be liable to be changed, or to be free to persuasion, or to be opened to a different conviction, upon the production of testimony or evidence which ought reasonably to produce a different conclusion.**

Sur reasons for a new trial.

Opinion of the court by LONGAKER, P. J. Delivered March 3d, 1873.

The only reason alleged for a new trial, is that one of the jurors expressed the opinion while the trial was progressing, that the defendants would lose the case.

The deposition discloses the fact, that Wm. Baer, one of the jurors, during the adjournment of the court, had a conversation with Mr. Beck, the deponent, as follows: "I came out from dinner at Henry Whitesell's hotel. I asked him what was up in court. He said the case of Reyer, Bro. & Co. Then I asked him how it looked. Then he said, the Reyers will lose it. I then asked him why? and he said they had confused the testimony of Thomas Beck, who was their principal witness."

That a pre-judgment is a good reason to set aside a verdict, is well established. A pre-judgment, however, differs greatly from the mere expression of an opinion based upon testimony produced and heard upon a trial. An expression of opinion, even if it be based upon testimony as far as given, and before the case is closed, and formed without due reflection, in a casual conversation, and with no settled purpose to act upon it, is not a pre-judgment.

Pre-judging, and giving an opinion upon facts as they are then believed to be, are quite different conclusions. The first implies a strong disposition to favor the one side or the other, regardless of the testimony; a fixed determination to find in favor of a particular party, let the evidence be what it may. The last involves a belief in the facts as they were supposed to exist at the time the opinion is declared; they are impressions formed from existing facts, which it is to be presumed will be removed by the production of evidence showing a different state of facts. Pre-judgment involves a charge of gross misbehavior, amounting to criminality in the juror; it is a determination to decide, right or wrong, in a particular way. McCausland v. Crawford, 1 Yeates, 378; Com. v. Flanaghan, 7 W. & S. 420.

To express an opinion casually, during the progress of a trial, is quite natural; and it is to be regarded as an expression only upon the testimony as far as the case has been heard; nor is it to be presumed that it will be presisted in, if, during the further progress of the trial, other testimony is adduced, and new developments are made, which lead, or ought to lead to a different conclusion. It is, however, far better for jurors not to form opinions, were it possible, and most especially, not to express them before the case is fully given them in charge. The mind, however, is so constituted, that it constantly alternates during the progress of a trial, first receiving one impression, and then quickly changing and adopting another thought, as each varying phase of the testimony is presented; but such mental assertions are not settled convictions, nor unchangeable opinions—much less are they a pre-judgment. To judge a case legally, presupposes that condition of mind in the juror which is open to a reasonable conviction. To pre-judge a case, requires that condition of mind which has arrived at a conclusion so irrevocably fixed as not to be liable to be changed, or to be free to persuasion, or to be open to a different conviction, upon the production of testimony or evidence which ought reasonably to produce a different conclusion.

If verdicts are to be set aside upon the facts here presented, it is to be feared, that few, if any, would ever survive such a rule of law. All that would be required, would be that some meddlesome or designing person should entrap some unwary juror into the expression of an opinion (without the knowledge of the unsuccessful litigant), and as soon as the verdict is known, make it the subject matter for a new trial. It is necessary that such a rule shall not be declared, so that the fruits of a verdict shall not perish.

The rule is discharged, and a new trial is refused.

O. H. Meyers, Esq., for rule.
W. W. Schuyler, Esq., contra.

Supreme Court, United States.

[Head Notes of Decisions reported in 16th Wallace, soon to appear.]

ACTS OF CONGRESS.

For the furtherance of hearing claims against the government in the Court of Claims not to be interpreted in a narrow spirit, so as to give substantial effect to technical defences. Cross v. United States, 479.

ADVERSE POSSESSION.

Continuity of, in law, held to have been broken when, perhaps, continuous in fact, in a special case under certain statutes of Virginia, regarding the redemption of land sold for taxes. Armstrong v. Morrill, 120.

AGENT.

As *ex. gr.*, the cashier of a bank, when made consignee of goods under a bill of lading, may libel vessel for their non-delivery. The Thames, 98.

AFFREIGHTMENT.

Distinguished from an equitable ownership in the party hiring proportioned to money paid for hire, with the privilege of purchasing at a price fixed. Propeller Company v. United States, 670.

ANNUAL RESTS.

In a State where the law allows as high as ten per cent. per annum interest, a decree will not be reversed, because it allows against a fraudulent administrator eight per cent., with annual rests. Hook v. Payne, 252.

ANSWER.

An amended answer in admiralty setting up an improbable defence, and one quite departing from that set up in the original answer, treated unfavorably. The Maybey and Cooper, 204.

ATTORNEY IN FACT.

To execute a bond, who in executing it, makes by accident a mistake in the baptismal name of the obligor, does not impair the efficacy of the bond; the accident being shown. Dolton v. Cain, 472.

AUCTION SALES.

Where the land department of the government, denying an unfounded preemption claim in the government lands, set up by a person indebted to several persons, proceeds to sell the lands at public auction as part of the public lands, and the debtor and several of his creditors enter into an agreement that the land shall not be bid up, but on the contrary, shall be struck off at as low a price as possible to one of the creditors, who shall divide it among such creditors as will come into an agreement to receive it in satisfaction of their debts, and the land is thus sold at an under price, creditors who have not come into the arrangement cannot set the arrangement aside. The government alone can interpose. Easley v. Kellom et al., 279.

BANKRUPT ACT.

1. A judgment b yconfession when both parties to it knew of the insolvency of the debtor, though taken before the 1st day of June, 1867, is an unlawful preference under the 35th section of the bankrupt act, if taken after the enactment of the law. Traders' Bank v. Campbell, 87.

2. The proceeds of the sale of a bankrupt's goods being in the hands of one sued as a defendant, another person who had a like judgment and execution levied on the same goods, is not a necessary party to this suit, being without the jurisdiction. The rule laid down as to necessary parties in chancery. Ib.

3. The proceeds of the sale being in the hands of a bank, though it had given the sheriff a certificate of deposit, the assignee was not obliged to move against the sheriff in the State court to pay over the money to him, but had his option to sue the bank which had directed the levy and sale, and held the proceeds in its vaults. Ib.

4. The defendant having money received as collections for the bankrupt, delivered it to the sheriff, who levied the defendant's execution on it and applied it in satisfaction of the same. This is a fraudulent preference, or taken by process under the act, and does not raise the question whether if the defendant had retained the money it could be set off in this suit against the bankrupt's debt to the defendant. Ib.

5. So taking a check from the bankrupt and crediting the amount of the check then on deposit, on the bankrupt's note the day before taking judgment, was a payment by way of preference and therefore void, and does not raise the question of set-off. Ib.

6. The two clauses of the 35th section of the bankrupt act, construed and held to differ mainly in their application to two different classes of recipients of the bankrupt's property or means. Gibson v. Warden, 244.

7. Where an assignee in bankruptcy claims a fund as the property of his bankrupt, which sometime before the bankruptcy a firm of which the bankrupt was a member transferred to a third party, and which the transferee now claims adversely to the assignee, the proceedings in the District Court should not be summary and under the first section of the bankrupt act, but formal and under the second clause of the third section. Smith v. Mason, Assignee, 419.

8. An appeal from a proceeding in bankruptcy, disposing, under the first section, of such a claim, lies (other requisites allowing it) from the Supreme Court of the District of Columbia to this court. Ib.

BILL OF LADING.

1. The bill delivered to the shipper of the goods shipped, is the bill that makes the contract concerning them, and if it is different from the one retained by the ship, it, and not the "ship's bill," is evidence of the contract. The Thames, 98.

2. Goods shipped under a bill of lading must be delivered to the person named in it or to his order, and under no circumstances may be delivered to a mere stranger. The obligation of the ship stated where the endorsee of the bill is unknown. Ib.

3. The endorsee of A. may libel a vessel for non-delivery of the goods shipped, though he be but an agent or trustee of the goods for others. Ib. And see The Vaughan v. Telegraph, 258.

4. A "clean" bill of lading, that is to say, a bill of lading which is silent as to the place of stowage, imports a contract that the goods are to be stowed under deck. The Delaware, 579.

5. This being so, parol evidence of an agreement that they were to be stowed on deck is inadmissible. Ib.

BILL OF REVIEW.

A bill of review held to have been properly entertained on the after-discovery of a lost paper; and a former decree held, on the new evidence, to have been rightly reversed. Easley v. Kellom, 279.

BOND.

One executed by an attorney in fact, who, through what is shown to have been accident, causes the bond to be prepared, and signs it with the obligor's right family name, but with a wrong baptismal name, is valid. Dolton v. Cain, 472.

CAPTURED AND ABANDONED PROPERTY.

An inference that the proceeds of, had been paid into the treasury, drawn from the *prima facie* presumption of law that the military and financial officers of the United States had done their official duty; and the money restored to a loyal claimant accordingly. United States v. Crusell, 1.

CHATTEL MORTGAGE.

Seal to, not necessary under the statutes of Ohio. Gibson v. Warden, 244.

CASE STATED.

The parties to a suit in the District Court may, independently of any legislative provision, agree on and state a case for the judgment of the court. Henderson's Distilled Spirits, 44.

COLLECTORS.

Certain ones entitled to retain, for their own use, moneys received by them from the owners of steamers, and from engineers and pilots, by virtue of the thirty-first section of the act of August 30th, 1852. United States v. Ballard, 457.

COLLISION.

1. When navigating in a port, it is no excuse for a steamer which runs against another vessel 200 feet and more outside of the ordinary channel, and between 300 and 400 feet out of the ordinary track of steamers, that she was rounding a point and coming into her dock; and that she could not see in consequence of a fog, and that she supposed she was at the right place to change her course. The Bridgeport, 116.

2. The respective rights and obligations as to keeping or changing their courses, of steamers and sailing vessels approaching each other at sea—this matter examined, and the rules deduced and stated in a case of collision at night. The Scotia. 170.

3. Rules to guard against collision stated, which govern vessels sailing on intersecting lines at different rates of speed. The Cuyuga, 270.

4. Though a steamship pursuing, in a crowded harbor, for her own greater convenience in getting into dock in a particular state of the harbor, a channel not entirely the ordinary one for vessels of her size, be bound to more than ordinary precaution, yet if she has a right to use that channel and do take such more than ordinary precaution, she is not responsible for accidents to other vessels that, with it all, were inevitable. The Java, 189.

5. The fact that a steamship is in charge of a pilot taken conformably to the laws of a State, is not a defence to a proceeding *in rem* against her for a tortious collision, the laws of the State providing only that if a ship coming into her waters, refuse to receive on board and pay a pilot, the master shall pay the refused pilot half pilotage, and no penalty for the refusal being prescribed. The China (7 Wallace, 58) affirmed. The Merrimac, 199.

6. A steamship of 2000 tons having a tug, each of 500 tons, on each side, condemned as guilty of a rash act for sailing in a place from 70 to 75 feet wide, which had little or no more than the width of the ship and tugs abreast, between a buoy which indicated an entire obstruction of navigation, and a ship aground with a steamtug on each side. Ib.

7. Where a ship ordered a tug to tow her out of the harbor to sea when the navigation was made dangerous by wind, tide, and ice, and the master of the tug remonstrated, and finally went only on the shipowner's insisting, and on their agreeing to take the risk of all accident, both ship and tug were held liable on a libel for a collision, there being in addition some evidence of faulty navigation. The Mabey and Cooper, 204.

COMMISSIONERS OF TAXES.

1. Though "authorized" under the act of 6th February, 1863, to bid off property to the United States "at a sum not exceeding two-thirds of its assessed value," are not bound to bid it up so as to make it bring in all cases that much. Turner v. Smith, 553.

2. Under this act and that of June 7th, 1862, the tax commissioners are not bound to hunt up the real owners. The tax laid is a direct tax on the land, and on all the estates, interests, and claims connected with or growing out of it. A rent charge is accordingly cut off and destroyed by a sale of the land. Ib.

CONSTITUTIONAL LAW.

Congress has power to confer on the city of Washington authority to assess upon the adjacent proprietors of lots, the expense of repairing streets with a new and different pavement, or of repairing an old pavement. The tax need not be a general one on the city. Willard v. Presbury, 676.

CONTRACT.

1. In the matter of a contract, a distinction sometimes exists between a motive which may induce entering into it and the actual consideration of the contract. This subject illustrated. Philpot v. Gruninger, 570.

2. A consideration moving to A. and B., with whom C. afterwards enters into partnership, and of which consideration C. thus gets the benefit, will support a promise by C. Ib.

3. Equity will not readily set aside a reasonable one, made for the sake of peace, though want of money may have been an inducing cause with one of the parties to the making of it. French v. Shoemaker, 315.

CORPORATE SECURITIES.

When a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached in the hands of such a holder for any infirmity than any other commercial paper. City of Lexington v. Butler, 282.

COUPON.

Statutes of limitation will not bar suit on, unless the time be sufficient to bar suit on bond also. City of Lexington v. Butler, 282.

COURT AND JURY.

1. When a plaintiff presents as an important part of his case a written proposal, and then insists on a recovery on the ground of mere suspicion that there was a verbal proposal differing from it, it is the duty of the court, if there is no evidence at all of such different verbal proposal, to tell the jury when requested that there is none, and to tell them that they may in such a case find such a verbal proposition; is error. Ward v. United States, 28.

2. Where there is such a written proposal, it is the duty of the court, at the request of either party, to construe it, and in doing so the admitted facts concerning the relation of the parties to the transaction are to be considered. Ib.

3. Parties may by consent waive a jury in the District Court, and state a case for the court independently of any legislative

provision. Henderson's Distilled Spirits, 44.

4. Whether, under a policy which provides that fraud or false swearing in furnishing the preliminary proofs of loss, or in an examination which by the terms of the policy the assured, on a claim for loss, was bound to submit to, there has been such fraud or false swearing, is a question for the jury. Insurance Company v. Weides, 375.

5. Whether the evidence before a jury does or does not sustain the allegations in a case, is a matter wholly within the province of the jury, and if they find in one way, this court cannot review their finding. Gregg v. Moss, 564.

COURT OF CLAIMS.

1. The 4th and 5th rules regulating appeals from, were designed to enable a party to secure a finding of fact on any point material to the decision of that court. Mahan v. United States, 109.

2. But a failure of the court to find the fact as the party alleges it to be, will not justify the bringing of all the evidence on that subject before the Supreme Court, though on a refusal of that court to make any finding on the subject, the Supreme Court may remand the case for such finding. Ib.

3. Directed, by the Supreme Court, to interpret an act of Congress, passed for the furtherance of hearing a claim against the government, in a liberal spirit, and not in a narrow view of the legislative intention, and so as to give substantial effect to technical defences. Cross v. The United States, 479.

DEED.

One executed by an attorney appointed by a husband and wife under a power drawn in France, and with the verbiage which notaries there usually indulge in, to sell the lands in the United States of the husband and wife, the husband owning lands here, but not the husband and wife, *Held*, sufficient in favor of a *bona fide* purchaser, long in possession, to convey the husband's lands. Dolton v. Cain, 472.

DERELICT.

The master, officers, and crew of a vessel, with every person on board, having gone off, in extreme anxiety for their personal safety, from the vessel on to another which they had brought to them by signals of distress, the mere expressed intention by the master to employ if possible a tug to go and rescue his vessel (she then lying at anchor in a violent gale), to which expression of intention, the person to whom it was made replied, that he "could not get a tug that would come and bring the boat in, as the weather was too rough," was held not sufficient to deprive the vessel of the character of a derelict, so far as timely effort to save her was contemplated. The Laura, 336.

EQUITABLE OWNERSHIP.

In a party hiring a vessel with the privilege of buying her at a price named, crediting the money paid for hire, distinguished from an affreightment. Propeller Company v. United States, 560.

EQUITY.

1. Will not set aside a contract whose purpose is a settlement of disputes, simply because one party to it was in want of money when he made it, and because such want may have been an inducing cause for his making it; the party having been an intelligent person, who acted deliberately and with knowledge of what he was doing. French v. Shoemaker, 315.

2. Will consider that a party to a contract who, when the act of the other side renders impossible literal performance, has performed all that can be reasonably expected of him, comes in certain cases within the character of a party performing his part. Dolton v. Cain, 472.

3. Will look through forms to substance, and protect a *bonâ fide* pu chaser long in possession under a deed of *cestuis que trust*, and plainly intended for their benefit, from disturbance by conveyance, long afterwards from the heirs of the party named in the deed as trustee, and now claiming the land under a sharp and mere technical rule of conveyancing. Ib.

Acts of Assembly.

SESSION OF 1873.

An act declaratory of the law relating to square timber taken adrift in the West Branch, and regulating the control of the same.

SECT. 1. Be it enacted, &c., That it is the true intent and meaning of the several acts of the General Assembly, regulating the taking up of lumber or logs adrift in the West Branch of the Susquehanna and its tributaries, that none of the provisions thereof are applicable to squared timber taken from landings or moorings, or from the banks of the said streams within the counties of Elk, Cambria, Cameron, Clearfield, Indiana, Central, Clinton or Lycoming, by extraordinary freshets or ice floods and driven or floated down the said streams thereby, but that all of the said squared timber so as aforesaid taken adrift and lodged or found upon the banks within the bed or on lands adjoining said West Branch or its tributaries, at any point on the same, shall be as fully to all intents and purposes the property of those out of whose possession the same was taken by said freshets or floods at the place at which it may be found, as it was when lying at the landings from which it was taken away, and no claim for salvage, bank lease, or labor expended thereon shall be of any validity whatever in regard thereto, but the parties owning the same, or their agents, may enter on the said land, adjoining the said streams, or within the bed or banks thereof, and remove the same by paying such damages as may accrue to the owners of the land on which said timber may be found.

SECT. 2. That the Court of Common Pleas of Clearfield county, or two of its judges, shall appoint three experienced and competent lumbermen, actually engaged in the business of taking square timber to market, who shall each give bond in five thousand dollars, with two sureties, to be approved by the said judges for the faithful performance of their duties, who shall be known as prize masters, and shall be subject to the control and jurisdiction of the said court in all things relating to their said duties, and it shall be their duty to take charge of all marked square timber so as aforesaid taken adrift by extraordinary freshets or ice floods on the stream, and its tributaries aforesaid, and found and being in the bed, on the banks, on lands adjoining the said streams, or in the custody and possession of persons whom they have reason to suspect obtained the same without authority, to gather up the same and secure it wherever found, and in whosesoever possession the same may be, to distinctly mark the same with a mark, by them to be selected and duly registered at all the booms, and in the offices of the prothonotaries of Clearfield and Clinton counties, to keep accurate accounts of the same by size and length, kind of timber, and apparent value, and they shall hold said squared timber to deliver it to the owner or owners at any time prior to the sale thereof, when he or they shall satisfy by proof the said prize masters, or a majority of them, that it is his or their property, and shall pay to them a just *pro rata* for the expenses incurred in taking up and securing the same; they shall after three months from such freshets shall have passed, or at such other times as they may fix, proceed to sell in open market, for the best price they can obtain, all of the said timber then remaining in their hands, for which no owner hath appeared and proved his right, and after deducting expenses of the performance of their duties herein provided for, and of securing and selling said squared timber, they shall distribute the proceeds under the order of the court aforesaid *pro rata*, among all those who shall prove to an auditor to be by said court appointed, the quantity, value, kind and character of the timber, so as aforesaid taken from them, and no provision of law now in existence shall authorize any boom company in said stream to charge for tonnage, or hold therefor any square timber going into the said booms, but on demand therefor, either by the owners thereof, or by the prize masters herein named, the same shall be delivered up at the earliest day practicable, and a right of action shall accrue to and exist in favor of said prize masters for all unmarked square timber, which on demand therefor shall not be to them delivered by any corporation, person or persons, in whose possession the same may be, and the said corporation, person or persons, shall not be permitted to defend said action by showing title or ownership thereof in any other person or persons, corporation or corporations than themselves: *Provided*, That they may show and prove a *bona fide* purchase thereof, from the real owner before suit is brought.

SECT. 3. All laws or parts of laws inconsistent with the provisions of this act, be and the same are hereby repealed.

Approved 11th February, 1873.

An act to authorize the governor to appoint additional notaries public.

SECT. 1. Be it enacted, &c., That the governor is hereby authorized to appoint as many notaries public as in his judgment the interest of the public may require: *Provided*, That before any commission shall be issued under this act, a receipt from the State treasurer shall first be produced, showing the payment of twenty-five dollars into the State treasury, for the use of the commonwealth.

Approved 19th February, 1873.

An act to fix the salary of the governor of this commonwealth.

SECT. 1. Be it enacted, &c., That the salary of the governor of this commonwealth is hereby fixed at the sum of ten thousand dollars per annum, payable quarterly, this act to take effect upon and at the expiration of the present gubernatorial term.

Approved 15th January, 1873.

An act to repeal an act entitled an act supplementary to an act relating to the jurisdiction and powers of courts, approved the 16th day of June, A. D. 1836.

SECT. 1. Be it enacted, &c., That the act entitled an act supplementary to an act relating to the jurisdiction and powers of courts, approved the 16th day of June, A. D. 1836, and approved the 10th day of June, A. D. 1871, be and the same is hereby repealed, with like effect as if the same had not been enacted.

Approved 5th February, 1873.

An act relative to writs of estrepement.

SECT. 1. Be it enacted, &c., That the president judges of the several courts of common pleas of this commonwealth, shall and may exercise in vacation all the powers and authority for dissolving writs of estrepement that could be exercised by the courts over which they preside when in session: *Provided*, That notice shall be first given to the opposite party.

Approved 18th February, 1873.

An act to authorize mining and manufacturing companies to issue bonds and mortgages, and to use the same as collaterals for bank accounts.

SECT. 1. Be it enacted, &c., That mining and manufacturing companies organized under any general or special law of this commonwealth, are hereby authorized to issue and sell their coupon or registered bonds secured by mortgages upon the real estate of said companies to an amount not exceeding two-thirds of the capital stock of such companies, and to pay interest on said bonds at any rate not exceeding eight per centum per annum: *Provided*, That such issue shall be deemed necessary by the board of directors, either for the payment of indebtedness to construct improvements, or to purchase lands and materials.

SECT. 2. The manufacturing and mining companies are hereby authorized to make bonds and mortgages and use them as collaterals on which to obtain discounts from banks and banking companies or individuals.

Approved 20th February, 1873.

An act authorizing mining and manufacturing companies, or other organized companies of individuals, to take and hold mortgages on real estate to secure payment of notes, bills and renewals thereof.

SECT. 1. Be it enacted, &c., That it shall be lawful for mining and manufacturing companies organized under any special or general law of this commonwealth, or for any other organized company or individual, to execute, and deliver, and for all banks organized under any law of this commonwealth, or any other organized company, individual or individuals, to take and hold mortgages on real estate to secure payment of such notes, bills and other negotiable or other paper and renewals thereof, belonging to, or made by said companies, as the said banks, company, individual or individuals, shall agree to and execute from time to time for discount or otherwise: *Provided*, That such mortgage shall operate as a lien from the date of the record of such instrument.

Approved 17th February, 1873.—*Legal Opinion.*

LEGAL GAZETTE.

Friday, March 7, 1873.

JOHN H. CAMPBELL,
EDITOR.
THEODORE F. JENKINS,
ASSOCIATE EDITOR.

March 3d, 1873, the following additional rule was made in the District Court of Philadelphia.

RULE XXX.

In all cases in which, before the issuing of any writ of *scire facias*, security shall be entered by any party in interest under the 4th section of the act of August 1st, 1868 (relating to liens of mechanics and others upon buildings), said security shall consist of the bond of such party, with one or more sufficient sureties, in double the amount appearing to be due by the affidavit of the claimant, conditioned for the payment forthwith, of such sum as may be due to the claimant. In all actions upon said bonds, the claimant shall recover the amount appearing to be due to him, with interest and costs, and having filed a copy of said bond in said action, shall be entitled to judgment for want of an affidavit of defence, the prothonotary shall assess the damages, taking as the basis of such assessment, the claim filed.

A meeting of the Luzerne county bar was held on the 13th of February, in the court room at Wilkesbarre, to take action regarding the death of G. Byron Nicholson, Esq., late one of its prominent members. Judge Dana presided, and addresses were delivered by Messrs. Charles Pike, A. T. McClintock, D. L. Rhone, S. S. Winchester, H. Hakes, E. P. Darling, C. L. Lamberton, Judge Harding, W. W. Ketcham, and Judge Dana. Appropriate resolutions were adopted, after which the meeting adjourned.

Affairs in France and Spain are possessed of great interest at the present moment to Americans. In each country a republic is sought to be established, and the problem *how* to establish it is attempted to be worked out. France seems not to be as fully alive to the meaning of a real republic as Spain. The cable informs us that the *Corps Legislatif* on Tuesday last adopted the preamble to the constitutional project recently submitted by the "Committee of Thirty" of that body, which preamble declared "the assembly reserved to itself constituent power," thus refusing to dissolve. On the other hand, in the Spanish *Cortes*, a bill has been introduced by the president of the ministry, convoking the new Cortes on May 1st, and providing for an election by all male citizens of the age of twenty years, of its members on April 1st. This is getting at the matter in the right way, dissolving the present Legislature and having a new one elected by the people. France would do well to copy after Spain.

Our correspondent PERICLES, has been suffering under an affection of the eyes for some weeks past, but is now recovering. In answer to inquiries made, we would state that we hope to print another communication from him next week.

This week the press of matter compels us to crowd out the opinion of the Supreme Court of Illinois, reversing the decision of Judge Tipton, in the case of The People v. Chicago & Alton Railroad, published in the Gazette recently.

WILLIAM H. HOPKINS.

On Wednesday, at 2 P. M., died at Pittsburg, William H. Hopkins, a well known citizen of this State. He was born in Washington county, September 14, 1804, and was at the time of his death a banker in his native town. In 1834 he entered political life, being then elected to the lower house of the Legislature. By subsequent re-elections he retained his seat until 1840, being during his term of office three times speaker of the House. During the years 1842 and 1843 he held the position of secretary of the land office, and was canal commissioner during 1853, 1854 and 1855. He was also a commissioner of the old Cumberland State road for three years under Shunk, and for two years under Porter. In 1864 he was elected to the State Senate, his term ending in 1866. His latest official position, held at the time of his death, was that of a member of the Constitutional Convention.

In the Convention yesterday, Mr. Hopkins' death was announced, and eloquent speeches were made in eulogy of the high character for honesty, integrity and ability which he always possessed. Hons. Geo. V. Lawrence, John N. Purviance, and Thos. Hazzard, his colleagues, were especially earnest in their addresses and Judge Black, T. H. Baird Patterson, Esq., of Allegheny, and others also added their tributes of praise. Our own personal acquaintance with the decedent as a fellow member of the Convention, inspired us with the highest admiration for his many good qualities, and makes us deeply regret the loss which his family and the whole State have sustained. His name, will be handed down to posterity as that of an able, pure, and upright public officer, who will serve as a bright example for our youth to follow.

Among the many interesting matters pertaining to the Centennial celebration, is a memorial volume, designed to perpetuate among the records of the Centennial Commission the names of the living members of the Philadelphia bar, in which the autographs are preserved chronologically, according to admission. The caption to the subscription, written entirely by the hand of the venerable Horace Binney, reads as follows:

The members of the bar of Philadelphia, in conformity with the resolution hereinbefore recorded, respectfully subscribe one share each to the stock of the Centennial fund, understanding that the aggregate subscriptions are to be regarded as a contribution in their associate relations as members of the bar.

PHILADELPHIA, Feb. 22, 1873.

Date of Admission.	Name.
1800	Horace Binney.
1809	Henry A. Freeman.
1815	Henry J. Williams.
1816	James Page.
1821	Eli K. Price.
1825	John Cadwalader.
1825	Isaac Norris.

The committee of the bar having the subject in charge consists of James Page, chairman; J. Sergeant Price, secretary; Edward H. Weil, Frank M. Etting, R. L. Ashhurst, John Cadwalader, Jr., Alex. Thackara, Elwood Wilson, Jr., and Paul M. Elsasser. The volume has been prepared at the instance and under the personal supervision of Elwood Wilson, Jr., Esq., one of the committee.

BAR MEETINGS.

At noon on Saturday, 1st instant, members of the Philadelphia Bar met in the room of the Supreme Court, for the purpose of taking such action as will obtain for Philadelphia cases more of the time of the Supreme Court. T. Bradford Dwight, Esq., on motion of William L. Hirst, Esq., took the chair, and John Cadwalader, Jr., acted as secretary.

George L. Crawford read a preamble containing the statement of cases on the argument list before the Supreme Court in Banc. The total number of causes on the list is eight hundred and forty-three, two hundred and sixty-two of which, or nearly one-third the entire list, are on the Philadelphia county list.

As the six weeks already allowed for the hearing of this list is not sufficient for the purpose, a resolution requesting an extension of three weeks, in addition to the six already devoted, was appended to the preamble, and adopted.

William L. Hirst offered the following resolutions:

That the learned judges of the Supreme Court be requested to make a general order rule of court that causes on the argument list from Nisi Prius, shall take rank according to the time at which appeals shall be taken, and not according to the time at which suits shall have been originally commenced.

That a committee of seven be named by the chair to address the Constitutional Convention in favor of amending the constitution, by providing that the Supreme Court shall hold all its sessions in banc in the City of Philadelphia.

A committee was then appointed to take charge of the resolutions, and report at a subsequent meeting.

The meeting then adjourned.

An adjourned meeting was held on the afternoon of the 4th instant, in the room of District Court No. 4, Mr. T. Bradford Dwight in the chair. The committee to whom was referred the matter of the present condition of the Philadelphia list, and case for argument before the Supreme Court of the State sitting in banc, for the purpose of digesting and reporting some method of relief for the bench itself, as well as for the bar, presented the following resolutions for consideration:

First. That the Supreme Court be requested by the bar of Philadelphia to make a rule or order of court, to the effect that all appeals from the said court sitting at nisi prius be arranged as the list of cases for argument before the said court sitting in banc, according to the date of the original process in such case.

Second. That the Supreme Court be requested by the bar of Philadelphia to direct the prothonotary to prepare a list of cases in which counsel to secrue an early hearing may agree to limit their argument to a definite time.

Third. That a committee of seven be appointed to present these resolutions to the judges of the Supreme Court, and confer with them in order to ascertain whether the request can be acceded to and whether any other modes of relief can be devised.

Fourth. That a meeting of the bar be held on Saturday, March 15th, 1873, at 12 M. to consider what course shall be taken in order to make the sessions of the Supreme Court permanent in this city, and to suggest such other action as may be proper to attain the object in view.

The report was accepted, and the resolutions, after being read, were adopted.

The chairman then appointed the following gentlemen as the committee called for in the third resolution: Messrs. George L. Crawford, E. Spencer Miller, George W. Biddle, William L. Hirst, Benjamin Harris Brewster, Edward Olmstead, and George Junkin.

The meeting then adjourned.

PUBLICATIONS RECEIVED.

JURIES AND PHYSICIANS ON INSANITY. By R. S. Gurnsey, Esq., of the New York Bar. 8vo., pp. 11 N. Y., J. R. McDevitt & Co.

This is a pamphlet reprint of a paper read by Mr. Gurnsey before the Medico-Legal Society of New York City. The writer suggests that "the question of insanity should be taken from a legally *irresponsible jury*, and in *all* cases placed in the hands of a *responsible judiciary*, with the same rules of evidence as at present.

FIFTH ANNUAL REPORT OF THE PENNSYLVANIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS. Philada., 1873.

AN ANALYSIS OF BLACKSTONE'S COMMENTARIES. By Frederick S. Dickson, of Westchester, Pa., 4to., pp. 98. Philadelphia, Rees Welsh, publisher, 522 Walnut street. Price $4.00. Received from the publisher.

A PRACTICAL TREATISE ON THE LAW OF MUNICIPAL BONDS. By Wm. N. Coler, counsellor at law. 2 vols., 8vo., pp. 468, 498. New York, 1873. Received from John Campbell & Son, Philadelphia.

We acknowledge the receipt of a set of "The Law of Municipal Bonds," by Wm. N. Coler, counsellor at law.

The title of the work would not seem to convey the scope of subjects treated, or their general utility, without an examination of the index; but the index seems to be exhaustive, and harmonizes what is the law of municipal bonds. The author says the only distinction between the law merchant and that of municipal bonds, is *the status of the payor*, it being *the right of taxation*. In this the work becomes a treatise on constitutional provisions, legislative power creating and obligating the *payor*. The author seems to have found in every State some leading principles, as having become fixed law by the decisions of the Supreme Court of the State, by which the status of the payor is to be known. The first three chapters is a text on "The Law of Municipal Bonds;" "Status of the Payor;" "Public Purpose;" after which, the States are arranged under chapters in alphabetical order, giving the constitutional provisions and decisions affecting the right and remedy incident to taxation, prominent among which is: Pennsylvania, "Public Purpose, right to tax for;" Alabama, "Organic Law;" Delaware "Delegation of Legislative Power;" Illinois, "Debt by Donation," Iowa and Missouri, "Remedy of Payee;" while other States furnish equally as important questions adjudicated, that go to make what may be considered to be the law of municipal bonds. The arrangement in chapters by States, would be subject to many objections, were it not for the exhaustive index; but with this, it might be said to be text, and the objections fall. The work is well exe-

LEGAL GAZETTE

[SUPPLEMENT.]

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PHILADELPHIA FRIDAY, MARCH 7, 1873.

SUPREME COURT.

NISI PRIUS.

CURRENT MOTION LIST.

Saturday, March 8, 1873.

1 Barron v Prowattain; Hunsicker; Elcock, Crawford.

2 The Schuylkill Navigation Co v The City of Philadelphia; McMurtrie; G W Biddle, Collis.

EQUITY LIST.

1 Carhart et al v Power et al; G W Biddle; Harrington.

2 The Lehigh Valley Rail Road Company v Gorrell et al; T Hart, Jr.; J E Gowen.

3 Watts et al v The McKean and Elk Land and Improvement Company; S G Johnson, Meredith; G W Biddle, J G Johnson.

4 Brinck v The Logansport and Crawfordsville Railroad Co. et al; Todd, Dickson; G S West, E S Miller.

5 Herman, Executrix, &c, v Williams et al; Sypher; Brightly.

6 The Little Schuylkill Navigation Railroad and Coal Company v Kenney; Darling;

DISTRICT COURT.

The Miscellaneous Argument List will be taken up on Wednesday, March 12th 1873.

CURRENT MOTION LIST.

Saturday, March 8, 1873.

1 Leach v Crease; Ashman;
2 Latta v Dixon;
3 Stein id
4 Clarke v Grear; Law.
5 Mathey v Mathey; Osbourn.
6 Fisher v Smith; Fisher;
7 Quinlan v Kressler; Fisher.
8 Milne v McCammon; Lister.
9 Koecker v Stubbendorff; Johnson.
10 Moore v Bare; Patterson;
11 Mitchell v Brinkworth; Duffy.
12 Ashton v Stafford; Law;
13 Hoffman v Stone; White;
14 Hurlburt v Johnson; Blackburne.
15 Saving Fund v Eno; Hanna;
16 Heater Co v Stitt; Hollingsworth;
17 Thomas v Gray; Thorn.
18 Lovett v Kane; Grady.
19 Graham v Davison; Wollaston.
20 Swartley v Tittelon; Brewster;
21 Smith v Fisher;
22 Young v Young; Bennett.

DEFERRED MOTION LIST.

Saturday, March 8, 1873.

1 Beerhalter v Crawford; Ransford
2 Rockland v Morris; Darling.
3 Bickman v Harlan; Jones.
4 Thomas v Abbott; Thomas;
5 Simes v Green; Jacquette.
6 Smith v Friel; Arundel.
7 Angeny v Pierce; Carty;
8 Barclay v Yories; Hawkins.
9 Simmons v Dickey; Katz;
10 White v Sherman; Todd;
11 Duncan id id
12 Cohen v Schenck; Wagner;
13 Maguire v Lovett; Fenton;
14 id id id
15 Vandegrift v Hedley; Grier;
16 Lindsay v Dickey; Price;
17 Miller v Matchette; Stewart;
18 Collins v Lockwood; Dedrick.
19 Wample v Willcamp; Wagner;
20 McCandless v Eldridge; Simpson, Davis.
21 Mathey v Mathey; Osbourne.
22 Wilson v Stokes; Ferriere.
23 Shreve v Thomas; Rand, Pettit;
24 Bank v Galloway; O'Byrne;
25 McCandless v Eldridge; Davis, Simpson.
26 Mayer v Wiler:
27 Titus v Patton; Greenbank;
28 Vanderslice v Derringer; Walker.
29 id id id

COMMON PLEAS.

CURRENT MOTION LIST.

Saturday, March 8, 1873.

1 Winters v Winters; Grew, McIlwee;
2 Conkle v Conkle; Dedrick;
3 Hughes v Foundry Co; Flint;
4 Kintzback v Kintzback; Pfeiffer;
5 Cripps v Cripps; Harkins;
6 McDonough v Schmunk; Graham.
7 Urian v Urian; Paschall;
8 City v McIntyre; Gerhardt.
9 Nixon v Earp; Browne;
10 Whomsley v Whomsley; Moore.
11 Ralston v Ralston; Tull;
12 Dunn v Dunbar;
13 Pyle v Pyle; Chipman;
14 Browne v Browne; Foulke;
15 Kemble v Kemble; Kershaw;
16 Miller v Miller; C N Mann;
17 Laudenslager v Loudenslager; Earl;
18 Roberts v Roberts; Dedrick;
19 Baker v Baker; Cornman;
20 Montgomery v Montgomery; Bonham;
21 Savage v Savage; Seltzer;
22 Stack v Stack; Kilgore;
23 Lacey v Lacey; Redheffer;
24 Ware v Wissman; Bonham; S N Rich.
25 Audibert v Audibert; McIntyre.
26 Trust Estate of Isabella Nathans; Brewster, Jr;
27 Assigned Estate of Rohlman & Bro; Manderson;

DEFERRED LIST.

1 McBride v Malone; Sharp;
2 Keen v Curry; Tenner.
3 Rehn v Russell; Claxton; Wollaston.
4 Steinhart v Noe; Wagner.
5 Hunt v Stevenson; Fisher;
6 McCandless v Einstein; Thompson;
7 Crawford v Crawford; McKinley;
8 Briggs v Briggs; Ashman;
9 In re Phila Watch Co; Hart, Wright;
10 Kelly v Dougherty; Murphy; Corson.
11 Duncan v Westenberger; Davis;
12 Detweiler v Maginnis; Arundel.
13 Newbold v Newbold; Fletcher;
14 id id id
15 In re Estate of John T Estlin; Greenbank;
16 White v Loughery; Brown; Stover.
17 McAntee v Loughery; id id
18 Snyder v Weiss; H B Freeman.
19 Machine Co v Urian; Grady.
20 Simons v Keeler; Shapley.
21 McKeown v Pearson; Arundel.
22 Schoof v Gowry; Geoghegan; Selden.

EXCEPTIONS TO AUDITORS REPORT.

Monday, March 10, 1873.

1 Truitt's Estate; E S Miller; McCarthy, Montgomery.

MISCELLANEOUS ARGUMENT LIST.

Wednesday, March 12, 1873.

1 Commonwealth ex rel West v Johnson et al; Simpson, Peirce.

2 Commonwealth v Dickinson; Collis, Willson; Pile.

3 Commonwealth v Reliance Fire Co; Brewster; Newlin, Simpson.
4 Commonwealth v Hawkins; Ridgway, Rawle; Mann, Fletcher.
5 In re Neptune Hose Co; Shippen; Bickel.
6 Commonwealth v Armstrong; Archer; Miller.
7 Martin v McDermott; Worrell; Meany.
8 Lynex v Lynex; Ashman; Bowman.

ORPHANS' COURT

MOTION LIST.

Saturday, March 8, 1873.

1 Schofield's Estate; Return to citation; Hunn.
2 Sutton's Estate; For guardian; McPherran.
3 ...tton's Estate; For leave to mortgage; McPherran.
4 Teufel's Estate; For guardian; Starr.
5 Rockhill's Estate; For guardian; Shippen.
6 Newell's Estate; To sell ground rent; Shippen.
7 Schlesinger's Estate; To discharge executors; Northrop.
8 Lawrence's Estate; To pay purchase money; Lister.
9 French's Estate; to sell city loan; N F Campbell.
10 Collin's Estate; For guardian; Poulson.
11 Godfrey's Estate; For guardian; Poulson.
12 Reese's Estate; To discharge guardian; Morgan.
13 Rittenhouse's Estate; Return to citation; Brady.
14 Rittenhouse's Estate; Rule to pay money into court; Brady.
15 Schlafer's Estate; Widow's claim; Hagert.
16 Smith's Estate; For partition; E C Mitchell.
17 Harvey's Estate; To pay purchase money to executrix; E C Shapley.
18 Wagner's Estate; Return to attachment; Shallcross.
19 Ipe's Estate; For guardian; Clifford.
20 Roberts' Estate; For specific performance; McMurtrie.
21 Heddleson's Estate; To confirm inquisition; McIntyre.
22 Heddleson's Estate; For rule to accept or refuse; McIntyre.
23 Gartland's Estate; For order to pay; Fraley.
24 Parker's Estate; For guardian; Duane.
25 Moss' Estate; To pay money to executors; Borie.
26 Miller's Estate; Return to order of sale; Dolman.
27 Miller's Estate; For citation; Dolman.
28 Gallagher's Estate; For attachment; Black.
29 Hunterson's Estate; For order of sale; Carty.
30 Baker's Estate; Rule to discharge executor; Coulston.
31 Geyler's Estate; For guardian; Dittmann.

ARGUMENT LIST.

Tuesday, March 11, 1873.

1 Soley's Estate; Parsons, Stover.
2 Hummel's Estate; Dedrick, Thorn.
3 Gest's Estate; Vanderslice, McIntyre.
4 Smith's Estate; Sharkey, Hepburn.
5 Beck's Estate; Hennershotz, Staake.
6 Gartland's Estate; Parsons, Cochran, Dougherty.
7 Myers' Estate; Dedrick, Adams, Hopple, Martin.
8 Brennfleck's Estate; Walton, Morris.
9 Butler's Estate; Arundel, Goforth, Yerkes.
10 Hemphill's Estate; Freeman, Ledyard.
11 Perry's Estate; Dwight.
12 Stevenson's Estate; Brinckle, Bonham, Miller.
13 Moore's Estate; Bennett, G D Budd.
14 Hafner's Estate; Hunn.
15 Johnson's Estate; Hunsicker, Davis Simpson.
16 Rafferty's Estate; Dolman, A Thompson.
17 McVey's Estate; Ruddiman, Archer, Goodwin.
18 Williams' Estate; Bennett, C Biddle, Ashhurst.
19 Ovensbine's Estate; Carty, Thorn, Elcock.

QUARTER SESSIONS.

Saturday, March 8, 1873.

1. Commonwealth ex rel M K Peirce v The Sheriff; Hab Corpus; Brightley.
2 Commonwealth ex rel Charles Gebhardt v Johanna Gebhardt; Hab Corpus; Hoffiner.
3 Commonwealth ex rel Charles Bozner v Henry Michaels et al; Hab Corpus; Kneass.
4 Commonwealth v Gentry; Kneass; Dickerson.
5 Commonwealth v Hoffman; Rule to open judgment, &c; Hunsicker; Alleman.

cuted, and seems of practical utility to the bar generally, as well as to holdes of the municipal obligations, and must meet with a ready sale.

CONSTITUTIONAL CONVENTION.

LETTER III.

To the Editor of the Legal Gazette:

The people of the commonwealth have decided that the constitution shall be examined, for the purpose of proposing necessary amendments. The Legislature endeavored by after legislation, to except art. ix. from such examination; but the Convention, right after its assembling, correctly decided that such legislation is not binding, and is of no effect. The people is the master, the Legislature but the agent.

How necessary it is to examine art. ix., I shall endeavor to show in the following two letters, for the same contains an absurdity and a contradiction.

The first is contained in section 1, art. ix. the closing sentence of which reads as follows: "and of pursuing their own happiness."

The section guarantees certain rights, and is evidently fashioned after the Declation of Independence. But the minds drafting the section varied the language of the latter, by adding a small word, and thereby embodying into its substance what the writer deems an absurdity. The section as it stands, reads: "All men are born free and independent, and have certain inherent and indefeasible rights, among which are those of ..... pursuing their *own* happiness.

It is evident, that this section, if construed literally, leads to anarchy; for if every man has an indefeasible right to pursue his *own* happiness, government is impossible. Government can guarantee every man's happiness generally, but not every man's own happiness; and this general happiness is exactly what is meant to be guaranteed. Why, then, the word "own?"

It may be said, that this word was in the constitution from its beginning, without doing any injury, and may, therefore, remain for any further indefinite time. But such reasoning is fallacious; for history teaches us that a seemingly insignificiant error, or mistake, or oversight in the fundamental laws, in the course of time will work out a mistaken governmental system, and may even be the cause of its total destruction.

The overthrow of the Roman republic dates back to the establishment of Rome's second constitution, under Tullius Survilius, 534 b. Ch. The latter conceived that wealth should be the division line of the people, and he thereby broke up the arrogance of certain of the patrician classes, who, being the descendants of Rome's founders, enjoyed certain privileges. But by giving to wealth a political recognition, it became superior to worth. An aristocracy of wealth grew up. The wealthy found means to absorb the constantly increasing and newly created wealth. Men learned to honor wealth for its own sake, no matter how it might have been acquired, and corruption and servility became the type of the degenerated Romans. Would patriots like Cincinnati, Mus, Mucius, Scaevola, and the host of others, have thought that their descendants would bow before a hero Caligula, or an emperor purchasing the imperial throne? And yet, the subtle principle laid down by Tullius Servilius, in making wealth the standard of a Roman citizen's worth, in the course of five hundred years led to Cæsar, and ultimately to Nero. Our commonwealth has not completed its first century!

Let me point to the history of our Federal Union. The framers of the Constitution proposed art. iv., section 3, and the people accepted it as a compromise. Nobody thought harm, and yet that very section, within seventy-one years almost led to a disruption of the Union. Without this section, we would not have had a Dred Scott decision; no fugitive slave law; no abolition agitation of such magnitude, and no secession war.

Constitutions are intended for the security of the citizens and perpetuity of institutions. Their language shall be precise, and just mean that which the words imply. The word "own," in the section above referred to, if literally construed, implies anarchy. If it shall not be literally construed, may not enemies of republican institutions, fifty or five hundred years hence, succeed to construe it in their favor? T.

Supreme Court of Pennsylv'a.

In Equity.

MICHAEL PRICE v. JAMES H. SPENCER et al.

1. Where the plaintiff is employed by an association of which he is a member, and the chief and permanent service contemplated is to work a silver mine, if the adventure fail through from no fault of his, he may file a bill against them for compensation for the initiatory services performed by him.
2. The measure of compensation is the salary prescribed by the agreement.

Exceptions to master's report.

Statement of the Case.

Upon the 21st day of December, 1867, the defendants entered into the following agreement with the plaintiff:

Articles of agreement made the twenty-first day of December, Anno Domini 1867, between Michael Price of the first part, and James S. Spencer, Thomas S. Cavender, Joseph Firth, the said Michael Price, Michael E. Price, George R. Huzewell, and John M. Lisle, of the second part: Whereas the said Michael Price hath this day been appointed by the parties of the second part, their true and lawful attorney, for them and in their names, to examine the seven silver mines belonging to Joseph M. Sanchez, situated and located in the Guanacevi mining district, State of Durango, Mexico, to wit: Surrana Rosario, Barradon, Enciuella, Capuzaya, Cabras and La Galana, and also if he shall find the character and conditions of the said mines to be practically such as represented by their owner, to take possession and proceed in the working thereof. Now the articles witness: That the said Michael Price hereby agrees, in case he shall decide to take possession of the said mines, to give his whole and best services and abilities to the working thereof, in all legal and proper ways, for the term of three years, and in consideration thereof, the said parties of the second part, do for themselves respectively, their respective heirs, executors and administrators, covenant, promise, and agree to pay unto the said Michael Price, his executors, administrators and assigns, the yearly salary or sum of five thousand dollars in silver bars, at the mines, at their value by weight, in equal quaterly payments of one thousand two hundred and fifty dollars each, the first thereof to be made on the first day of April next ensuing the date hereof, and also in case the said Michael Price, shall deem it advisable to employ the services of his son George W. Price, as an assistant, to pay unto the said George W. Price, his executors, administrators and assigns, the yearly salary or sum of one thousand dollars in silver bars as aforesaid, in equal quarterly payments of two hundred and fifty dollars each, the first thereof to be made on the first day of April next ensuing the date hereof.

In pusuance of said agreement, as also by the authority conferred by a power of attorney, given to plaintiff by defendants, he proceeded immediately after the execution thereof, to the said silver mines. He employed his son George W. Price, as an assistant, who remained in Mexico about the business of the defendants, for upwards of a year.

The plaintiff finding it impossible to obtain from defendants, the means wherewith to proceed in the working of said mines, return to Philadelphia, May, 1868, and solicited the defendants to proceed in the said undertaking. Defendants ratified his proceedings, but refused to comply with his request, and after a long delay abandoned the undertaking.

Opinion by Agnew, J. Delivered March 1st, 1873.

This is a peculiar, and not a clear case. I am inclined to think, however, that the plaintiff is entitled to compensation under the contract of December 21st, 1867. Being himself a member of the association, and one of the signers of the contract with himself, he has no remedy by action at law, as the District Court held, in an action on the covenant. That he performed services under the agreement is undeniable, and it will be singular if there be no remedy at law or in equity to recover compensation. The difficulty in the case seems to flow from the original adventure having come to an end, and the fault of this the report of the master eventually places at the door of the plaintiff. But is this a reason to refuse partial compensation?

The original purchase, through Gilmore & McManus, fell through, but not by any fault of the plaintiff. When he arrived at Durango, he found he had no title which would enable him to take possession of the mines and work them, in consequence of the purchase money not being paid to Mr. Sanchez by the first purchaser. He negotiated with Sanchez, and purchased from him directly, and on better terms. But he could not go on under the new arrangement, without submitting his acts to his associates for ratification. This he did by returning to Philadelphia. They ratified his purchase, and tried to raise means to pay the purchase money, but after considerable delay, failed. Here the master lays the fault at Price's door, because he was a member of the association. But it is not in the case that they raised their proportions and he failed to raise his. The adventure fell through by a common fault. But the plaintiff had earned a portion of salary before this failure. He had gone to Mexico under the agreement and visited the mines, and the original purchase fell through by no fault of his. When it fell through, he endeavored to carry it out by a new arrangement, and performed his duty to the best of his power, and his effort was ratified. How, then, can the subsequent failure of the association to carry out the substituted arrangement deprive him of his reward for services actually rendered under the agreement?

This brings the case to the question, did he earn anything under the agreement? The master interpreted it, that the salary was only for *working* the mines; and not having done so, and not having made *silver bars*, the prescribed medium of payment, the plaintiff is entitled to nothing under the agreement.

True, the *annual* salary is for working the mines, the chief and continued subject of reward; but does the agreement include no more? Does it not include the initiatory services also? I think so. The agreement of the plaintiff was to do two things; First, to proceed as agent and attorney of the association, from Philadelphia to the mines of Mr. Sanchez, in the Guanacevi Mining District, in Mexico, examine the mines, and ascertain their character and fitness. Second, to take possession and work them for the association. For these services, but one compensation was provided in the agreement—a salary of $5,000, payable in quarterly instalments, the first beginning on the first of April following. The contemplated year in the contract began, therefore, on the first of January, 1868. The date of the contract being December 21st, 1867, the duties of the plaintiff necessarily began within ten days, and at Philadelphia, the place of starting. Now, though working the mines was the chief service for which the salary was contemplated, the absence of all other compensation, and the time the salary was to begin, together with evident justice of compensation, makes it clear that the salary included the initiatory, as well as the permanent services. It could not have been the intention that the plaintiff should make a long, dangerous, and toilsome journey, in midwinter, to a remote, wild, and semi-barbarous region, there to exercise his skill and judgment in determining the character and availability of the mines, make preparations for mining, and only begin the working of them months after the year had commenced; and yet have nothing for services so arduous and so valuable. This would be the effect, if the contract be interpreted as understood by the master. Certainly such could not have been the purpose of the parties. The payment of the $2,000 for expenses cannot alter the interpretation of the contract. There is no evidence that this payment was understood to be a part of the agreement, while the expenses necessary for such a journey, and to make preparations for mining, would be great. There being no proof to alter or modify the written agreement, its interpretation must rest upon the writing itself. The services being rendered on the footing of the agreement, and before the adventures fell through, it seems to me the plaintiff is entitled to a due proportion of his salary. This would be three quarterly instalments, the master having reported that the enterprise was abandoned in October, 1868.

The finding of the master disposes of the $2,000 consumed in necessary expenses, excepting so much as the plaintiff expended in payment of his son. Though no cross bill was filed, the sum thus illegally expended would be a fair and legitimate abatement from the plaintiff's salary, to be ascertained and reported by the master. The exceptions of the plaintiff, therefore, are sustained, and the case is referred back to the same master to find the balance of salary due to the plaintiff, and report the same to the court, with the form of a final decree, in accordance with this opinion.

Thomas R. Elcock and *William J. McElroy, Esqs.*, pro plaintiff.

George Junkin, Jr., Esq., pro defendants.

FOX v. SNYDER.

A copy of a bond for $1,481.50, conditioned that the defendant should, within two years, improve a certain lot of ground, being filed, to which defendant filed an affidavit of defence, alleging that the said sum was penal, and was only to secure the improvement of the value of said lot, which defendant had done by erecting houses contiguous, upon a rule for judgment for want of a sufficient affidavit of defence: *Held*, That the said sum was not a penalty, but liquidated damages, and that the affidavit showed no defence.

Rule to show cause why judgment shall not be entered for want of a sufficient affidavit of defence.

Opinion by MERCUR, J. Delivered January 11th, 1873.

The plaintiff declared on a bond under seal, executed by the defendant to plaintiff, bearing date March 9th, 1869, in the sum of $1,481.50, conditioned that if the said defendant should improve or cause to be improved, within two years from the date thereof, on the lot that day conveyed by said plaintiff to defendant, by the erection of dwelling houses, fronting on Oxford street, each to be similar, or not inferior to those built by —— Lewis, during the years 1868–69, on the north side of Columbia avenue, &c., so as to fully comply with this agreement, then said obligation to be null and void, "or else to be and remain in full force and virtue as liquidated damages for the non-compliance thereof."

With a copy of the bond, the plaintiff filed a suggestion under oath, that the defendant did not erect or commence the erection of any house or houses, such as are in said bond stipulated, at or before the expiration of two years from the execution and delivery of said bond, nor were there any such houses erected thereon, nor had there been any such.

The defendant swears that he has a full, just and legal defence to said action, the nature of which he gives, and is substantially this, to wit: That about the time he purchased the aforesaid lot of plaintiff, on the northwest corner of Seventeenth and Oxford streets, he also purchased one other lot of him on the northwest corner of Sixteenth and Oxford streets; that the reason plaintiff gave for requiring said bond, was because he desired said mentioned lot to be improved, and thus enhance the value of remaining lots of which he then was and still is a large holder; and to indemnify the plaintiff against any loss which he might sustain by reason of the failure of the defendant to enhance the value of ground in that vicinity, was the sole object for which the bond was given. That defendant proceeded to erect and finish two houses on the lot of ground at the corner of Sixteenth and Oxford streets, which houses were much superior in character, style and finish to the kind which he was bound to erect by the terms of his contract, and to the same degree increased the value of plaintiff's property in the vicinity, and that the bond had no further consideration nor significance, being no part of the consideration paid for said lot; also, that defendant subsequently built upon the lot of ground immediately west of the one referred to in the bond, eighteen dwelling houses, which have greatly added to the value of plaintiff's other lots, and much more than fulfilled the conditions of the bond. That he has further entered into a contract with a responsible builder to erect upon the lot of ground mentioned in said contract, twelve substantial three-story brick houses; that the necessary papers have been prepared, and that work upon said buildings will be commenced in a few days upon this said lot, where he had agreed to erect two houses only.

It will be observed that defendant does not swear that he has erected any dwelling houses upon the lot on which he agreed to build; nor that he has erected elsewhere, any one similar or not inferior to those he was obligated to build; but that he has erected in other locations several houses, whereby the plaintiff has been benefited as much as if he had fulfilled his contract. This, however, is a question not given to the defendant to decide. The written instrument shows the only contract between the parties. The defendant does not aver the making of any other or different one. There is no ambiguity in it. It clearly expresses what the plaintiff required, and what the defendant agreed to perform. A contract to sell and deliver a pair of horses, not more than four years old, suited to driving in carriage, is not satisfied by a tender of a pair eight years old, although in the judgment of witnesses the latter were much more valuable to the vendor.

The defendant avers that he has now entered into a contract for the erection of houses on the lot in question, yet he does not affirm that they are to be of such a description, style or value as required by the contract. There has been no fulfilment of the contract.

What then is the increase of damages? Is the sum mentioned in the bond to be deemed a penalty or liquidated damages? The authorities have not been either uniform or consistent in determining the line of separation. Great importance should be given to the meaning and intention of the parties. That intention, however, need not be deduced from the language of the written instrument alone; but the subject matter and surroundings may be considered. Hence a sum expressly stipulated as liquidated damages will be relieved against, where it is obviously to secure the payment of another sum capable of being compensated by interest. So on the other hand, a sum denominated a penalty or forfeiture will be considered liquidated damages, where it is fixed upon by the parties as the measure of the damages, because the nature of the case, the uncertainty of the proof, or the difficulty in establishing the measure of damages, have induced them to make the damages a subject of previous adjustment. Streeper v. Williams, 12 Wright, 450; Powell v. Burroughs et al., 4 P. F. Smith, 329; Pearson v. Williams' Administrators, 26 Wendell, 630. This last case is very similar to the one under consideration. Williams sold to Pearson certain lots. Pearson, by writing under seal, covenanted to erect by a day specified on some part of said lots, two brick houses, or in default thereof to pay said Williams on demand after the day specified, the sum of $4,000. It was held, that the plaintiff was entitled to recover the specified sum as liquidated damages.

In the bond executed by Snyder, the sum specified is not stated as a penalty, either in the obligatory part or in the condition. In the latter, it is expressly stated to be liquidated damages. The extent of the injury sustained by the plaintiff through a failure of the defendant to fulfil the contract, is very uncertain. It would be extremely difficult to prove. The amount specified is not large. It is not such a gross sum as usually indicates a penalty. Upon the other hand, it clearly indicates a sum which the parties have agreed shall fix and determine the legal liability of the defendant, irrespective of what the actual damages might be.

Holding then that the damages are fixed and liquidated, the rule is made absolute.

IN EQUITY.

JAMES D. WHETHAM v. THE PENNSYLVANIA AND NEW YORK CANAL & R. R. CO., and J. C. MILLER.

Great delay is regarded in equity as a bar to a remedy.

On bill and plea.

Opinion by AGNEW, J. Delivered March 1st, 1873.

The plea in this case is not double. It sets forth a forfeiture of the stock in question for non-payment of an assessment, not as the substantive ground of the plea, but as an absolute and distinct act of denial of the corporation of the plaintiff's right to the stock. Hence it is not set forth in such terms of legal certainty as to constitute a legal bar in and of itself, but in such as to fix a positive act, and a distinct period of time from which the delay of the plaintiff shall be counted against him. This being the only inducement, the final and declarative assertion in the plea is the lapse of time offered as an equitable bar to the plaintiff's bill.

In the case of McKelvy v. Blair, decided, at the last Pittsburgh Term, we held, that in analogy to the statute of limitations, a bill for an account filed more than six years after the dissolution of a partnership, the defendant not being a liquidating partner, and no proceeding having been taken to compel an account in the meantime, was barred by lapse of time. This had been substantially decided before in Hamilton v. Hamilton, 6 Harris, 20. That delay is regarded in equity as a bar to a remedy, is sustained by many authorities, some of which will be found collected in Rand v. Goodyear, 17 G. & R. 350. See also Ashurst's Appeal, 10 P. F. Smith, 290; Fleming v. Culbert, 10 Wright, 498.

The claim of Whetham, the plaintiff here, is purely in equity. He claims by outstanding certificates of stock transferred to him, not presented for transfer to himself, while Miller, who has the legal title to the stock standing in his name, has not asserted his title at all, and is made a co-defendant. These facts are rightfully assumed, for the plaintiff has set forth in his bill no excuse for his delay, and has not replied to the plea any ground to relieve himself of the effect of the facts set up in the plea. The question, therefore, in the bill and plea, arises solely when the naked effect of ten years' delay after forfeiture of the stock, be that forfeiture regular or irregular.

There is a class of cases bearing on this question, which shows that even where the relation of the parties is that of agent or attorney, or in a partial sense confidential, yet delay will bring the party who ought to have demanded an account or settlement within the operation of the statute of limitations. Finney v. Cochran, 1 W. & S. 112; Alexander v. Lackey, 9 Barr, 120; Lafarge v. Zane, Ibid. 410; Campbell v. Boggs, 12 Wright, 524; Pittsburgh & Conn. R. R. Co. v. Byers, 8 Casey, 22; Rhines v. Evans, 16 P. F. Smith, 192. The principle to be extracted from this class, is, that diligence is necessary to enable a party to avoid the running of the statute of limitations. Hence, though in many instances a demand may be necessary before the institution of suit, yet the want of it, when it is the party's own neglect, will not stop the running of the statute. In this case the plaintiff was in default, for though holding only a title in equity by the assignment of the certificate, he made no demand to be admitted to the privileges of a stockholder, and his claim was necessarily unknown to the corporation. It was his duty before the six years had expired to ascertain the condition of the stock, and to demand a transfer. Had he done so he would have found the forfeiture on the stock entry, and would have at once been prompted to measures to set it aside if irregular.

Having these views of the case, judgment must be given for the defendants on the plea.

C. B. ALLEN v. J. BUCHANAN, M. D.

The Legislature cannot repeal a charter granted before the amendment of the constitution of 1857.

Demurrer to narr.

Opinion by AGNEW, J. Delivered March 1st, 1873.

The charter of the Eclectic Medical College of Pennsylvania was granted by act of Assembly in 1850, before the amendment of the constitution in 1857. It contains no power of repeal. That such a charter is a contract between the State and the corporators, as to the franchises granted, is well settled. Iron City Bank v. City of Pittsburgh, 1 Wright, 340. Without a judicial proceeding to declare a forfeiture of the charter upon cause shown, there is no power to repeal it summarily. Erie & North East R. R. Co. v. Casey, 2 Casey, 301; Same v. Same, 1 Grant, 271; Com. v. Pittsburgh & Connellsville R. R. Co., 8 P. F. Smith, 46–7. The act of 22d March, 1872, is the act of but one party to the contract, without a power reserved in the contract to authorize the State to do the act, and being without the consent of the other party (the corporators), is nugatory, because of the Constitution of the U. S.,

art. 1, § 10, and the constitution of the State, art. 9, § 10, forbidding the passage of laws impairing the obligation contracts. The recital in the preamble of the act of 1872, that it had been ascertained by evidence produced before a committee of the Senate, that the Eclectic Medical College had been guilty of unlawful, discreditable and dangerous acts, on which the repeal was thereupon declared, does not help the case. The committee had no judicial power, and could not turn itself into a court of justice to take jurisdiction, summons and try the corporation for its alleged offences. It was but a portion of the legislative body itself, charged with a function merely auxiliary to legislation. Its judgment was no more than the judgment of the body conferring upon it the power of inquiry. The act of 1872, repealing the charter, was therefore without legislative force, and void. The corporation is entitled to a trial in due course of law, to ascertain its breach of duty, before its charter can be taken away. A franchise is a valuable privilege, and is property in the contemplation of law; and the body possessing it, is as much entitled to a judicial determination of its right, or want of right, to hold it, as a natural person is of his right to his lands or his goods. The defendant is therefore entitled to judgment upon his demurrer.

Demurrer sustained, and judgment thereupon for the defendant, that he go without day, and be paid his costs.

Recent Decisions.

MISSOURI.

SUPREME COURT OF MISSOURI. WHEELER v. STANDLEY.

1. When in a suit on his non-negotiable notes, the defendant alleges that the notes were a part of the purchase money for certain real estate, which was conveyed to him by an alleged attorney in fact, and that the power of attorney was a forgery, such an allegation is a good defence.

2. When there is no fraud, and a party receives a conveyance with covenants of general warranty, he cannot retain possession, and set up failure of consideration when sued for the purchase money.—1 *Law News*, 196.

SUPREME COURT OF MISSOURI. HAZEN et al. v. BARNETT.

1. Although a parol partition is good between the parties when accompanied by possession, yet the equitable title only passes, which by adverse possession may ripen into legal estate; and a party to such an agreement has a right to have the parol agreement confirmed by a decree vesting in him whatever title the other party had in the premises.—1 *Law News*, 197.

SUPREME COURT OF MISSOURI. MATTISON v. AUSMUSS.

1. A. was in possession of certain land under title from C., when B. entered upon it, falsely claiming that he had a tax title, while in fact he had none, and the land had been redeemed, which fact of redemption he concealed from A.

2. B. subsequently made a quiet claim deed to A. under such false representations and concealment, and took a deed of trust to secure the consideration thereof; the land was sold to B. under the deed of trust, and he sued A. for possession. *Held:*

3. That A. had not so admitted B.'s claim as to be estopped from denying it; first, because the claim was a fraudulent one and was not made in good faith; second, because the grantee in a deed holds adversely to the vendor, and may strengthen his title from any other source.

4. There is no estoppel where the occupant is not under an obligation, express or implied, that he will at some time or in some event surrender the possession.—1 *Law News*, 196.

SHERIFF'S SALES.

The following are the prices obtained for the properties sold at Sheriff's sale on Monday last.

Jas. Wilson $1,700
Sam'l Birney. 3,900
Michael Gibbons. No. 1, $3,900. No. 2, 1,200
Dennis Collins. 3,800
Geo. W. Barron. 8,500
Alex. Linton. 1,875
David Torrence. 1,000
John Noble. 1,500
Rose Kane or (Kene). 625
Wm. Sharsward. No. 1, $6,900. No. 2, 7,300
Harry P. Ward. 5,000
Charles Carlin, dec'd. 1,025
John L. Thomas and John Kinnicutt. No. 1, $1,000. No. 2, 1,000
John McLaughlin. No. 3, $500. No. 4, 2,050
Alex. Hamilton and Matthew Fulton. 1,400
Jas. S. Mitchell. 90
Margaret Carr. 225
Chas. Stines. No. 1, $25. No. 2, 25. No. 3, 25. No. 4, 25. No. 5, 25. No. 6, 25. No. 7, 25. No. 8, 25. No. 9, 25. No. 10, 25. No. 11, 25. No. 12, 25. No. 13. 25. No. 14, 25. No. 15, 25. No. 16. 25
John E. Brady. 100
Geo. F. Knott. 6,000
Anthony C. Walters. 3,500
Wm. Haywood. 5,800
Thos. Clark. No. 1, $200. No. 2, 300. No. 3, 400. No. 4, 250. No. 5, 50
Sam'l H. Fisher, dec'd. 1,600
Jas. Sloan. 1,450
John Coyle. 850
Peter Coyle. 600
John O'Reilly. 7,300
Wm. Crawford. 675
David C. Richardson. 1,800
John Ross. 200
John Thomas, and David J. Griffiths. 900
Charles Goepp. 100
Thomas Clark. 150
Levis Passmore. 4,900
John C. Stackhouse & Charles Getchell. 100
John C. Stackhouse & Charles Getchell. 100
John Campbell. 400
John B. Brown. No. 1 to 18, each. 20
Thomas Pollock. 440
Jacob Heller, Sr. 300
Philip R. Engard and Edward S. Fitch. 210
Sam'l E. Graver. 350
Adam Schmunk. No. 1. $800. No. 2, 1,600
Wm. J. Bell. 1,600
John Schaeffer. No. 1, $1,400. No. 9, 75. No. 10, 1,500. No. 11, 400. No. 12. 450. No. 13, 500
Joseph M. Price. No. 2, $50. No. 3, 25. No. 4, 25. No. 5, 25. No. 6, 25. No. 7, 25. No. 8, 25. No. 9, 25. No. 10. 25
Abraham Focht. No. 1, $75. No. 2, 500
James W. Havens. 200
Peter Cocker. 1,000
Ebert J. Wendell. 1,550
Geo. Singiser. 100
Joseph N. Pope. No. 1, $40. No. 2, 70. No. 3, 1,100. No. 4, 1,000
Edwin Irwin, dec'd, and others. 800
Erbs and Barth. No. 1, $25. No. 2, 30. No. 3, 25
John and Thos. E. Williams. No. 1, $100. No. 2, 50. No. 3, 50
Andrew Mowbray. No. 1, $1,100. No. 2, 1,175
John B. Capewell. 1,500
George O. Evans. No. 1, $50. No. 3, 100
Lewis Worth. 16,000 20,000
John Longstreth & Henry T. Grout. No. 1, 1,500
Wm. J. Bell. No. 1, $25. No. 2, 25. No. 3, 25
Jos. J. Ray and Wife. 1,850
Order of Sale. 410
James Duffy. 200
Sam'l W. Kennedy. 425
J. C. Sweeney and Jas. E. Hagerty. No. 1, $100. No. 2, 15
James Keenan. 3,500
Edward Shields. 2,800
Edward Shields. 2,600
Edward Shields. 1,800
Jos. G. Willis. No. 1, $25. No. 2, 25. No. 3, 25. No. 4, 25
Sam'l W. Kennedy. 35
Sam'l W. Kennedy. 35
Sam'l W. Kennedy. 20
Martin Kintzbach. 1,500
John Young. No. 1, $10. No. 2, 10
John Young. 410
Margaret B. and Abraham H. Derrickson. No. 1, $50. No. 2, 50. No. 3, 50
Andrew J. Frederick. 1,500
Martin Matchiesky. 100
Isaac Senneff, dec'd, with notice to John S. Malloch. 3,450

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in March, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

Jan. 31, Hannah P. Quigg, Administratrix of ANN QUIGG, dec'd.
" 31, Thomas A. Mullin, Guardian of MULLIN'S minors.
Feb. 1, Maria M. Wharton et al., Executors of GEORGE M. WHARTON, dec'd.
" 1, Charles F. Linton, Administrator of CHARLES H. FOWLER, dec'd.
" 4, Helen L. Harrington et al., Executors of MAURICE A. HARRINGTON, deceased.
" 5, Jos. S. Kennedy, Executor of SUSAN JONES, dec'd.
" 5, James Brady, Executor and Trustee of LAWRENCE BLOOMER, dec'd.
" 7, John S. Derr, Executor of JOHN DERR, dec'd.
" 7, Franklin B. Colton, Executor of VIRGINIA M. HARRIS, dec'd.
" 7, Franklin B. Colton, Administrator of JOHN BERNADOW HARRIS, deceased.
" 7, Wm. D. Lewis, Administrator of Wm. D. LEWIS, JR., dec'd.
" 7, James Hull, et al., Exec'rs of NANCY W. CRAIG, dec'd.
" 7, Wm. Harper, JR., et al., Executors of WILLIAM HARPER, dec'd.
" 8, Robert Wilson et al., Executors of PETER D. LEWIS, dec'd.
" 10, Annie Yeager, Administratrix of WM. YEAGER, dec'd.
" 10, Thomas Shaw, Administrator of THOS. SHAW, SR., dec'd.
" 10, John Seiser, Executor of MATTHEW PLEIS, dec'd.
" 11, Joshua H. Morris, Guardian of EDWARD M. WISTAR, late minor.
" 11, Samuel Welsh et al., Acting Trustees of John M. Boyd, under the will of ISAAC BOYD, deceased.
" 11, Catharine Wurfflein et al., Administrators of ANDREW WURFFLEIN, deceased.
" 11, Robert Patterson et al., Executors of HELLEN H. PATTERSON, dec'd.
" 11, Samuel Christ et al., Executors of SUSAN A. WAYLON, dec'd.
" 12, Washington Bastian et al., Executors of GEORGE BASTIAN, dec'd..
" 12, John McCandless, Administrator of DAVID McCANDLESS, deceased.
" 12, Joseph Lake et al., Executors of BERNARD GOCKELN, dec'd.
" 13, Francis R. Cope, Administrator of ELIZABETH S. BROWN, dec'd.
" 13, Thomas W. Ayers, Administrator of SAMUEL W. AYERS, JR., dec'd.
" 13, Robert Patterson, Executor of ELIZABETH SNYDER, dec'd.
" 13, Benjamin H. Kaufman, Administrator of FITZSIMMONS CALHOUN, deceased.
" 14, Franklin Shoemaker, Executor of MARY ANN WILLIAMS, dec'd.
" 14, Wm. McGeorge, Jr., Guardian of CARRIE E. V. C. MERSHON, late minor.
" 14, WM. McGeorge, Jr., Guardian of HORACE DEAN, late minor.
" 14, Alexander C. McCurdy, Administrator of DR. ANSON H. PLATT, deceased.
" 15, Henry C. Streler, Administrator of ANTON SEIBEL, dec'd.
" 15, David Winebrener, Guardian of ALLEN W. ARMSTRONG, late minor.
" 15, Philip Wagner, Trustee under the will of LAVINIA CARTER, dec'd.
" 17, Collins W. Walton et al., Executors of SAMUEL D. WALTON, dec'd.
" 18, Frances Robinson, Administratrix of JAMES ROBINSON, dec'd.
" 19, Jenneta Henning, Administratrix of GEPHART HENNING, dec'd.
" 20, Mary Ann Ehrlen, Administratrix of CHRISTIAN EHRLEN, dec'd.
" 20, Theodore Kitchen et al., Executors of JOHN S. KITCHEN, dec'd.
" 20, J. G. Rosengarten, Administrator of FRANZ STOCK, dec'd.
" 21, Frederick Schneider et al., Administrators of GOTTLEIB FREDERICK BLUMHARDT, dec'd.
" 21, Henry Mohr, Executor of ANNA MARIA SCHAFFER, dec'd.
Feb. 21, Henry Closking et al., Executors of JOHN BURK, dec'd.
" 21, William J. Thomason, Administrator d. b. n. c. t. a. and Trustee of WILLIAM PILLING, dec'd.
" 24, Robert Riddle, Acting Executor and Trustee of FRANCIS MILLER, deceased.
" 24, Sarah Potts et al., Executors of WM. POTTS, dec'd.
" 24, Louisa Loudenslager, Administratrix of CHRISTOPHER H. LOUDENSLAGER, dec'd.
" 24, Charles H. Hutchinson et al., Executors of J. PEMBERTON HUTCHINSON, dec'd.
" 24, Theophilus Harris, Exec'r of MARY GENTRY, dec'd.
" 24, Catharine Brugger, Administratrix of JOHN BRUGGER, dec'd.
" 25, Mary Twells, Administratrix of EDWARD TWELLS, dec'd.
" 25, George Trotter, Surviving Trustee of MARY JANE TROTTER, under the will of Thomas Hart, dec'd.
" 25, George W. Schenck et al, Administrators of MARY SCHENCK, dec'd.
" 25, The Girard Life Ins. Co., &c., Acting Trustee of ENOCH LANING, deceased.
" 25, George Foster, Executor of MARY HAYS, dec'd.
" 25, Uselma C. Smith, Guardian of DUVAL, minors.
" 25, James Markoe, Guardian of WALTER and HERBERT COX and MARY FIELD, minors.
" 26, John P. Thompson, Surviving Executor and Trustee under the will of ABRAM SHALKOP, dec'd.
" 26, A. P. Spinney, Executor of JOHN S. DYE, dec'd.
" 26, Matilda Bigot, Administratrix of ALPHONSE BIGOT, dec'd.
" 26, James Alexander, Administrator of REBECCA VINCENT, dec'd.
" 26, The Girard Life Ins. Co., &c., Administrators of EDWARD MAGARGE, deceased.
" 26, The Girard Life Ins. Co., &c., Executors of WM. COFFIN, dec'd.
" 26, Benjamin Homer et al, Executors of HENRY HOMER, dec'd.
" 27, Richard Peltz, Administrator of JOHN T. JONES, dec'd.
" 27, J. H. Butler et al., Executors and Trustees of E. H. BUTLER, dec'd.
" 27, Elijah Cox, Guardian of A. COX, minor.
" 27, Susan Murphy, Executrix of THOS. MURPHY, dec'd.
" 27, Eli K. Price, Trustee of MARY L. KAMBORGER, under the will of Mary E. Heartle.
" 27, Elizabeth B. Hopkins, Administratrix c. t. a. of ELIZABETH J. HOPKINS, dec'd.
" 27, Robert Guy, Administrator of SAMUEL ROGERS, dec'd.
" 27, Henry Vollmer, Executor of WM VOLLMER, dec'd.
" 27, Thomas Neilson et al., Trustees under the will of ROBERT NEILSON, deceased.
" 27, Thomas Neilson et al., Trustees for DAVIS COLCORD et al., under the will of Robert Neilson, dec'd.

WILLIAM M. BUNN,
feb 28-4t Register.

THE JUROR: BEING A GUIDE TO citizens summoned to serve as jurors. Containing information as to the manner of drawing and selecting jurors; their rights, privileges, liabilities, and duties; reasons for exemption from service, and mode of arriving at and rendering verdicts. By Andrew Jackson Reilly, officer of the District Court for the city and county of Philadelphia. Revised by E. Cooper Shapley, Esq., of the Philadelphia Bar, and secretary of the Board for Selecting and Drawing jurors for the city of Philadelphia. Philadelphia John Campbell & Son, Law Booksellers and Publishers, 740 Sansom Street, 1873.

In connection with "THE JUROR" it is proposed to have an appendix containing a directory of the principal practising attorneys of the State of Pennsylvania, as information needed by jurors when favorably impressed with the learning, skill or eloquence of those before them. The circulation of this work is already assured to the extent of five thousand copies the ensuing year, in different parts of the State. Members of the Bar will please

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M. THOMAS & SONS, AUCTIONEERS.

REAL ESTATE SALE, MARCH 11.

Will include—

Coates, No. 2007—Business Stand—Three-story Brick Store and Dwelling. Orphans' Court Peremptory Sale—Estate of Bayard Robinson, dec'd.

Park avenue, No. 1713—Modern Three-story Brick Residence. Has the modern conveniences. Same Estate.

Gratz, Nos. 1701, 1703, 1705, 1707, 1709 and 1711—6 Three-story Brick Dwellings. Same Estate.

Uber, Nos. 1723 and 1727-2 Three-story Brick Dwellings. Same Estate.

Huntingdon, E. of Sixteenth—2 Lots. Same Estate.

Lancaster road, Radnor Township, Delaware County, Pa., 10 miles from Philadelphia—Very Superior Farm, 105 Acres.

Pine, No. 1630—Modern Four-story Brick Residence, with a Three-story Brick Dwelling in the rear on Helmuth street. Sale by Order of Heirs.

Race, No. 1637—Modern Three-story Brick Residence. Has the modern conveniences. Immediate possession.

German, No. 421—Two-and-a-half-story Brick Dwelling.

Mortgage, $1,200.

Sergeant, No. 1020—Three-story Brick Dwelling.

REAL ESTATE SALE, MARCH 18.

Will include—

Vine, No. 1607—Modern Three-story Brick Residence. Has the modern conveniences. Immediate possession.

Lombard, No. 1113—Modern Three-story Brick Dwelling. Orphans' Court Sale.—Estate of Henry B. Bobb, dec'd.

Main, Riverton, Burlington County, N. J.—Very Desirable Cottage Built Residence. Near the Delaware river, and easy of access to the city. Residence of Mr. Robert B. Knight.

Woodbury Turnpike, Gloucester County, N. J., 1 mile north of Woodbury—Very Valuable Farm, 135 Acres.

Callowhill, Old York road, Crown, between Fourth and Fifth streets—Large and Valuable Three-story Brick Building, formerly known as "Sængerbund Hall."

Mortgage, $7,000.

St. John, No. 629—Two-story Brick Dwelling, Executor's Peremptory Sale—Estate of Nicholas Helverson, dec'd.

Third, (North,) No. 627—Two-story Brick Stable. Same Estate.

Coates, Nos. 225 and 227—Three-story Brick Dwelling and Four-story Brick Building. Same Estate.

5 Shares Consolidation National Bank. Same Estate.

Georgetown road, Mansfield Township, Burlington County, N. J., about 1 mile from Mansfield—Desirable Farm, 88 Acres, Sale by order of Heirs—Estate of Samuel Emlen, dec'd.

Old Front street, Westmoreland street, Ontario street, Rover street, D and E streets and Hart lane—Squares of Ground—Trustees' Peremptory Sale—Estate of Leonard Jacoby, dec'd. See plans.

Conrad's lane, above Kitchen's Mill Bridge, Germantown, 1 mile from Wissahickon Station on the Norristown Railroad—Valuable Country Seat and Farm, 21 Acres.

Delaware River, Bensalem Township, Bucks County, Pa., at Eddington Station on the Philadelphia and Trenton Railroad—Valuable Country Seat and Farm, 158 Acres.

REAL ESTATE SALE, MARCH 25.

Will include—

Oxford, No. 2204-Genteel Three story Brick Dwelling. Orphans' Court Sale-Estate of David Anderson, dec'd.

Spruce, Nos. 1527 and 1529—Very Valuable Hotel Location 2 Four-story Brick Residences, 44 feet front, 240 feet deep. They have the modern conveniences.

WANTED BY A CONVEYANCER, the WHOLE or PART of an OFFICE on WALNUT Street. Address,
feb 21-3t* C. E. B., this Office.

FOR SALE.—Elegant Private Residence, 408 South Ninth street, below Pine, four minutes' walk from Chestnut street. Conveniently situated for any one in business near the centre of the city. House in thorough repair every way, with every modern convenience—Large Saloon, Drawing Room, Stationary Wash Stands in every chamber, good Heaters—Fine large kitchen, Stationary Stone Wash Tubs, Baths and Water closets on 2d and 3d floors.—House in thorough order. Can be bought low, if applied for soon, on terms to accommodate. Apply to

C. F. GUMMEY,
mar 1 No. 733 Walnut street.

NOTICE TO MEMBERS OF THE BAR.

The Circuit Court of the United States direct the Clerk to announce that no cases will be entered upon the Trial or Argument Lists of said Court for April Sessions, 1873, unless specially ordered by counsel on or before MONDAY, the 24th of March.

SAMUEL BELL,
Clerk Circuit Court United States,
feb 28-3t E. D. of Pa.

JAMES A. FREEMAN, & CO. AUCTIONEERS.

No. 422 WALNUT STREET.

REAL ESTATE SALE AT THE EXCHANGE, MARCH 12, 1873.

On Wednesday at 12 o'clock noon.

Executor's Absolute Sale.—Valuable Tract of Land, 216 Building Lots, 1st Ward, fronting on Mifflin and McKean streets, Snyder avenue, 11th, 12th, Gerhard, Gettz, Wisner, and Long streets. Plans may be had at the Auction Store. Estate of George Gettz, deceased.

Orphans' Court Sale.—Lancaster avenue. Desirable Building Lot, east of Girard avenue. Lot 20 x 283 feet to Merion avenue. Estate of Allen, minors.

Orphans' Court Sale.—1210 Kater street. Three-story Brick House and Brick Stable. Lot 32 x 55 feet. Subject to $52, silver ground rent. Estate of Robert Buck, dec'd.

Orphans' Court Sale.—Norristown, 2 Building Lots, Arch street east of Basin street. Lot 40 x 100 feet. Estate of Edmund G. Boor, deceased.

Trustees' Sale.—1209 Carpenter street. Two-story Brick Shop. Lot 16 x 67 feet. 2d Ward.

Sale by Order of Heirs.—113 Jacoby street. Neat Two-and-a-half-story Brick Dwelling, below Race street, 10th Ward. Lot 15 x 76 feet. $30 ground rent. Estate of Susan Stricker, dec'd.

REAL ESTATE SALE AT THE EXCHANGE MARCH 26, 1873.

Orphans' Court Sale.—Hancock street. Four Three-story Brick Court Houses, above Thompson street, 17th Ward. Lot 20 x 87½ feet. Estate of Wm. Harris, dec'd.

Orphans' Court Sale.—Hancock street. Valuable Two-story Brick Manufacturing Buildings, above Thompson street. Lot 60 feet on Hancock, and extending through 150 feet to Mascher street, on which it fronts 80 feet. Same Estate.

Orphans' Court Sale.—Thompson street. 6 Desirable Building Lots, corner of Hancock street, each 16 feet front on Thompson street by 70 feet deep. Same Estate.

Orphans' Court Sale.—Thompson street. Three-story Brick Dwelling, with Frame Kitchen attached, 96 feet east of Hancock street. Lot 33 feet front on Thompson street by 70 feet deep. Same Estate.

Orphans' Court Sale.—Thompson street. Three-story Brick Dwelling, 16 feet 2 inches west of Mascher street. Lot 15 feet 3 inches front on Thompson street by 70 feet deep. Same Estate.

Orphans' Court Sale.—Thompson and Mascher streets. Building Lot at the N. W. corner, 16 feet 2 inches on Thompson street by 70 feet on Mascher street. Same Estate.

Plan and Survey of the whole at the Auction Store.

Orphans' Court Sale.—1131 South Eighth street. Three-story Brick Store and Dwelling, below Passyunk road. Lot 15 x 60 feet. $30 ground rent. Estate of Ellen McCloud, a minor.

Orphans' Court Sale.—1133 South Eighth street. 3 Three-story Brick Store and Dwellings, below Passyunk road. Lot 15 x 60 feet. $30 ground rent. Estate of Jane McCloud, a minor.

Executors' Absolute Sale.—560 East York street. Genteel Three-story Brick Dwelling, with back buildings and conveniences. Lot 18 x 67 feet, 19th Ward. Estate of Arthur Rogers, dec'd.

2025 Coates street.—Business Stand—Modern Three-story Brick Store and Dwelling, corner of Corinthian avenue. Lot 20 x 87 feet. $4,000 may remain.

249 North Fifth street.—Desirable Three-story Brick Dwelling, with conveniences. Lot 17½ x 87½ feet, above Race street.

3301 Sansom street.—Neat Brown Stone Residence with Mansard roof and back buildings, has all the modern conveniences. Lot 15 x 75 feet along 32d street. $3000 may remain.

10 Acres of Land on Westchester R. R., 4 miles from Market Street Bridge.

Administratrix's Sale—422 Walnut street. Stock of a Retail Jewelry Store. On Monday morning, March 10th, at 10 o'clock, will be sold at the Auction Store, the stock of a retail Jewelry Store, including Watches, Chains, Bracelets, Shirt studs, Sleeve Buttons, Breastpins, Ear Rings, Finger Rings, Clocks, Plated Spoons, Forks, &c. Estate of Charles F. Meissner, deceased.

Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, MARCH 14, 1873. No. 11.

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Supreme Court of Illinois.

THE CHICAGO AND ALTON RAILROAD CO. v. THE PEOPLE.

The Legislature of Illinois, with the intention of carrying out art. xi., sec. 13, of the State constitution of 1870, passed an act regulating the charges for freight on railroads. The act provided that no greater charge should be made for the transportation of freight over any distance than was charged at the same time for freight of the same class over a less distance. It also provided that in case of unlawful violation of its provisions, the franchises of the offending corporation should be forfeited. The plaintiffs, a railroad company, having made such discrimination, proceedings upon *quo warranto* were commenced against them. Their defence was, that by their charter, which was a contract, they were entitled to make such discrimination and that the act was in contravention of the section of the United States Constitution prohibiting a State from passing any law impairing the obligation of contracts, and was therefore invalid. The court below decided that the act was constitutional. [See opinion of the court reported in 4 LEGAL GAZETTE, 385.] Upon appeal to the Supreme Court of Illinois, this decision was reversed, *the court holding:*

1. It is undoubtedly clear that the Legislature has the right to pass an act for the purpose of preventing *unjust* discriminations in railway freights, and to enforce its observance by appropriate remedies.
2. But while the Legislature has an unquestionable power to prohibit unjust discrimination in railway freights, no prosecution can be maintained under the act in question, because it does not prohibit unjust discrimination merely, but discrimination of *any character*, and because it does not allow the companies to explain the reason for the discrimination, but forfeits their franchises upon an arbitrary and conclusive presumption of guilt, to be drawn from the proof of an act that might be shown to be perfectly innocent. In these particulars the act violates the spirit of the constitution.

The judgment of the Circuit Court ousting the appellant of its franchises, must therefore be reversed.

Appeal from McLean Circuit Court.

Opinion of the court by LAWRENCE, C. J. Delivered February 22d, 1873.

This record brings before us the proceedings upon an information in the nature of a *quo warranto*, filed by the railroad commissioners of the State against the Chicago and Alton Railroad Company, under the act which went into operation July 1st, 1871, entitled "An act to prevent unjust discriminations and extortions in the rates to be charged by the different railroads in this State for the transportation of freight on said roads."

The information set forth that the company, in violation of this act, had repeatedly charged and received for transporting lumber from Chicago to Lexington, a distance of one hundred and ten miles, the sum of $5.65 per 1,000 feet, while at the same time it had only charged for transportation of like lumber from Chicago to Bloomington, a distance of one hundred and twenty-six miles, the sum of $5 per 1,000 feet. The company by way of defence, pleaded its charter, and alleged that the rates of toll from Chicago to Lexington were in fact reasonable, while the rates from Chicago to Bloomington were unreasonably low, and were established because of the competition at the latter point with the Illinois Central Railroad Company. To this plea the relators demurred. The demurrer was sustained, a judgment of ouster was pronounced against the company, and its franchise was declared forfeited. From this judgment the company has prosecuted an appeal to this court.

The question involved in this record is the constitutionality of the act of the Legislature under which the information was filed. The object of the General Assembly in passing the law is indicated by its title, which we have already given. The substance of the first section of the act is, that no railroad corporation in this State shall charge a larger compensation for the transportation of freight over any distance than it is charging at the same time for freight of the same class over a less distance; nor shall it charge the same amount that it charges over a less distance. Another clause of the same section provides that no railroad company in this State shall charge a larger compensation for freight over any portion of its road, than is charged for freight of the same class over any other portion of equal length.

The second section of the act merely defines what is meant by the phrase "railroad corporation."

The third section makes the rates of the year 1870 the standard for freight charges. This section is not brought before us by this record.

The fourth section provides for the recovery of a penalty of $1,000 in an action of debt, together with a reasonable attorney's fee, by any person aggrieved by the violation of this act.

The fifth and last section provides that any unlawful violation of this act by any railroad corporation "shall be deemed and taken a forfeiture of its franchises" and authorizes a proceeding to that end, such as is before us in the present record.

Very elaborate arguments have been filed by counsel, but they are chiefly devoted to a discussion of the power of the Legislature to control the rate of railway charges or to fix their maximum limit. It is urged by counsel for the company, that its charter is a contract with the State, by which the latter has irrevocably granted to the corporation the right to establish its rates of toll, subject only to an implied condition, which is admitted by counsel, that they shall not be unreasonable or excessive. It is further urged that this charter, with all the privileges it granted, is protected under that clause of the Constitution of the United States which prohibits the States from enacting any law impairing the obligation of contracts. On the other hand it is contended by counsel for the relators, that railroad corporations which obtain their right of way through the exercise of the right of eminent domain—a right belonging only to the sovereign power of the State, and to be delegated by that power only for public purposes—must be regarded as *quasi* public corporations, and therefore subject to legislative control, so far as may be necessary for the public welfare, of which the Legislature must necessarily be the judge. It is further contended that the right to control and regulate their tolls is a species of police power, which the Legislature cannot alienate from the State, even if it should so desire, because essential to the proper sovereignty of the State.

These propositions of counsel invite us to a wide field of discussion, upon which we do not at present propose to enter. We have stated them for the purpose of saying in terms, that we express no opinion in regard to them, and do not propose to do so until a case shall come before us demanding their discussion. There are laws upon our statute book involving their consideration, but the act before us does not necessarily do so in its application to the present case, and the expression of an opinion in regard to legislation not involved in this record would be obviously improper.

Conceding, for the purposes of this appeal, all that is claimed by counsel for the appellant in regard to the inviolability of railroad charters regarded in the light of contracts, we are still of opinion that the Legislature has the clearest right to pass an act for the purpose of preventing an unjust discrimination in railway freights, whether as between individuals or communities, and to enforce its observance by appropriate penalties. The grounds of this opinion may be briefly stated, and they are as follows:

A railroad company is chartered, and is chartered solely for the purpose of exercising the functions and performing the duties of a common carrier.

The duties and liabilities of common carriers are clearly defined by the common law, and have been so defined for centuries. In all commercial countries the law upon this subject is one of the most important branches of legal science, and its leading principles were established by the courts of England at an early day. One of these principles is, that nothing excuses the carrier for the non-delivery of the goods received by him for carriage, except the act of God or the public enemy.

We do not find it written in the charters of railroad corporations in this State that they shall exercise their franchises subject to this stringent liability. Yet, nevertheless, this court has firmly held them to it, not permitting them to evade it even by a notice, or by any means short of a special contract with the shipper to which his free assent must be shown to have been given. Another perfectly well settled rule of the common law in regard to common carriers, is that they shall not exercise any unjust and injurious discrimination between individuals in their rates of toll. In the language of Chief Justice Holt, when delivering the opinion of the Court of King's Bench, in the celebrated case of Coggs v. Brenard, L. Raymond, decided in 1703, the common carrier "exercises a public employment," and it necessarily follows that he must deal with the public fairly and without unjust discrimination. This common law duty of common carriers is not prescribed in the charters of railroad corporations, but, like the other duty of delivering goods in safety, unless prevented by the act of God or the public enemy, it attaches to them, by virtue of their function as common carriers, the moment they commence the transportation of freight. In accepting their charters, which gave them an artificial existence as common carriers, they necessarily accepted them with all the duties and liabilities attached by the existing law to the function of a common carrier. This proposition seems to our mind so plain as hardly to admit of more argument than an axiom in mathematics. While the law now imposes, and always has imposed, upon individuals exercising the vocation of a common carrier, the obligation of rendering service to all persons without injustice to any, how utterly unreasonable it is to claim that a corporation is to be permitted to discriminate in its tolls, at its own discretion, and without regard to justice, merely because the Legislature, in the charter that created it for the purpose of exercising a like vocation, has authorized it to establish rates of toll, without in terms providing that they shall be free from unjust discrimination. What was the import of that grant, made as it was, in broad and general terms? Clearly nothing more than that the corporation should have the same right of establishing tolls that a natural person has when acting as a common carrier—a right to be exercised within the same limitations that the common law, in behalf of justice and public policy, imposes upon the natural man.

This case has been argued on both sides with commendable ability and candor, and we avail ourselves of an admission made by counsel for the company, to illustrate the position we are enforcing. It is conceded by counsel in express terms that "a natural person is not allowed to make unreasonable and excessive charges as a common carrier, and an artificial person is subject to the same restrictions." It is, of course, contended by counsel that the Legislature has no power to determine

what charges are reasonable or unreasonable, but with that branch of the question we have in this case no concern. It is undoubtedly true, as conceded by counsel, that the artificial person has no more right than the natural person to make unreasonable and excessive charges as a common carrier. And why? This restriction is not found in railway charters as generally framed, and certainly not in the charter presented by this record in regard to which counsel are speaking. The obvious reason is the principle we have already stated. The rule forbidding unreasonable charges was a common law rule when these charters were granted, and the companies accepted their charters with this implied limitation upon the power granted, in general terms, to establish their rates of freight. If this implied condition against unreasonable rates of freight attached by the existing law to their charters at the date of their acceptance, on what ground can it be held that the corresponding condition against unjust discrimination did not equally attach? There is no ground for the distinction. The charters were granted for the purpose of furnishing improved means of transportation and travel to all persons alike, without unjust discrimination between individuals or communities, and they were accepted with the knowledge that the nature of the grant imposed that obligation.

This question of unjust discrimination is not before this court for the first time. In the case of Vincent against this same company, 49 Illinois, 33, we held that railway companies can make no injurious discrimination between individuals, and therefore could not charge one rate for delivering grain at a certain elevator in Chicago, and a higher rate for delivering at another elevator in the same city, and equally accessible upon its line.

The same rule was recognized in The People v. C. & A. R. R. Co., 55 Ill. 111, though the facts of that case were found not to require its application. The rule was declared in C. & N. W. R. R. Co. v. The People, not yet reported, but to appear in 56 Ill. The opinion in that case cites several English and American cases, in which it was held that railway companies could not be permitted to practice an injurious and arbitary discrimination between different persons, and we now refer to them without further citation.

If, then, an unjust discrimination is not to be permitted as between individuals in regard to freights, is it any more permissible as between different communities or localities?

We are wholly at loss to discover the slightest difference in reason or principle.

If a farmer living three miles from the Springfield station, upon this company's road, is charged fifteen cents per bushel for shipping his corn to Chicago, is it just that the farmer who lives twenty miles nearer Chicago should be charged a higher sum? Certainly not, unless the railway company can show a peculiar state of affairs to justify the discrimination, and this must be something more than the mere fact that there are conflicting lines at one point and not at the other. The discrimination in such a case is as much a discrimination between individuals as it would be in reference to two persons living in the same locality and shipping at the same station, unless, as before stated, a satisfactory reason can be given for discrimination between the points of shipment, and such a reason, in the case supposed, it is not very easy to conceive.

So, too, in the case before us. The resident of Bloomington who sends to Chicago for a car of lumber, is charged by the company at the rate of five dollars per thousand feet for transportation. The resident of Lexington who orders the same lumber at the same time is charged five dollars and sixty-five cents per thousand feet for a transportation sixteen miles less in distance. Is there not here, unless an explanation can be furnished by the company, an unjust discrimination between individuals, quite as much within the prohibition of the principles of the common law as would be an unjust discrimination between individuals of the same town.

We have endeavored to show on what a firm foundation rests the constitutional power of the Legislature to prohibit unjust discrimination in railway freights, even conceding what is claimed for their charters as contracts.

We should, however, be doing the counsel for the appellant an injustice, if it were to be inferred from what we have said that they distinctly assert a right on the part of the company to make unjust discriminations.

We understand them to concede in the conclusion of their argument the power of the Legislature to prohibit such discriminations, but they insist that no discrimination is unjust if the person against whom it is made is not himself charged an reasonable rate. They therefore averred in their plea to the information that the charges for freight to Lexington were in fact unreasonable, and those to Bloomington were unreasonably low. But in our opinion if the act of the Legislature had directed its penalties as it should have done, not against all discriminations, but only against unjust discriminations, and had made *that* the issue to be tried, it would have been no answer to aver in the plea that the larger rates for the less distance were reasonable rates. That would have had only an argumentative bearing upon the issue to be tried, to wit, the existence of an unjust discrimination between neighboring towns. What is a reasonable rate of freight over a railroad is at best a mere matter of opinion, depending on a great variety of complicated facts, which but few persons could intelligently investigate, and which it would be wholly in the power of the company to furnish or withhold. Railroad experts might be produced who would testify that in their opinion the rate to Lexington in the present case was a reasonable rate, but the fact that a less rate was charged for the greater distance to Bloomington, if the difference was a permanently established and not a casual difference, and if it could be explained only by the fact that there was a competing line at one place and not at the other, might be well accepted as conclusive proof that the rate to Lexington was not a reasonable rate.

The only issue to be made, under a law properly framed, would be whether there was an unjust discrimination or not. If on the trial of such an issue, the prosecutor proves a permanent established discrimination, like that disclosed by the present record, and the company can show no other reason for it than the existence of a competing line at the favored point, the defence must be held unsatisfactory, notwithstanding witnesses may testify that they believe, as a matter of theoretical opinion, that the rates to Lexington are reasonable. They cannot be reasonable, and the discrimination must be unjust, if the lesser rates for the greater distance have been established merely because the company have ceased to exercise at that point a practical monopoly.

It cannot be supposed that either of the competing lines would establish a permanent rate of charges upon a scale that would not furnish a remunerative profit. The rates to Bloomington would be established under the influence of a fair competition, which, by the ordinary laws that govern commerce, might be relied upon as establishing a rate not unreasonably low. At Lexington the rates would be established by the uncontrolled discretion of the company, and it should not cause surprise if they were fixed unreasonably high. If the rates are not unreasonably high at Bloomington they are unreasonably high at Lexington. If they *are*, and at all other points touched by competing lines, is it not certain that the company will indemnify itself by charging, at the stations where there is no competition, a rate unreasonably high? And will not a discrimination arising solely from such a cause be necessarily an unjust and injurious discrimination, as to all persons shipping or receiving freights at the non-competing stations?

If Lexington is a town where a considerable business is done, it is evident that this discrimination of rates, if permanently established, will diminish its business and check its growth. It was never intended or expected that these corporations should use their power to benefit particular individuals, or build up particular localities by arbitrary discriminations in their favor, that must cause injury to other persons or places engaged in rival pursuits or occupying rival positions. It is in vain to say in defence of such discriminations, made without just cause, that the rate of charges against the injured person or locality is a reasonable rate, and therefore no injury is done.

An injury, as a matter of fact, is committed in the manner just suggested, and the Legislature has the right to require the corporation to show a sufficient cause for the discrimination which produces the injury, and it cannot be permitted to evade the issue, by raising the legislative inquiry as to whether the rates charged against the injured parties or localities are not, after all, reasonable rates. Even if reasonable, when regarded in reference to the profit upon the capital invested in the road, they are not reasonable in the true sense of the term, if no satisfactory reason can be given for charging less rates for the same or for greater services rendered to persons doing buiness with the company at neighboring stations.

From what we have said, it will be seen that the object of the law under which these proceedings were instituted was, in our opinion, clearly within the power of the Legislature. The law was intended to prescribe the methods by which to enforce a common law duty that the railways of the State voluntarily assume whenever they exercise the functions of a common carrier, and it is in no respect a violation of their charters. It remains to be considered whether these are defects in the details of the law which need to be amended before it can be exercised. We are of opinion that there are such defects, but they are susceptible of easy amendment.

The discrimination forbidden by the common law to common carriers is an unjust or unreasonable discrimination. The provision in our new constitution is also against unjust discrimination. It is in the following words:

"The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freights and passenger tariffs on the different roads in the State, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises." Art. xi., sec. 15.

This provision, expressly directing the Legislature to pass laws to prevent *unjust* discrimination, is a recognition of the palpable fact that there may be discriminations which are not unjust, and by implication it restrains the power of the Legislature to a prohibition of those which are unjust. That was undoubtedly the object of the Legislature in passing the existing law. This is clearly shown by its title. But the act itself goes further. It forbids any discrimination whatever under any circumstances, and whether just or unjust in the charges for transporting the same classes of freight over equal distances, even though moving in opposite directions, and does not permit the companies to show that the discrimination is not unjust. The mere proof of the discrimination makes out a case against the railway companies which they are not allowed to meet by evidence showing the reason or propriety of the discrimination, and then, upon this sort of *ex parte* trial, imposes, as a penalty for the offence, a forfeiture of the franchise, which would often be equivalent to a fine of millions of dollars. The object of the law is commendable, but such a proceeding to be followed by such a penalty for the first offence can not be sustained.

It could only have been authorized through the inadvertence of the Legislature. The law, as it now stands, makes an offence out of an act which might be shown not to be an offence, but an exercise of a wise discretion, really beneficial to the people of the State, and while debarring the companies from all right of explanation, confiscates their franchises upon the first conviction. The Legislature cannot raise a conclusive presumption of guilt against a natural person for an act that may be innocent in itself, taking from him the privilege of showing the actual innocence or propriety of the act, and confiscating his property as a penalty for the supposed offence. Those provisions of our constitution which forbid the deprivation of life, liberty, or property, except by due process of law, and which guarantee the right of trial by jury as heretofore enjoyed, and the right in all criminal prosecutions to appear and defend

in person or by counsel, would all be violated by such a law. These provisions, it is true, are designed to apply only to natural persons, but artificial persons must be permitted to invoke the spirit of justice which prompted them, so far as may be neccessary to protect their property and franchises against the operation of a law that substantially condemns without a trial.

That the naked fact that a railway company charges a larger sum for transporting freight of the same class over a given distance than it is charging for the same distance over another part of its road, or in the opposite direction, is not of itself conclusive evidence of an unjust discrimination, will be manifest on a moment's consideration. Take, for instance, the road of the appellant, with one terminus at Chicago and the other at East St. Louis. At one season of the year more freights are moving from Chicago towards East St. Louis than in the opposite direction.

The consequence, of course, is that the supply of empty cars at the latter point will be in excess of the demand. There is a water route between those points which also touches several intermediate stations upon the road. Now, unless the railway company is permitted under such circumstances to induce shipments over its line by lowering its freights, it is evident that a portion of its cars will return empty. This would, of course, necessitate a higher charge for freight moving towards St. Louis than it would be necessary to impose if return freights could be secured by lowering the rates on the return trip. To forbid the company to lower the rates of return freight would thus benefit no one, and would work an injury both to the company and the people along the line. At other seasons of the year the larger amount of freights is moving in the opposite direction, and then the operation must be reversed.

We give this illustration for the purpose of showing that a difference of price for the same distance of transportation is not necessarily an unjust discrimination, and that any law must be fatally defective which infers guilt as a conclusive presumption, from the mere fact of difference of rates, without permitting the companies to show why the different rates were adopted.

We may so far take judicial notice of the course of public affairs in this State, as to say that the real abuse which the Legislature was understood by this act to prevent was not such proper discriminations as those we have just been supposing, but the practice which had become general among the railways of charging a higher compensation for carrying the agricultural products of the State to market, when shipped at a station where there was no competing line, than when shipped where there was such competition, although the distance over which the freight was carried in the latter case might greatly exceed the distance in the former. The same system also prevailed in regard to the freight from Chicago to points in the interior, although probably not felt to be so great an evil. For discriminations of this character, when adopted as a system, we can certainly perceive neither justification nor excuse; but, nevertheless, it is the right of a company, when prosecuted on the ground of unjust discrimination, to offer what evidence it can by way of explanation.

It might, for example, show in the present case, that the lumber shipped to Lexington had caused a greater expense in loading or unloading than to Bloomington. This may not be a very probable defence, but defences may, nevertheless, exist, and if they do the companies should not be deprived of the right to make them.

Before this act can be enforced, it should be so amended as to correspond with the requirement of the constitution, by directing its prohibitions against *unjust* discriminations. It should make the charging of a greater compensation for a less distance or for the same distance, merely *prima facie* evidence of unjust discrimination, instead of conclusive evidence as it now is, and it should give to the railway companies the right of trial by jury, not only on the fact of discrimination, but upon the issue whether such discrimination is just or not.

There is another feature in this law to which we deem it our duty to advert. As the act now stands, a forfeiture of all franchises is the only penalty that can be imposed upon a company, in a prosecution instituted on behalf of the people, and it is imposed for the same offence. This, as already remarked, in some cases would amount to a fine of millions of dollars. Is not this a violation of the spirit of that constitutional provision which says, in terms, that "all penalties shall be proportioned to the nature of the offence?"

Is it not also a violation of the spirit of the very clause of the constitution under which this act was framed, and which requires the Legislature to pass laws to prevent unjust discrimination and extortion by railroad corporations, "and enforce such laws by adequate penalties, to the extent, *if necessary for that purpose*, of forfeiture of their property and franchises?" Would it not be better to enforce the law by a series of considerable and increasing fines, before imposing the final penalty of forfeiture? A law admitting of but one penalty, and that of the harshest possible character, will necessarily be subjected by the courts to close criticism and a strict construction.

The English Parliament passed a law in 1854, prohibiting the giving of undue or unreasonable preferences or advantages by railway companies in the management of their business. Under this act various cases have arisen in the English courts which have been cited by counsel. It is unnecessary to comment upon them. They hold, as we do, that a discrimination is not necessarily an unjust discrimination. That is to be determined upon the evidence.

The opinion of the court is, that while the Legislature has an unquestionable power to prohibit unjust discrimination in railway freights, no prosecution can be maintained under the existing act until amended, because it does not prohibit unjust discrimination merely, but discrimination of any character, and because it does not allow the companies to explain the reason for the discrimination, but forfeits their franchises upon an arbitrary and conclusive presumption of guilt, to be drawn from the proof of an act that might be shown to be perfectly innocent. In these particulars the existing act violates the spirit of the constitution.

The judgment of the Circuit Court, ousting the appellant of its franchises, must therefore be reversed.

Judgment reversed.

[Head notes of decisions reported in 16th Wallace, soon to appear.]

Supreme Court, United States.

Evidence.

1. Parol evidence not admissible to show in the case of a "clean" bill of lading, that there was an agreement to stow the goods on deck. The Delaware, 579.

2. A presumption exists *prima facie* that the military and fiscal officers of the United States have done their official duty. United States v. Crusell, 1.

3. To show that a person to whom a deed has been made conveying property in trust did not accept the trust, a declaration not under seal, but signed by him, nine years after the deed, making known to all whom the matter concerned, "that immediately on his receiving notice of the conveyance he did positively refuse to accept, or to act under the trust intended to be created, and that he had at no time since accepted the trust or acted in any wise as trustee in relation to it," is proper evidence; the party making the declaration being dead and his handwriting proved. Armstrong v. Morrill, 120.

4. Courts may take judicial notice of the fact that, by the common consent of mankind, certain rules of navigation, fixing the number, color, position, power, &c., of lights to be used at sea by night, on steamers and sailing vessels respectively, so as the better to guard against collision by establishing a uniform rule on the subject, have been acquiesced in, as of general obligation. The Scotia, 170.

5. An amended answer in admiralty, setting up an improbable defence, and one quite departing from that set up in the original answer, treated unfavorably. The Mabey and Cooper, 204.

6. A statement in figures of the value of certain merchandise destroyed by fire, which statement professed to be a copy of another and original statement contained in a book—itself destroyed in the fire—accompanied by proof that on a certain day the witnesses took a correct inventory of the merchandise and that it was correctly reduced to writing by one of them and entered in the volume burnt, and that what is offered is a correct copy, may, on a suit against insurers, be received in evidence to fix the value of the merchandise burnt, even though there be no independent recollection by the witnesses affirming to the correctness of the original statement of what they found the value of the merchandise to be. Insurance Companies v. Weides, 375.

7. The result of an undertaking is sometimes a safe criterion by which to judge of an act which causes it. The Steamer Webb, 406.

8. The Supreme Court on error to judgments of circuit courts when acting in the place of juries, under the act of March 3d, 1865, cannot pass on the weight of evidence. Dirst v. Morris, 484.

9. A plaintiff in ejectment, claiming under a deed made on a sale in a foreclosure of a mortgage, may properly put in evidence the record of the proceedings in foreclosure, even though the defendant claim by a deed absolute made by the mortgagor, prior to giving the mortgage under which the foreclosure took place. Ib.

10. On an issue between a partnership and third parties as to the day when the partnership was formed, the mere articles of partnership are not evidence in favor of the partnership. It must be shown by extrinsic evidence, that they were made on the day when they purport to have been made. Philpot v. Gruninger, 570.

Foreclosure.

Where the terms of a mortgage or deed of trust require that before any foreclosure or sale under it is made, sixty days' notice shall be given in certain newspapers, a sale without the notice conveys no title. Bigler v. Waller, 297.

Forfeiture.

Where a forfeiture is made absolute, by statute, a decree of condemnation relates back to the time of the commission of the wrongful acts, and takes effect from that time, and not from the date of the decree. The doctrine strictly applied and to a hard case. Henderson's Distilled Spirits, 44.

Homestead Laws of Illinois.

The nature of the homestead right under them and the effect of a judicial sale of the property in which it exists or has existed considered. Black v. Curran, 463.

Illinois.

Under certain of its limitation laws, it is not necessary in ejectment that the defendant's entire title be evidenced by acts of record. What is sufficient, stated. Dolton v. Cain, 472.

Insurance.

1. Under a policy, one of whose conditions is that in case of loss the assured, after furnishing evidence of his loss, shall submit to an examination under oath, and until such examination should be permitted, no loss should be paid, the insurers cannot as a condition of recovery compel the assured to answer questions as to the sum per cent. of claim for which he had settled with other parties insuring him. Insurance Companies v. Weides, 375.

2. Under a policy, one of whose conditions is that fraud or false swearing on the part of the assured in an examination which, by the terms of the policy, he was bound to submit to on a claim by him for loss, it is only fraudulent false swearing in furnishing the preliminary proofs or in the examination which avoids the policy. Ib.

3. Insurance may be effected in the name of a nominal partnership where the business is carried on by and for the use of one of the partners. Phœnix Insurance Company v. Hamilton, 504.

4. In case of an insurance thus effected, where no representations are made with regard to the persons who compose the firm, there is no misrepresentation on that subject which avoids the policy. Ib.

5. And where the firm has no actual care or custody of the property insured (grain), but so far as regards its preservation from fire, it is entirely in the control of the other parties, and is so understood to be by the company making the insurance, the omission to inform the insurance company of an agreement of dissolution previously made, cannot be considered a concealment which will avoid the policy. Ib.

LEGAL GAZETTE.

Friday, March 14, 1873.

JOHN H. CAMPBELL, EDITOR.

THEODORE F. JENKINS, ASSOCIATE EDITOR.

Quite a number of judges and lawyers from the interior of the State have visited this city during this week and last, principally to attend the sitting of the Supreme Court *in banc*. The Constitutional Convention seems to be a central point of interest to them. Judges Hall, of the Bedford district; Harding and Dana, of the Luzerne district; Butler, of the Chester district; Ross, of the Montgomery district; Pearson, of the Dauphin district; Walker, of the Schuylkill district; and Bucher, of the Union district, having severally made their appearance at the sessions of that body. Among the lawyers who have "come to court" during the period above mentioned, we have noticed quite a number of familiar faces; among them, Geo. B. Kulp, the editor of our excellent little contemporary, the Luzerne Legal Register, and Messrs. Campbell and Smith, of the Luzerne county bar.

Notwithstanding the fact, that three courts for jury trials are held by the judges of the District Court of Philadelphia, business is still very much behindhand. We understand that there are over SIX HUNDRED CASES ordered for trial prior to the September Term, that *have not yet been tried*, and as on an average, there are not more than twenty or twenty-five cases tried in each court in a week, or from sixty to seventy-five in all, there seems to be no earthly prospect of *ever* catching up. The constitution of the State contains a provision, that "all courts shall be open, and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered without sale, denial or DELAY." Now, if the judges find it physically impossible to try all the cases that are commenced in the District Court, and lawyers and suitors, and witnesses are compelled to lose valuable time, waiting for cases to be reached or tried, and dancing attendance in court when their cases are expected to be reached, there should be some remedy provided, so that the constitutional provision above quoted should not be a mockery We hope the Constitutional Convention will take the matter in hand.

The Pacific Law Reporter, in noticing the appearance of the Legal Chronicle, of Pottsville, says that "Pennsylvania seems to be the mother for all law papers. Nearly as many are now published there as in all the other States combined."

The Constitutional Convention has been doing some work this week and last. The reports of the committees on suffrage and elections, the legislature, the executive, education, and legislation, have been almost disposed of on first reading, and we may reasonably hope that the second and third readings of these reports will not consume much time. The Convention takes a recess from the 28th instant,' to April 8th.

PUBLICATIONS RECEIVED.

THE NEW YORK CITY "RING," its Origin, Maturity and Fall discussed in a Reply to the New York Times. By S. J. Tilden. 8vo., pp. 83. New York, 1873.

COOK'S EXCURSIONIST, AND HOME AND FOREIGN TOURIST ADVERTISER, American edition.

Supreme Court of Pennsylv'a.

ZANE v. KENNEDY.

1. A power to sell includes a power to mortgage.
2. A mere agreement to extend the time for the payment of a note, will not be binding, and will not work a release of a surety.
3. When there is a trust for the payment of debts, the debts, after a lapse of twenty years, are presumed have been paid.

Error to the District Court for the city and county of Philadelphia.

Opinion by SHARSWOOD, J. Deilvered March 6th, 1873.

The only question which appears to have been raised on the trial of this case in the court below was, whether the power of sale which by the deed of trust of February 28th, 1832, John Zane and wife to William L. Hirst, was vested in the trustee, was duly exercised by the conveyance of January 30th, 1841, by William L. Hirst and Maria Antoinette Zane to Anthony M. Zane. It may be conceded, that if the evidence offered—the rejection of which forms the fourth error assigned—had been admitted, it would have proved that the deed was without consideration as between the parties, and was executed solely in order that the grantor, Anthony M. Zane, might mortgage the property to Isaac M. Zane, as was done accordingly, February 1st, 1841; which mortgage was to be, and was assigned to Kennedy and others, as collateral security for certain notes of Isaac M. Zane, given to the assignee for goods purchased by him. The object of the whole transaction being to set Isaac M. Zane up in business. Isaac M. Zane was a son of Maria Antoinette Zane, who was the *cestui que trust* in the deed of trust of February 28th, 1832, and who was a party to the deed to Anthony M. Zane. The power contained in the deed of 1832, is in these words: 'And upon the further special trust and confidence that the said William L. Hirst, his heirs, executors, successors, and assigns, shall be, and he and they are hereby, and by force and virtue of these presents, authorized and fully empowered to sell and convey, by all lawful assurances and conveyances, all or such parts of the said hereby granted estate, as the said Maria Antoinette shall, by writing under her hand, from time to time request and require, and for and as respects the purchase money thereof, upon the special trust and confidence, that in the said William L. Hirst, his heirs, executors, successors, and assigns, shall and will pay the same to the said Maria Antoinette, and her receipt for the same shall be his full voucher and protection for so doing, notwithstanding her present or any future coverture." The question then is, whether the trustee, at the request, and with the consent in writing of the *cestui que trust*, had power to mortgage the premises. It is perfectly clear that if he had, Mrs. Zane was entire mistress of the money raised by the mortgage, and could give it to her son, Isaac M. Zane, if she so pleased. In a case in which a married woman had power to mortgage for her separate use and disposal, it was held by this court that she could execute the power for the benefit of her husband. Hoover v. The Samaritan Beneficial Society, 3 Whart. 445. The whole case, then, is resolved into the question whether in this State an absolute and unrestricted power to sell includes a power to mortgage. We cannot regard this as an open question. It was expressly decided in Lancaster v. Dolan, 1 Rawle, 231, that a power to sell does include a power to mortgage, which is a conditional sale. It was not a mere *obiter dictum*, but the very point upon which the judgment hinged as to the remainder of the estate, over which there was a general power of appointment. It has since been recognized as the settled law in several cases. Presbyterian Corporation v. Wallace, 3 Rawle, 130; Gordon v. Preston, 1 Watts, 386; Duval's Appeal, 2 Wright, 118; Pennsylvania Life Insurance Co. v. Austin, 6 Wright, 263. It is of no consequence whether the case of Mills v. Banks, 3 P. Williams, 9, cited in support of the ruling in Lancaster v. Dolan, has or has not been subsequently disapproved of in England. We are bound to adhere to a determination of this court settling a rule of property, and which has been so often recognized and arffimed. There would be no security for titles, nor could counsel advise with confidence if we were ready to listen to suggestions for the re-consideration of points solemnly determined by our predecessors whenever the courts of some other State or country have adopted a different rule.

There are two other objections to the judgment which were not made below, nor are they contained in the printed paper book of the plaintiff in error; but we will, nevertheless, briefly dispose of them. The first is, that as there was evidence that the promissory notes of Isaac M. Zane, to secure which the mortgage was intended, had been extended without the consent of Mrs. Zane, who was known to all parties to be the real mortgagor, and should, therefore, to the extent of the mortgaged premises, be viewed as a surety, the mortgage was discharged by such extension. There was no evidence to submit to the jury, upon which such a defence could be based. A witness for the plaintiff, indeed, testified that in a general conversation with Mr. Julian, one of the assignees of the mortgage, he said, "that they had done all they could for Isaac; that they had extended the notes for which the assignment of the mortgage was made as collateral, several times;" but on cross-examination he added: "Nothing was said about any consideration having been given by Isaac for the extension of the notes; does not know that there was any consideration, or that the old notes were given up." A mere agreement to extend the time without consideration, and without a surrender of the old notes, and the taking of new ones, would not be binding on the creditor, and would not prevent the surety from paying the debt and immediately seeking reimbursement from his principal, which is the reason of the rule that when time is given by a binding agreement, the surety is discharged. The United States v. Simpson, 3 P. R. 437; Clippinger v. Corps, 2 Watts, 45; Rhoads v. Frederick, 8 Watts, 448; Miller v. Stem, 2 Barr, 286; 2 Jones, 383; Brubaker v. Okeson, 12 Casey, 519. There is nothing, therefore, in this objection.

The other ground upon which a reversal of the judgment is asked, is, that the execution of the power was subject to the prior charge of the debts of John Zane, specially secured by the deed of trust. But there are several conclusive answers to this. These debts were charged upon and made payable only out of John Zane's interest in the property, which was for his life, probably his estate by the curtesy, and that interest had expired at the time of the trial. Moreover, more than twenty years had elapsed since the execution of the deed of trust, and the presumption was that the debts were paid. Besides all this, the claims of these creditors could only be set up by themselves, or the trustees suing for their use. The plaintiff below was not the holder of the legal title, nor a trustee for them, but a *cestui que trust*, under the deed of trust, prosecuting this ejectment to recover the equitable estate, if it had not been legally diverted by the mortgage, and the proceedings upon it, by which, however, both the legal and equitable title were vested in James M. Kennedy, the purchaser at sheriff's sale, a title which the plaintiff had herself solemnly confirmed, by joining the new trustee, Thomas D. Smith, in the deed dated May 7th, 1844.

Judgment affirmed.

APPEAL OF JOHN S. HAINES.

1. An act of Assembly cannot vest in a tribunal like a court of chancery, acting without a jury, the power to determine upon the legal right of parties, unless their exists some equitable ground of relief.
2. The act of April 28th, 1868, relating to the extinguishment of ground rents, is unconstitutional.

Appeal from an order of the Court of Common Pleas of Philadelphia county.

Opinion by SHARSWOOD, J. Delivered March 6th, 1873.

The only ground upon which the constitutionality of the act of April 28th, 1868, Pamphlet Laws, 1147, can be supported under the decisions of this court in North Pennsylvania Coal Co. v. Snowden, 6 Wright, 488; Norris' Appeal, 14 P. F. Smith, 275, and Tillmes v Marsh, 17 Ibid. 507, is that it is a proceeding within the jurisdiction of a court of equity. It must certainly be considered as settled by those cases, that an act of Assembly cannot vest in a tribunal like a court of chancery, acting without a jury, the power to determine upon the legal rights of parties, unless there exists some equitable ground of relief. We may look in vain for any principle or authority to sustain a bill praying for a decree under the facts and circumstances, as disclosed in the petition filed in the court below. As to the power which has been principally relied on, to order deeds or instruments to be delivered up and cancelled, there is always some ground of equity upon which the chancellor has interposed, besides the mere fact that the instrument cannot be enforced at law. There must be some danger of future litigation, when the facts will be no longer capable of complete proof, or have become involved in the obscurities of time. 2 Story's Eq. Jur., s. 705. This is the reason upon which a bill *quia timet* may be sustained. No case has

been produced, and we think none can be, which goes the length which must be maintained here, that wherever there is an outstanding claim or incumbrance upon an estate which is barred by reason of lapse of time, and therefore cannot be enforced at law, but which nevertheless, is a cloud upon the title, and prevents it from being marketable, the possessor can invoke the aid of a court of equity to remove the cloud, and forever bar such claim or incumbrance by a perpetual injunction. If this could be done, there is not an ejectment in the common law courts which by an inversion of parties could not be brought into a court of equity, and the question finally determined by one decree without a jury, instead of two verdicts and judgments. No doubt it is highly important to the parties, and, indeed, of public interest, that some mode should exist by law by which all such clouds may be removed, and that valuable estates be brought into the market. We are very far from holding that the Legislature cannot do this. But then trial by jury must be "as heretofore, and the right thereof remain inviolate." By the thirty-third section of the act of June 16th, 1836, Pamphlet Laws, 701, entitled "An act relating to the lien of mechanics and others upon buildings;" whenever a mechanic's claim is filed against a building, it is made lawful for the owner, or any person interested, to call the claimant into court, which is thereupon authorized to proceed in like manner, as if a *scire facias* had been issued, and duly served and returned. No one has ever thought of questioning the constitutionality of that section, which has been frequently acted upon and found very beneficial. Had there been a provision in the act of 1868, giving the respondent the right to demand an issue, as by the eighty-seventh section of the act of June 16th, 1836, Pamphlet Laws, 777, in questions arising upon the distribution of the proceeds of sheriff's sales, all objections to the act on this score would have been obviated. The learned judge who delivered the opinion of the court below, appears to have thought that because "there is nothing in the law which would prevent the court from sending every such case as this by a general rule to a jury," it may therefore "very well be questioned whether this act does in fact absolutely deprive the parties of a jury trial." But as such a general rule or the award of an issue in any particular case, would be entirely in the discretion of the court, it is clear that the parties have not secured to them, their constitutional right of trial by jury. They would in effect hold it at the mere pleasure of the court.

The contention which has the most plausibility, is that upon the evidence in this case there was no question of fact for the decision of a jury, and that assuming all the facts to be true, the court before whom the trial might be had, would be bound to instruct the jury that the ground rents in question must be presumed in law to be extinguished. Conceding this to be so, there is a fallacy which lurks in this argument. The respondent in his answer demurred to the jurisdiction of the court, and if in law he was right, he could not be affected by any failure in the evidence, which he was not at all bound to produce. No party can be concluded by the decision of a court which has no jurisdiction to decide the controversy. We cannot strike from the act the words "on due proof being made of the truth of the said petition," and insert other words which would confine the jurisdiction to the case, where no evidence should be produced which would save the act from its unconstitutional operation. That would be judicial legislation. We assume in this judgment that the evidence brought the case in law entirely within the purview of the act of 1855. Upon that, however, we give no opinion.

Order reversed at the costs of the appellee.

COLLINS v. THE SOCIETY FOR THE RELIEF OF DISTRESSED AND DECAYED PILOTS, &c.

The act of March 24th, 1851, relating to pilotage is constitutional. The discrimination therein made between different vessels, is a valid exercise of legislative discretion.

Error to the Court of Common Pleas of Philadelphia county.

Opinion by SHARSWOOD, J. Delivered March 6th, 1873.

Three contentions have been made in this case, which it will be necessary to consider, but they can be disposed of briefly.

The first is that the plaintiffs below were not entitled, upon the true construction of the sixth section of the act of March 24th, 1851, Pamph. L. 229, to recover the penalty of full pilotage demanded in their declaration. The established canon of interpretation, that penal statutes must receive a strict construction, has been invoked in support of the argument. It is not pretended, however, that the penalty was not incurred, applying to the act the most rigid rule. "If such vessel be not licensed as aforesaid, then and in such case the master, owner, or consignee thereof, shall forfeit and pay the full pilotage thereof." The subsequent clause appropriating the amount of the penalty to the pilot society is no part of the penal provision, and is to be construed fairly and reasonably to ascertain the intention of the lawmakers just like any other statute. It mattered not to the offender—formed no part of what it was necessary for him to read and understand, in order to avoid the infraction of the law—to whom the Legislature might choose to give it. We have no doubt whatever, that all the forfeiture accruing by virtue of the act, including the full pilotage in question, were intended to be granted to the plaintiffs below.

The second position of the plaintiffs in error is that this grant is contrary to the constitution of this commonwealth, and for this he relies upon the case of the Philadelphia Association v. Wood, 3 Wright, 73. But the principle of that decision is entirely inapplicable here. It was there held that a tax upon a class of persons, such as two per cent. of their gross receipt, upon all agencies of foreign insurance companies in the city of Philadelphia, could not be appropriated by law before it reached the treasury of the State, to a coporation or an individual. But this penalty is in no sense a tax, and has no similitude to one. To say that the Legislature could not appropriate it as they pleased, to the person grieved, the pilot whose services were refused, to an informer or to a charity, would be to contradict the uniform legislation of the State. The statute book is filled with such grants of penalties—one great object of it undoubtedly being to secure better the enforcement of the law, by making it the interest of private persons or corporations to prosecute offenders.

The third contention is that the act inasmuch as it imposes full pilotage upon registered vessels which are mostly engaged in foreign commerce, and only half pilotage upon licensed or coasting vessels, is an infringement of section x. par. 2 of art. 1 of the Constitution of the United States, which declares that "no State shall, without the consent of Congress, lay any imposts, or duties on imports or exports what may be absolutely necessary for executing its inspection laws."

There might be devised, no doubt, a system of pilotage fees, and penalties which would be obviously intended to evade this inhibition, and would, therefore, be invalid, but that can no more be said of the act of 1851 than it could of the act of March 29th, 1803. Pamph. L. 560. It is decided by the Supreme Court of the United States in Cooley v. The Board of Wardens, 12 Howard 299, in affirming the constitutionality of the act of 1803, that the States have power to pass pilotage laws, to license pilots to regulate their compensation, and to enforce their laws by appropriate penalties. They may discriminate between the different kinds of vessels, according to their size and character, requiring heavier fees and putting severer penalties upon some than others. If the fees are not an impost or duty, certainly the penalty is not. It is a substitute for the fees which ought to have been paid. In the case of small vessels there is less at risk, and they can be more easily navigated by an ordinary seaman. But it matters not what the reason for the discrimination was, it was in the discretion of the Legislature. "The purpose of the law," said Mr. Justice Curtis in delivering the opinion of the court in the case cited, "being to cause masters of such vessels as generally need a pilot, to employ one, and to secure to the pilot a fair remuneration for cruising in search of vessels or waiting for employment in port, there is an obvious propriety in having reference to the number, size and nature of employment of vessels frequenting the port; and it will be found by an examination of the different systems of these regulations which have from time to time been made in this and other countries, that the legislative discretion has been constantly exercised in making discriminations, founded on differences both in the character of the trade and the tonnage of vessels engaged therein."

Judgment affirmed.

BOARD OF EXAMINERS.

For March Term, 1873.

EDWARD OLMSTED, Ch'n, HENRY S. HAGERT,
ROBT. N. LOGAN, JOHN M. COLLINS,
WM. ROTCH WISTER, GEO. L. CRAWFORD,
SAMUEL DICKSON, GEORGE T. BISPHAM,
S. S. HOLLINGSWORTH, *Secretary*.

The Board will meet on Thursday, March 27th, at the office of Henry S. Hagert, Esq., at 3 o'clock P. M., and statedly thereafter on the last Thursday of each month.

Court of Common Pleas of Philadelphia.

ASSIGNED ESTATE OF TRUITT, BROS. & CO.

1. An accountant who by mistake or fraud omits to charge himself with money actually received by him, may be surcharged therewith in a subsequent account.
2. In an assigned estate the inventory is *prima facie* evidence of liability.
3. A letter press book is evidence against the owner thereof.
4. A party to the record is not admissible as a witness to prove the handwriting of a decedent whose estate is sought to be charged thereby.

STATEMENT OF CASE.

1. Charles Boggs, now deceased, was the assignee of Truitt, Brothers & Co. The assignment was made September 20th, 1861.

2. The first account was filed December 13th, 1862, was duly audited and confirmed absolutely, June 27th, 1863 On November 21st, 1868, Charles Boggs, the assignee, died, whereupon Davis Boggs, his brother, took out letters of administration.

3. On December 5th, 1868, on behalf of a creditor of Truitt, Brothers & Co., a petition was presented for the appointment of an assignee in the place and stead of said Charles Boggs, deceased; whereupon the court appointed Joseph H. Dunn, who, on the 23d of January, 1869, was awarded a citation against Davis Boggs, the administrator of the late assignee, to show cause why he should not file the accounts of the said Charles Boggs, as assignee.

Davis Boggs, the administrator, filed his answer to the petition and citation of the present assignee, setting forth his inability to file such account, for lack of materials so to do, and his want of knowledge as to the condition of the assigned estate.

Upon his showing, the court appointed an auditor to state a second account. The auditor by his report charged the estate of Charles Boggs, deceased, when exceptions to his report were filed on the part of the administrator of the said decedent, and of the new assignee.

Opinion by PAXSON, J. Delivered March 8th, 1873.

This case bristles "with exceptions." Thirteen have been filed on behalf of Joseph B. Dunn, the present assignee, and fifteen on behalf of the administrator of Charles Boggs, deceased, the former assignee. A considerable number of said exceptions relate to alleged errors of the auditor upon the facts. As the evidence has not been brought up, we have no means of correcting his rulings thereon, if erroneous. This disposes of the 1st, 3d, 4th, 5th, 6th, 7th, 8th, 9th and 10th exceptions, filed by Mr. Dunn, and of the 10th, 11th, 12th, 13th, 14th and 15th exceptions, filed by the administrator of Charles Boggs. In disposing of the remaining exceptions, we will take up first those filed on behalf of Joseph B. Dunn, the present assignee.

The second of said exceptions alleges error in ruling out certain items, because they were received by Mr. Boggs prior to the filing of his first account, although not included therein.

The assignment is dated September 20th, 1861, and the first account was filed December 13th, 1862. Charles Boggs, the assignee, died on November 21st, 1868.

The auditor reports that in his opinion the investigation is limited to transactions between the filing of the first account and the death of the assignee. His reason for this conclusion is, that the terms of the reference do not extend beyond the time referred to. The present assignee presented his petition to the Court of Common Pleas, praying for a citation against the administrator of the former assignee, to show cause why an account should not be filed. The petition sets forth that the petitioner "has reason to believe and avers, that assets of the said estate to a large amount came to the hands of the said Charles Boggs, after the filing of his said account, of which no account whatever has been rendered." To this petition and the citation issued thereon, the administrator filed an answer, setting forth his inability to file such account, for lack of material so to do, and his want of knowledge as to the condition of the assigned estate. Whereupon, an auditor was appointed by the court to state a second account.

I do not think the averment in the petition that assets came into the hands of the first assignee after the filing of said first account, of itself limits the auditor to such items. The order to him is to state an account; the statement referred to in the petition is merely the reason why such account should be stated. In so stating it, everything not previously accounted for should be included.

It was alleged, however, by the learned counsel for the administrator of the first assignee, that as to all matters which were or might have been passed upon by the auditor in the first account, the confirmation of his report is conclusive as to all the world. Moore's Appeal, 10 Barr, 435; Groff's Appeal, 9 Wr. 379; Taylor v. Cornelius, 10 P. F. S. 187; Weber v. Samuels, 7 Barr, 526, and Rhoad's Appeal, 3 Wr. 386, were cited in support of this view. All of these cases refer to matters which were either embraced in the prior account, or were known to parties, and might have been the subject of surcharge in said prior account. None of them reach the case of an accountant who has received divers sums of money, which he has altogether omitted from his account, and of which the auditor has no knowledge. This amounts to fraud. I am not aware that it has ever been held that an accountant, who by either fraud or mistake, omits to charge himself in his account with money actually received by him, may not be surcharged therewith in a subsequent account. To do so would open a wide door to fraud. This exception is sustained.

I think the 11th exception is well taken. The auditor does not give us any reason for declining to charge the former assignee with interest on balances in his hands. This assignee utterly neglected his duties for years; kept no accounts of the estate; wasted the assets in debauchery, leaving his successor in the trust, the creditors, and his unfortunate securities in the dark as to the condition of the estate. This question was fully discussed in Brown's Estate, 8 Phila. R. 197. The auditor would do well to adopt the rule pursued in that case, in allowing a proper balance for contingencies, and a reasonable time for investment.

The 12th and 13th exceptions are also sustained to the extent of charging the said Charles Boggs with the amount of the inventory filed, less the amount accounted for in the prior account. The inventory is *prima facie* evidence of liabilty. It is for the accountant to discharge himself therefrom. This he may do by showing items already accounted for, or which could not be collected. The auditor has not formally charged the assignee with the inventory. In fact, he has not stated an account at all in the proper sense of the term. These errors of form can be corrected in a supplemental report.

It remains to dispose of the exceptions filed by the administrator of Charles Boggs.

I see no error in admitting in evidence the letter-book containing press copies of letters from Charles Boggs to the creditors. It was the assignee's own book, and was evidence against *him*. Foot v. Bentley, 44 N. Y. R. 166, does not apply. This disposes of the first exception. The second is dismissed for the reason that this case is not within the bar of the statute, or of any analogy thereto. The 3d and 4th exceptions are virtually disposed of by what has already been said in another part of this opinion. The 5th exception is novel. It is alleged that the auditor should not have surcharged Chas. Boggs with any items for the three years next preceding his death, because of his continued intoxication during that period. This exception is dismissed. Nor do I see the force of the 6th exception. The question as to the endorsement of Charles Boggs, is not one of reasonable doubt, but of the weight of the evidence. I cannot say the auditor was wrong. The 7th, 8th and 9th exceptions all refer to one question, viz.: the admission of the evidence of Charles B. Truitt, Samuel L. Kreutzborg, Joseph H. Dunn and Thomas D. Watson. It was objected that these witnesses were all incompetent by reason of interest, and that they are not admissible under the statute, because their testimony relates to matters prior to the death of Charles Boggs. Of these witnesses, the first and second were the assignors; the third is the present assignee. Each of these is a party to the record, and for that reason incompetent to testify as to any facts occurring prior to the death of Charles Boggs. It is alleged, however, that Dunn was only called to prove the handwriting of Mr. Boggs. But the very writing which Dunn was called to prove, was made or executed prior to the death of Mr. Boggs. The latter is not here to speak in regard to it. We think this case comes within the prohibition of the act of Assembly. But no such objection applies to Thomas D. Watson; he is not a party, nor has he any interest. His testimony therefore, was properly received. The three exceptions last named are sustained to the extent of excluding the evidence of Truitt, Kreutzborg and Dunn, and all of the items referred to, so far as they depend exclusively upon their testimony.

The 7th, 8th and 9th exceptions, filed by the administrator of Charles Boggs, are sustained. The balance of his exceptions are dismissed.

The 2d, 11th, 12th and 13th exceptions, filed by Joseph B. Dunn, are sustained. The balance of his exceptions are dismissed. The report is referred back to the auditor, with directions to amend the same in accordance with this opinion.

Henry J. McCarthy and *John P. Montgomery, Esqs.*, for administrator of Chas. Boggs, deceased.

E. Spencer Miller, Esq., for Joseph B. Dunn, assignee.

In re CHARTER OF THE REV. DAVID MULHOLLAND BENEVOLENT SOCIETY OF MANAYUNK.

Opinion by PAXSON, J. Delivered March 8th, 1873.

We commend the object of this association, but we cannot give the charter our approval for two reasons, viz.:

1st. The membership is not restricted to citizens of this commonwealth, and

2d. It is provided by article 11th, that any member "enlisting in the regular army or navy shall thereby forfeit his membership, and all claims on the society."

We will not approve a charter with such a clause as this. It is against public policy. A corporation which is a creature of the law ought not to prescribe its members for aiding the government which creates and protects it.

THIRTIETH JUDICIAL DISTRICT.
Court of Common Pleas.

In re PETITION of F. H. GIBBS et al.

Under the act of 1857, referring to the granting of charters of incorporation by the Court of Common Pleas, there must be actual subscriptions for stock on which payments have been made before a charter will be granted.

In re petition of F. H. Gibbs et al. to be incorporated as a gas company.

Opinion of the court by LOWRIE, P. J. Delivered March 4th, 1873.

This is a petition of seven persons to be incorporated as a gas company in Titusville, and the conditions and articles of the constitution proposed by them are that their place of business shall be Titusville, the stock shall be $100,000 in shares of $50, and the company shall be subject to the act of 1857, relating to gas and water companies. The application is made under the act of 27th February, 1872, P. L., p. 20, which, with the utmost brevity of words and latitude of meaning, gives the court power to grant charters of incorporation to gas companies, which when so incorporated shall be subject to the act of 1857, already referred to.

But that act always contemplates an association of men already formed, who have subscribed for a specified amount of stock, by contract of each one for so many shares, and that some part thereof is paid down. In the nature of things there must be an association before there can be an incorporation, and in this class of cases there must be stockholders, by each taking a given amount of stock, before the court can incorporate them. In this case no stock is subscribed for, and therefore there are no persons whom we can incorporate as members of a corporation. Such a charter would be mere waste paper, and our record would give no information relative to the persons who would constitute themselves a corporation under it, if it should be granted.

It seems to us that this proposed form of exercising our authority in such cases is not a proper one. The act of 1872 seems to give the court all the power now exercised by the Legislature and the governor in such cases. If this be so, the court ought to judge of the expediency of granting such a charter, so as at least to see that several corporations shall not come into undue collision on the same territory. And it ought to regard the spirit of the act of 1857, by seeing that every person desiring to become a stockholder shall have an opportunity to subscribe for stock, and that the proper amount has been fairly subscribed and a proper proportion paid.

On this petition we can hardly say more than this. But we may suggest that, if a petition be presented asking the court to appoint commissioners to receive subscriptions of stock for this company, every proper question can be considered.

This petition is rejected.

[Head notes of decisions reported for 16th Wallace, soon to appear.]

Supreme Court, United States.

INTERNAL REVENUE.

1. A removal of distilled spirits from the place where distilled to a bonded warehouse of the United States, if made with intent to defraud the United States of the tax due on the spirits, is illegal, and, though the intent was never executed, the spirits removed are subject to forfeiture. Removal to even such a place may be part of a scheme to defraud the government of its duties. Henderson's Distilled Spirits, 44.

2. The 5th section of the act of July 14th, 1870, by which the power of collectors of internal revenue to post-stamp certain instruments of writing and remit penalties for the non-stamping of them when issued, is extended in point of time, applies to notes issued before the passage of the act as well as to notes issued subsequently. Pugh v. McCormick, 61.

3. On a distiller's bond, given under the 2d section of the internal revenue act of July 20th, 1868, conditioned that the obligors "shall in all respects comply with all the provisions of law in relation to the duties and business of distillers," the condition is prospective as well as present, and embraces such provisions of law relating to the duties and business of distillers as may be in force during the term for which the bond is given, whether enacted before or after its execution. United States v. Powell, 493.

4. The "distillery warehouses" which distillers are required by the 15th section of the same act to provide, situated on their distillery premises, are "bonded warehouses," within the meaning of the joint resolution of Congress of March 29th, 1869, which declares that the proprietors of all "internal revenue bonded warehouses" shall reimburse to the United States the expenses and salary of all storekeepers put by it in charge of them. Ib.

5. These expenses properly include *per diem* wages paid to storekeepers for taking charge of them on Sundays. Ib.

JUDICIAL NOTICE.

Courts may take judicial notice of the fact that, by the common consent of mankind, certain rules of navigation, fixing the number, color, position, power, &c., of lights to be used at sea by night, on

steamers and sailing vessels respectively, so as the better to guard against collision at sea, by establishing a uniform rule on the subject, have been acquiesced in as of general obligation. The Scotia, 170.

JURISDICTION.

1. Of the supreme Court of the United States.

(a) It has jurisdiction—

1. Of appeals from the highest State courts, under the 25th section of the judiciary act, only in a limited number of cases, and this court in a pointed way, calls the attention of the bar of the court generally to the fact that much expense would be saved to suitors, if before they advised them to appeal from decisions of these courts to this one, they would see that the case was one of which this court had cognizance under the section. Hurley v. Street, 85.

2. Of a judgment of a State court holding void a contract of which the consideration was the notes of the Confederate States in ordinary use as money during the rebellion, when the judgment holding the contract void was based on a constitutional or legislative enactment passed after the contract was made, and not on general grounds of public policy. Delmas v. Insurance Company, 661.

3. (Other things allowing) of a writ by one defendant, on a judgment against three, the defendant who prosecutes the writ having given notice to his co-defendants of his intention to prosecute it, and there, being a refusal by them to co-operate. O'Dowd v. Russell, 402.

4. As of a "final" judgment, of a judgment in a court of last resort, that a judgment against A. (who had been sued for not faithfully discharging the duties of a vendue-master of a city and been held discharged under the bankrupt act) be reversed. As also as of the same final nature, of a judgment in a court of last resort, that a judgment in an inferior court, holding B. and C. (the sureties of A. on his bond as vendue-master) liable, be affirmed. Ib.

5. Of appeals from proceedings in bankruptcy from the Supreme Court of the District of Columbia in certain cases. Smith v. Mason, Assignee, 419.

(b) It has not jurisdiction—

6. Under the 25th section of the judiciary act, unless it can be seen from the record that a State court decided the question relied on to give this court jurisdiction. Cockroft v. Vose, 5.

7. Nor under that section, when the decision of the State court is made on precedents of general jurisprudence of this court, or on one of its own similar pre-existent rules; notwithstanding (in the latter case) that the State have subsequently made the rule one of the articles of its constitution. Caperton v. Bowyer, 216; Tennessee Bank v. Bank of Louisiana, 9; Palmer v. Marston, 10; Sevier v. Haskell, 13.

8. Nor under that section, if the judgment of the State court may have been given on grounds which the section does not make cause for error, as well as upon some ground which it does so make. Steines v. Franklin County, 15; Kennebec Railroad v. Portland Railroad, 23.

9. Nor under that section, when nothing appears in the record to show on what grounds the decision of the matter in which the Federal question is alleged to be involved was made. Caperton v. Bowyer, 216.

10. Nor under that section, of necessity, and in the presence of disproof in the record, merely because a certificate of the presiding justice of the highest court of a State may certify that there was drawn in question the validity of an act of the State, on the ground that it was repugnant to the Constitution of the United States, and that the decision was in favor of its validity. Ib.

11. Nor under that section, unless the record shows that more than one Federal question was decided when the certificate certifying that a certain one which it mentions was, is silent as to any other, and when this court considers that the certificate in what it does mention is disproved by the record, and when, moreover, the case may have been well decided on grounds not Federal. Ib.

12. Nor under that section when the writ is taken on the ground that the provision of the Constitution which ordains that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," has been violated by a refusal of the highest State court to give proper effect to a judicial record of another State, unless it appear that the record have been authenticated in the mode prescribed by the act of May 26th, 1790, "to prescribe the mode in which the public acts, records, and judicial proceedings in each State shall be authenticated, so as to take effect in every other State." Caperton v. Ballard, 238.

13. Nor where the decision of the State court consists only in granting or refusing to grant a motion for a rehearing in an equity suit. Steines v. Franklin County, 15.

14. Nor (when the State court is composed of a chief justice and associates) unless the writ be allowed by the chief justice himself. Bartemeyer v. Iowa, 26.

II. Of the circuit courts of the United States.

(a) They have jurisdiction—

15. Under the act of March 2d, 1867, of a suit brought by the assignee of a chose in action, when the case has been transferred under that act from a State court into one of them. City of Lexington v. Butler, 282.

16. Of negotiable paper (other things allowing), though the plaintiff be an assignee of it. Ib.

(b) They have not jurisdiction—

17. (Where the suit is between citizens of the same State) of a suit which does not relate to some matter already litigated in the same court by the same persons, and which is not either in addition to, or a continuance of, an original suit. Such second suit is an original and not an ancillary suit. Christmas v. Russell, 69.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in March, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

Jan. 31, Hannah P. Quigg, Administratrix of ANN QUIGG, dec'd.
" 31, Thomas A. Mullin, Guardian of MULLIN'S minors.
Feb. 1, Maria M. Wharton et al., Executors of GEORGE M. WHARTON, dec'd.
" 1, Charles F. Linton, Administrator of CHARLES H. FOWLER, dec'd.
" 4, Helen L. Harrington et al., Executors of MAURICE A. HARRINGTON, deceased.
" 5, Jos. S. Kennedy, Executor of SUSAN JONES, dec'd.
" 5, James Brady, Executor and Trustee of LAWRENCE BLOOMER, dec'd.
" 7, John S. Derr, Executor of JOHN DERR, dec'd.
" 7, Franklin B. Colton, Executor of VIRGINIA M. HARRIS, dec'd.
" 7, Franklin B. Colton, Administrator of JOHN BERNADOW HARRIS, deceased.
" 7, Wm. D. Lewis, Administrator of Wm. D. LEWIS, JR., dec'd.
" 7, James Hull, et al., Exec'rs of NANCY W. CRAIG, dec'd.
" 7, Wm. Harper, JR., et al., Executors of WILLIAM HARPER, dec'd.
" 8, Robert Wilson et al., Executors of PETER D. LEWIS, dec'd.
" 10, Annie Yeager, Administratrix of WM. YEAGER, dec'd.
" 10, Thomas Shaw, Administrator of THOS. SHAW, SR., dec'd.
" 10, John Seiser, Executor of MATTHEW PLEIS, dec'd.
" 11, Joshua H. Morris, Guardian of EDWARD M. WISTAR, late minor.
" 11, Samuel Welsh et al., Acting Trustees of John M. Boyd, under the will of ISAAC BOYD, deceased.
" 11, Catharine Wurfflein et al., Administrators of ANDREW WURFFLEIN, deceased.
" 11, Robert Patterson et al., Executors of HELLEN H. PATTERSON, dec'd.
" 11, Samuel Christ et al., Executors of SUSAN A. WAYLON, dec'd.
" 12, Washington Bastian et al., Executors of GEORGE BASTIAN, dec'd.
" 12, John McCandless, Administrator of DAVID McCANDLESS, deceased.
" 12, Joseph Lake et al., Executors of BERNARD GOCKELN, dec'd.
" 13, Francis R. Cope, Administrator of ELIZABETH S. BROWN, dec'd.
" 13, Thomas W. Ayers, Administrator of SAMUEL W. AYERS, JR., dec'd.
" 13, Robert Patterson, Executor of ELIZABETH SNYDER, dec'd.
" 13, Benjamin H. Kauffman, Administrator of FITZSIMMONS CALHOUN, deceased.
" 14, Franklin Shoemaker, Executor of MARY ANN WILLIAMS, dec'd.
" 14, Wm. McGeorge, Jr., Guardian of CARRIE E. V. C. MERSHON, late minor.
" 14, WM. McGeorge, Jr., Guardian of HORACE DEAN, late minor.
" 14, Alexander C. McCurdy, Administrator of DR. ANSON H. PLATT, deceased.
" 15, Henry C. Streler, Administrator of ANTON SEIBEL, dec'd.
" 15, David Winebrener, Guardian of ALLEN W. ARMSTRONG, late minor.
" 15, Philip Wagner, Trustee under the will of LAVINIA CARTER, dec'd.
" 17, Collins W. Walton et al., Executors of SAMUEL D. WALTON, dec'd.
" 18, Frances Robinson, Administratrix of JAMES ROBINSON, dec'd.
" 19, Jenneta Henning, Administratrix of GEPHART HENNING, dec'd.
" 20, Mary Ann Ehrlen, Administratrix of CHRISTIAN EHRLEN, dec'd.
" 20, Theodore Kitchen et al., Executors of JOHN S. KITCHEN, dec'd.
" 20, J. G. Rosengarten, Administrator of FRANZ STOCK, dec'd.
" 21, Frederick Schneider et al., Administrators of GOTTLEIB FREDERICK BLUMHARDT, dec'd.
" 21, Henry Mohr, Executor of ANNA MARIA SCHAFFER, dec'd.
Feb. 21, Henry Closking et al., Executors of JOHN BURK, dec'd.
" 21, William J. Thomason, Administrator d. b. n. c. t. a. and Trustee of WILLIAM PILLING, dec'd.
" 24, Robert Riddle, Acting Executor and Trustee of FRANCIS MILLER, deceased.
" 24, Sarah Potts et al., Executors of WM. POTTS, dec'd.
" 24, Louisa Loudenslager, Administratrix of CHRISTOPHER H. LOUDENSLAGER, dec'd.
" 24, Charles H. Hutchinson et al., Executors of J. PEMBERTON HUTCHINSON, dec'd.
" 24, Theophilus Harris, Exec'r of MARY GENTRY, dec'd.
" 24, Catharine Brugger, Administratrix of JOHN BRUGGER, dec'd.
" 25, Mary Twells, Administratrix of EDWARD TWELLS, dec'd.
" 25, George Trotter, Surviving Trustee of MARY JANE TROTTER, under the will of Thomas Hart, dec'd.
" 25, George W. Schenck et al., Administrators of MARY SCHENCK, dec'd.
" 25, The Girard Life Ins. Co., &c., Acting Trustee of ENOCH LANING, deceased.
" 25, George Foster, Executor of MARY HAYS, dec'd.
" 25, Uselma C. Smith, Guardian of DUVAL, minors.
" 25, James Markoe, Guardian of WALTER and HERBERT COX and MARY FIELD, minors.
" 26, John P. Thompson, Surviving Executor and Trustee under the will of ABRAM SHALKOP, dec'd.
" 26, A. P. Spinney, Executor of JOHN S. DYE, dec'd.
" 26, Matilda Bigot, Administratrix of ALPHONSE BIGOT, dec'd.
" 26, James Alexander, Administrator of REBECCA VINCENT, dec'd.
" 26, The Girard Life Ins. Co., &c., Administrators of EDWARD MAGARGE, deceased.
" 26, The Girard Life Ins. Co., &c., Executors of WM. COFFIN, dec'd.
" 26, Benjamin Homer et al., Executors of HENRY HOMER, dec'd.
" 27, Richard Peltz, Administrator of JOHN T. JONES, dec'd.
" 27, J. H. Butler et al., Executors and Trustees of E. H. BUTLER, dec'd.
" 27, Elijah Cox, Guardian of A. COX, minor.
" 27, Susan Murphy, Executrix of THOS. MURPHY, dec'd.
" 27, Eli K. Price, Trustee of MARY L. RAMBORGER, under the will of Mary E. Heartle.
" 27, Elizabeth B. Hopkins, Administratrix c. t. a. of ELIZABETH J. HOPKINS, dec'd.
" 27, Robert Guy, Administrator of SAMUEL ROGERS, dec'd.
" 27, Henry Vollmer, Executor of WM VOLLMER, dec'd.
" 27, Thomas Neilson et al., Trustees under the will of ROBERT NEILSON, deceased.
" 27, Thomas Neilson et al., Trustees for DAVIS COLCORD et al., under the will of Robert Neilson, dec'd.

WILLIAM M. BUNN,
feb 28-4t Register.

THE JUROR: BEING A GUIDE TO citizens summoned to serve as jurors. Containing information as to the manner of drawing and selecting jurors; their rights, privileges, liabilities, and duties; reasons for exemption from service, and mode of arriving at and rendering verdicts. By Andrew Jackson Reilly, officer of the District Court for the city and county of Philadelphia. Revised by E. Cooper Shapley, Esq., of the Philadelphia Bar, and secretary of the Board for Selecting and Drawing jurors for the city of Philadelphia. Philadelphia John Campbell & Son, Law Booksellers and Publishers, 740 Sansom Street, 1873.

In connection with "THE JUROR" it is proposed to have an appendix containing a directory of the principal practising attorneys of the State of Pennsylvania, as information needed by jurors when favorably impressed with the learning, skill or eloquence of those before them. The circulation of this work is already assured to the extent of five thousand copies the ensuing year, in different parts of the State. Members of the Bar will please

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M. THOMAS & SONS, AUCTIONEERS.

REAL ESTATE SALE, MARCH 18.

Will include—

Vine, No. 1607—Modern Three-story Brick Residence. Has the modern conveniences. Immediate possession.

Lombard, No. 1113—Modern Three-story Brick Dwelling. Orphans' Court Sale—Estate of Henry B. Bobb, dec'd.

Main, Riverton, Burlington County, N. J.—Very Desirable Cottage Built Residence. Near the Delaware river, and easy of access to the city. Residence of Mr. Robert B. Knight.

Callowhill, Old York road, Crown, between Fourth and Fifth streets—Large and Valuable Three-story Brick Building, formerly known as "Sængerbund Hall."

Mortgage, $7,000.

St. John, No. 623—Two-story Brick Dwelling, Executor's Peremptory Sale—Estate of Nicholas Helverson, dec'd.

Third, (North,) No. 627—Two-story Brick Stable. Same Estate.

Coates, Nos. 225 and 227—Three-story Brick Dwelling and Four-story Brick Building. Same Estate.

5 Shares Consolidation National Bank. Same Estate.

Georgetown road, Mansfield Township, Burlington County, N. J., about 1 mile from Mansfield - Desirable Farm, 88 Acres. Sale by order of Heirs—Estate of Samuel Emlen, dec'd.

Conrad's lane, above Kitchen's Mill Bridge, Germantown, 1 mile from Wissahickon Station on the Norristown Railroad—Valuable Country Seat and Farm, 21 Acres.

Delaware River, Bensalem Township, Bucks County, Pa., at Eddington Station on the Philadelphia and Trenton Railroad—Valuable Country Seat and Farm, 158 Acres.

Walnut, No. 1211—Large and Valuable Three-story Brick Residence, 24 feet front. Has the modern conveniences.

Fox Chase and Huntingdon Turnpike, 1 mile above Fox Chase Village—Desirable Country Place, 5½ Acres, 2 Dwellings, 2 Barns, Mill and Water Power. Immediate possession.

Warren, No. 2343—Modern Two-story Brick Residence with Mansard roof. Immediate possession.

REAL ESTATE SALE, MARCH 25.

Will include—

Spruce, Nos. 1527 and 1529—Very Valuable Hotel Location—2 Four-story Brick Residences, 44 feet front, 240 feet deep. They have the modern conveniences.

Old Front street, Westmoreland street, Ontario street, Rorer street, D and E streets and Hart lane—Squares of Ground, Dwelling and Barn—Trustees' Peremptory Sale—Estate of Leonard Jacoby, dec'd. See plans.

Old Front street and Hart lane—16 Very Desirable Lots Same Estate.

Ellsworth, No. 1120—Two-story Brick Dwelling.

Montgomery avenue, Nos. 910 and 914—2 Valuable Three-story Brick Stores and Dwellings. Immediate possession.

Morris, No. 142—Genteel Three-story Brick Dwelling.

Marriott, Nos. 841, 843, 845 and 847—4 Three-story Brick Dwellings. Trustee's Peremptory Sale—Estate of Wm. F. Hughes, deceased.

Crans' court, in the rear of the above—16 Three-story Brick Dwellings Same Estate.

Dock, No. 235—Valuable Business Location—Lot, formerly occupied by Jones' Hotel—22 feet front. Peremptory Sale

Eleventh and Montgomery avenue, S. W. corner Business Stand—Three-story Brick Tavern and Dwelling, with a Three-story Brick Store and Dwelling adjoining on Eleventh street.

Chatham, No. 516—Genteel Three-story Brick Dwelling. Executors' Sale.—Estate of Nicholas Petry, dec'd.

Rittenhouse, No. 16, Germantown—Three-story Brick Factory. Administrator's Sale—Estate of Leonard Fisher, dec'd.

Indiana and Rohrer, N. W. Corner—Lot Peremptory Sale.

Frankford road, No. 2119 above Dauphin—Three-story Brick Store and Dwelling and Stable. Executors' Peremptory Sale—Estate of Jas. Beatty, dec'd.

Chester County, Pa—Desirable Farm, 52 Acres, 2½ miles from Coatesville, ½ a mile east of Old York Road Station on the Wilmington and Reading Railroad.

REAL ESTATE SALE, APRIL 1.

Will include—

Twenty-first, (South,) No. 316, Corner of Granville—Modern Three-story Brick Residence. Has the modern conveniences. Immediate possession.

Forty-fourth, South of Huron—Modern Three-story Residence. Has the modern conveniences. Immediate possession.

Ridge avenue, No. 2206—Business Stand—Three-story Brick Store Dwelling, extending through to Turner street—2 fronts.

Ridge avenue, adjoining the above—Lot—2 fronts.

West Main street, Coatesville, Chester Co., Pa.—Valuable Business Stand—Three-story Stone Hotel, known as the "Midway Hotel," 2 acres.

Everett, No. 1204—Genteel Three story Brick Dwelling. Orphans' Court Sale—Estate of John O'Neil, dec'd.

REAL ESTATE SALE, APRIL 8.

Will include—

Front, (South,) No. 512—Large and Valuable Three-story Brick Residence—Executors' Sale—Estate of Marietta Whitecar, dec'd.

Whitecar's Row (between Fifth and Sixth and Locust and Spruce), Nos 7 and 8—2 Three story Brick Dwellings Same Estate.

2 Well secured Irredeemable Ground Rents, each $36 and $55 a year—Same Estate.

JAMES A. FREEMAN, & CO. AUCTIONEERS.

No. 422 WALNUT STREET.

REAL ESTATE SALE AT THE EXCHANGE MARCH 26, 1873.

Orphans' Court Sale.—Hancock street. Four Three-story Brick Court Houses, above Thompson street, 17th Ward. Lot 20 x 87½ feet. Estate of Wm. Harris, dec'd.

Orphans' Court Sale.—Hancock street. Valuable Two-story Brick Manufacturing Buildings, above Thompson street. Lot 60 feet on Hancock, and extending through 160 feet to Mascher street, on which it fronts 80 feet. Same Estate.

Orphans' Court Sale.—Thompson street. 6 Desirable Building Lots, corner of Hancock street, each 16 feet front on Thompson street by 70 feet deep. Same Estate.

Orphans' Court Sale.—Thompson street. Three-story Brick Dwelling, with Frame Kitchen attached, 96 feet east of Hancock street. Lot 33 feet front on Thompson street by 70 feet deep. Same Estate.

Orphans' Court Sale.—Thompson street. Three-story Brick Dwelling, 16 feet 2 inches west of Mascher street. Lot 15 feet 3 inches front on Thompson street by 70 feet deep. Same Estate.

Orphans' Court Sale.—Thompson and Mascher streets. Building Lot at the N. W. corner, 16 feet 3 inches on Thompson street by 70 feet on Mascher street. Same Estate.

Plan and Survey of the whole at the Auction Store.

Orphans' Court Sale.—1151 South Eighth street. Three-story Brick Store and Dwelling, below Passyunk road. Lot 15 x 60 feet. $30 ground rent. Estate of Ellen McCloud, a minor.

Orphans' Court Sale.—1153 South Eighth street. 3 Three-story Brick Store and Dwellings, below Passyunk road. Lot 15 x 60 feet. $30 ground rent. Estate of Jane McCloud, a minor.

Executors' Absolute Sale.—560 East York street. Genteel Three-story Brick Dwelling, with back buildings and conveniences. Lot 18 x 67 feet, 19th Ward. Estate of Arthur Rogers, dec'd.

249 North Fifth street.—Desirable Three-story Brick Dwelling, with conveniences. Lot 17½ x 87½ feet, above Race street.

3201 Sansom street.—Neat Brown Stone Residence with Mansard roof and back buildings, has all the modern conveniences. Lot 15 x 75 feet along 32d street. $3000 may remain.

533 Carpenter street.—Two and a half-story Brick Store and Dwelling, 7 rooms. Lot 13 x 48 feet. $500 may remain on mortgage.

2025 Coates street.—Business Stand Modern Three-story Brick Grocery Store and Dwelling, with Back Building and conveniences corner of Corinthian avenue. Lot 20 x 87 feet. $4,000 may remain. Immediate possession.

Sale of Personal Property on the Premises. Including Cows, Carriages, Harness, Household Furniture, &c. On Saturday, March 22d, 1873, at 1 o'clock, P. M., will be sold without reserve, at the residence of E. W. Heston, Fifty-second and Lancaster avenue, Hestonville. The personal property, including 10 Cows, 1 thorough bred Durham Bull two years old, Carriages, Harness, Sleigh, Dearborn Wagon, Trace Chains, Straw and Corn Fodder by the bundle, Farming Implements, Potatoes, &c.

Household Furniture.—Sofas, Chairs, Cottage Furniture, 1 Bed Lounge, Tables, Bedstead, Hat Rack, Cook Stove, lot of fancy Chickens, &c.

Assignees' Peremptory Sale on the Premises.—Large Brick Manufacturing Building, Steam Engine, Boiler, Machinery, Lumber, Horse, Wagon, &c. On Monday Morning, April 7th, at 10 o'clock, will be sold on the Premises Nos. 2017 and 2019 Howard street, 19th Ward, the Large Three-story Brick Cabinet Manufacturing Building. Lot 36 x 103 feet, after the Real Estate will be sold by Catalogue the entire stock of Machinery, Steam Engine, Boiler, Planing, Smoothing, Boring and Joining Machines, Saws, unfinished work, large stock of Well Seasoned Lumber, Horse, Wagon, Harness, &c.

Legal Gazette.

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Supreme Court of Pennsylv'a.

COMMONWEALTH ex rel. McLAIN v. LOCK et al.

1. The act of May 3d, 1871, relating to licenses for the sale of liquors, was a perfect law when it left the halls of the Legislature, and is constitutional.
2. The provision allowing the people to vote either for or against license, was not a delegation of legislative power, but only a submission of the expediency of the measure.

Mandamus.

Judgment for respondents on demurrer.

Appeal of Thomas M. Locke et al., commissioners, and Peter A. B. Widener, treasurer of Philadelphia, from interlocutory decree of the Court of Common Pleas of Philadelphia, granting an injunction.

Opinion of the court by AGNEW, J. Delivered March 17th, 1873.

That a power conferred upon an agent because of his fitness, and the confidence reposed in him, cannot be delegated by him to another, is a general and admitted rule. Legislators stand in this relation to the people whom they represent. Hence it is a cardinal principle of representative government, that the Legislature cannot delegate the power to make laws to any other body or authority. The true question in this case is whether the act of May 3d, 1871 (P. L. p. 522), "to allow the voters of the Twenty-second ward of the city of Philadelphia, to vote on the question of granting license to sell intoxicating liquor," is a delegation of *legislative* power. This must be determined by an analysis of the provisions of the act itself, and depends not upon the numerical order of the sections, but upon the nature of the legislative determination when the act left the hands of the Assembly.

Whatever the Legislature *then* determined to *be* is *law*, for so much was then a fixed and absolute resolve. What did the Legislature then determine absolutely? It enacted in the fifth section, "that any person who *shall* hereafter be convicted of selling or offering for sale, in the Twenty-second ward of the city of Philadelphia, any intoxicating liquors, spirituous, vinous, malt or other intoxicating liquors, without a license, *shall* be sentenced to pay a fine of fifty dollars," etc. The provisions of the first, second and third sections are equally imperative and absolute, and may be summed up in a few words, viz.: That a special election *shall* be held in the Twenty-second ward, at the next annual municipal election, and every third year thereafter; that the constable of the ward *shall* give a certain notice of such election, at which time the question of license or no license *will* be submitted to the voters of this ward; that the election *shall* be held by the same officers, in the same manner, and under the same penalties prescribed by the general election law, and due returns of the election made in a similar manner. The language is imperative, and the law was absolute in all these respects, when the act was approved by the governor.

We come, then, to the fourth section, which provides that whenever, by the returns of election, it shall appear that there is a majority against license, *it shall not be lawful* for any license to issue for the sale of spirituous and other liquors in said ward, at any time thereafter, until at at an election, as above provided, a majority of the voters of said ward shall vote in favor of a license.

What did the Legislature in this section submit to the people, and what did they not submit? This is quite as clear as any part of the act. Each elector is to vote a ticket *for* license or *against* license. He is allowed by the law to say, "I am for the issuing of licenses, or "I am against the issuing of licenses," and thus to express his judgment or opinion.

But this is all he was permitted by the law to do. He declared no consequence, and prescribed no rule resulting from his opinion. Nor does the majority of the votes declare a consequence. The return of a majority is but of a mere numerical preponderance of votes, and expresses only the opinion of the greater number of electors upon the expediency or inexpediency of licenses in this ward. When this is certified by the return, the Legislature, not the voters, declare "it shall (or it shall not) be lawful for any license to issue for the sale of spirituous liquors." Thus it is perfectly manifest, this law was not made, pronounced or ratified by the people; and the majority vote is but an ascertainment of the public sentiment—the expression of a general opinion, which, as a fact, the Legislature have made the contingency on which the law shall operate. When the law came from the halls of legislation, it came a perfect law, mandatory in all its parts, prohibiting in this ward the sale of intoxicating liquors without license; commanding an election to be held every third year, to ascertain the expediency of issuing licenses, and when the fact of expediency or inexpediency shall have been returned, commanding that licenses shall issue or shall not issue. Then what did the vote decide? Clearly not that the act should become a law or not be, for the law already existed. Indeed, it was not delegated to the people to *decide* anything. They simply declared their views or wishes, and when they did so, it was the *fiat* of the law, not their vote, which commanded licenses to be issued or not to be issued.

Now in what respect does a vote upon license or no license in a particular ward or township, differ from a vote whether a new township shall be continued or annulled; or from a vote to determine whether a seat of justice shall be continued where it is, or be removed to another place; or from a vote for or against a subscription by a city to the stock of a railroad company; or from a vote of the people of a district for or against a consolidation of it with a city? Yet in all these instances (to which reference will be made hereafter), it has been decided that a determination of these questions by a vote of the people interested in them, and an enactment of law dependent on the result of this vote, are not a delegation of the law-making power to the people, but a submission only of the expediency of the proposed measure. This is simply common sense, for in none of the instances did the Legislature commit to the people the making of the law, but merely the province of determining a matter important to wise and judicious legislation—something upon which the Legislature deemed it proper its own act should await, and then should operate accordingly. The wit of man cannot draw a well-grounded distinction between the result of a vote upon license in a township, and a result of a vote upon the existence of a township, or the removal of a court house, or a subscription to stock, or the consolidation of an outlying district with a city.

The Legislature in the act of 1871, have given to the people a *law*, not a mere *invitation;* needing no ratification, no popular breath to give it vitality. The law is simply contingent upon the determination of the fact whether licenses are needed, or are desired in this ward. And why shall not the Legislature take the sense of the people? Is it not the right of the Legislature to seek information of the condition of a locality, or of the public sentiment there? The constitution grants the power to legislate, but it does not confer knowledge. The very trust implies that the power should be acted wisely and judiciously. Are not public sentiment and local circumstances just subjects of inquiry? A judicious exercise of power in one place may not be so in another. Public sentiment or local condition may make the law unwise, inapt, or inoperative in some places, and otherwise elsewhere. Instead of being contrary to, it is consistent with the genius of our free institutions to take the public sense in many instances, that the legislators may faithfully represent the people, and promote their welfare. So long, therefore, as the Legislature calls to its aid the means of ascertaining the utility or expediency of a measure, and does not delegate the power to make the law itself, it is acting within the sphere of its just powers.

It is urged that Parker v. Com'lth, 6 Barr, 507, decided the question before us. That case was overruled soon after it was decided, not in express terms, it is true, but its foundation was undermined when it was held that laws could constitutionally be made dependent on a popular vote for their operation. Besides, the reasoning in Parker v. Com'lth is fallacious in assuming the fact that there was a delegation of legislative power. There is much in the opinion well and ably said. The first eight pages may be passed over, and we are brought then to the marrow of the argument, which is contained in the following sentences: After a summary of the act of 1846, Justice Bell proceeds to say that as a *statute* it "depends for its *validity* and *binding efficacy*, within the several counties named in it, upon the popular vote of designated districts." "Possessing no *innate* force, it remains a *dead letter until breathed upon by the people*, and called into activity by an exertion of their voice in their primary assemblies." "If a majority within the particular district should vote negatively upon the question yearly to be submitted to the people, *the act as a statute has no existence.*" If a majority of the votes be cast in the affirmative, *then the act is to take effect as a statute.*"

"It operates *not propria vigore*, but, if at all, only by virtue of *a mandate expressed subsequently* to its enactment, in pursuance of an *invitation* given by the legislative bodies." "*As it left the halls* of legislation it was *imperfect and unfinished;* for it lacked the qualities of command and prohibition absolutely essential to every law." I have italicised the portions which show the thought of the opinion and evince the assumption on which the argument rests. If we admit the fact, that the law now before us were of this character, an imperfect and unfinished act, a mere invitation to the people to issue their subsequent mandate, and to breathe into it all its vitality, and thus give to it all its validity and binding efficacy as a law, we might have to concede the conclusion that there was a delegation to the people of the power to legislate. But it is beyond cavil that when the act of 1871 left the halls of legislation it was a mandatory law in all its parts, and the only thing committed to the people was to vote for or against the issuing of licenses, and thereby supply the evidence of expediency. It acts *propria vigore*, and is called into existence by no subsequent popular mandate. By its command the sale of liquor is forbidden, the popular vote is taken, and its effect declared. This popular vote is but the law's appointed means of determining a result, which the law enacts, in an alternative form, shall be the contingency of its operation. The law did not spring

from the vote, but the vote sprang from the law, and the law alone declared the consequence to flow from the vote. The assumption that the act is not a law till enacted by the people is the foundation of the argument, and with its fall the superstructure vanishes. The character of this law is precisely that of hundreds of others, which the legislative will makes dependent on some future act or fact for its operation. To assert that a law is less than a law because it is made to depend on a future event or act, is to rob the Legislature of the power to act wisely for the public welfare, whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to be fully known. Such an assertion attacks even the moral government of the Creator. God breathes into his creature the power of judgment and discretion, and then declares to him in His law: "As you determine your act, so shall be the consequences." The law is active and operates only when man determines. Does man or God make the law?

What is more common than to appoint commissioners under a law to determine things upon the decision of which the act is to operate in one way or another? The courts exercise powers dependent on their own discretion. Take the case of granting a license to keep an inn and to sell liquor. The judge determines whether the license is necessary, and if not necessary the law says to the applicant, "No license." The law takes effect just as the judge determines, yet who says it is the court that legislates? What is the difference, in essence, whether the necessity for places for the sale of liquors be determined by the people or the courts? Each in its place is but an instrumentality of the law. The judge speaks, the people speak, but each speaks by the authority of law, and the law commands the consequence. The error of the argument is in attributing the consequence to the voice that speaks, instead of to the law, which makes the people its own mouth-piece, and has beforehand proclaimed the consequence of the utterance. The people, by virtue of the law, declare the expediency of licenses in the ward, and the law itself has already enacted what shall follow this declaration. Though contingent in form, the law is mandatory throughout in all it requires and all it determines. That is not less an act of sovereign power which says to the subject do this, and that shall follow; do that, and another thing shall follow. To the subject a discretion of acting is given, and as he decides, the law pronounces the consequence. It is the sovereign which gives the law, not the subject.

Then, the true distinction, I conceive, is this: The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation shall follow, which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation. Hence the necessity of the municipal divisions of the State into counties, townships, cities, wards, boroughs and districts, to which is committed the power of determining many matters necessary, or merely useful, to the local welfare. Can any one distinguish between committing the determining power to the *authorities* of the districts, and to the *people* of the district? If the power to determine the expediency or necessity of granting licenses to sell liquors in a municipal division can be committed to a commission, a council, or a court, which no one can dispute, why cannot the people themselves be authorized to determine the same thing? If a determining power cannot be delegated, then there can be no power delegated to city councils, commissions, and the like, to pass ordinances, by-laws and resolutions in the nature of laws, binding and affecting both the persons and the property of the citizens. If a determining power cannot be conferred by law, there can be no law that is not absolute, unconditional and peremptory; and nothing which is unknown, uncertain and contingent can be the subject of law.

If, in any case, a question could arise upon a delegated power, it would be in that which is delegated to the councils of Philadelphia to make *laws*, so-called. Look at the language of the sixteenth section of the act of March 11th, 1789: "The mayor, &c., shall have full power and authority to *make*, ordain, constitute and establish such and so many *laws* or ordinances," &c. See, also, the fourth section of the consolidation act of July 2d, 1854: "That the *legislative* powers of the said city shall be vested in two bodies, to be called the select and common councils." In pursuance of this power rights of person and property are regulated, fines and forfeitures inflicted, and discretionary powers are vested in committees, departments and officers. Can there be a clearer instance of the exercise of powers in their nature legislative, by an act of delegation? Yet who believes that this is unlawful, or that it is really a delegation of the law-making power in the sense of a delegation of it from the halls of legislation to the council chambers? On the contrary, the charter of the city is itself the law which breathes into these *quasi* legislative acts of councils all their life and power, and which, for useful and necessary local purposes, delegated to councils, not the power of making laws, but the discretion and determining power necessary to regulate the affairs of a great city, that, owing to distance, and want of knowledge and of time, the Legislature cannot determine for itself, but which by its *law* it directs to be done by others. Just at this point the opinion in Parker v. Commonwealth evidently labors when it touches this instance of delegated power, and attributes the efficacy of corporation laws to the consent of the citizens, and affirms that the relation between the municipality and the members is founded in contract. But it is too clear for argument that ordinances derive their binding force from the law which authorizes them, and not from compact. The power to pass them is delegated, and the true question is what is the nature of the delegated power? As already stated, it is merely a determining power, as to matters committed to the discretion of the councils by law, not a law-making power *per se*.

Parker v. Commonwealth was decided by three judges to two, with a strong dissent proceeding from the latter. In less than a year afterward a question arose upon a law authorizing the people to determine by a vote whether a new township should be continued or annulled. Commonwealth v. Judges Q. S., 8 Barr, 391. The only attempt to distinguish the case from Parker v. Commonwealth, was by saying in the latter there was an exercise of sovereignty—of the power of enacting a law by ballot; while in the former there was an exercise of a subordinate function only, for the convenience of public business. But we have already shown that the distinction rests on no difference, and the assumption in Parker v. Commonwealth of the delegation of a legislative power being unfounded, the argument fails, and the distinction in the Commonwealth v. The Judges falls with it. The Commonwealth v. Painter, 10 Barr, 214, occurred a year later. The law authorized the electors of Delaware county to determine by ballot whether the seat of justice should be continued at Chester, or be removed to another place, and, in the event of a vote for removal, that a commission should select the site and a court house be erected. The law was held to be constitutional, the court not attempting to distinguish it from Parker v. Commonwealth, excepting to say that the latter does not reach or cover the case in hand. The law, however, was examined in view of Parker v. Commonwealth, and the opinion was delivered by Coulter, J., who had written an able dissenting opinion in that case. Four years later came Moers v. City of Reading, 9 Harris, 188.

The law provided for taking the sense of the people upon a subscription to the stock of the Lebanon Valley Railroad Company, the subscription being authorized or not, as the people should declare by their vote. The law was held to be constitutional, C. J. Black remarking, "It is argued that it is not an exertion of legislative power by the Assembly, but a mere delegation of it to the people of Reading. We cannot see it in that light. Half the statutes on our books are in the alternative, depending on the discretion of some person or persons, to whom is confided the duty of determining whether the proper occasion exists for executing them. *But it cannot be said the exercise of such a discretion is the making of the law.*" This is the precise point which we have endeavored to show was overlooked in Parker v. Commonwealth, and the contrary assumed without proof. It is to be noticed, also, that Moers v. City of Reading, was decided by an entirely new bench of judges. These cases have been followed very recently in Smith v. McCarthy, 6 P. F. Smith, 359. A law for consolidating certain outlying districts with the city of Pittsburg was made to depend upon the vote of the people. It was held to be constitutional, Thompson, Chief Justice, remarking: "We do not regard it within the principle which forbids the delegation of legislative power." There was also the common school system of the State, which, by the act of 13th June, 1835, § 13, was made dependent upon the vote of the people of every district, by election every third year. In many parts of the State, the hostility to the law was intensely bitter, and the school law was not adopted in some districts for more than twenty years, yet it has never been declared unconstitutional.

I have not thought it useful or necessary to notice the supposed distinction between acts of the Legislature as *laws* and as *grants* of sovereign prerogative, for the plain reason, that having by an analysis of the act itself, and by abundant precedents, shown that it is a *law* in its nature and mandatory character, the distinction has no place or application. If it were useful, it might not be difficult to show, that in our form of government, all grants of royal prerogative or of franchises are the product of the exercise of the legislative power only, and by the terms of the constitution, in the first section of the first article, must pass by the grant of the legislative power therein, or not at all. The Legislature cannot delegate the power of passing laws relating to these subjects, more than they can delegate the power to legislate on other subjects.

Nor have I thought it necessary to refer to the decisions in other States, for the plain reason, also, that our own decisions, since Parker v. Commonwealth, rule the case; while that case was the forerunner of the decisions in all the other States (except Delaware), and with its fall, they have lost their chief prop and support.

Decrees affirmed, and special injunction ordered to remain.

REED, C. J., and SHARSWOOD, J. dissented.

Dissenting opinion delivered by READ, C. J.

Nearly sixteen years ago, this court held in Parker v. the Commonwealth, 6 Barr, 507, the act of 7th April, 1846, entitled "An act authorizing the citizens of certain counties to decide by ballot, whether the sale of vinous, and spirituous liquors, shall be continued in said counties," to be unconstitutional and void. The opinion delivered by Judge Bell was a very able one, and was concurred in by Chief Justice Gibson and Judge Rogers. "Mindful," says Judge Bell, "of the ancient institutions of the country, and following the example set by the Federal Constitution, the people of Pennsylvania, when ordaining and establishing a fundamental law for the government of the commonwealth, decreed that the legislative power *shall* be vested in a General Assembly, to consist of a Senate and House of Representatives, to be elected at stated periods by the citizens of the respective counties. They thus solemnly and emphatically divested themselves of all right directly to make or declare the law, or to interfere with the ordinary legislation of the State, otherwise than in the manner pointed out in art. ix., section 20, which declares, 'the citizens have a right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with the power of government, for redress of grievances or other purposes, by petition, address, or remonstrance.' This provision, which found a place in the constitution of 1790, is reiterated and re-established by the amended constitution of 1838, adopted by a vote of the whole people, thus, conclusively showing that the experience of nearly half a century had worked no change in the senti-

ment which lodged the legislative authority of the commonwealth in *selected and responsible bodies of men*, liable to the *animadversions* of their constituents, as the only safe depository of this portion of the sovereign power. Desiring to interfere no further with the regulated action of these bodies, than in the mode thus expressly reserved, by the right of selecting the delegates composing them, and through the influence which inevitably flows from enlightened public opinion, deliberately and temperately expressed, the people sought to guard against an abuse of the high power they had delegated, by providing a specific mode of election of members of the Senate and House of Representatives; by prescribing the qualifications; by stipulating the separate and independent action of the two chambers; by an appeal to the conscience in the oath or affirmation exacted from each member to support the constitution of the commonwealth, and to perform the duties of his office with fidelity; and by conferring on the chief executive magistrate the prerogative of the *veto*, designed for the correction of hasty and inconsiderate legislation. The system so established is a system of checks and balances, seeking safety in the declared *responsibility* of the individual agent and the guardian watchfulness of the co-ordinate branches."

This legislative power thus exclusively vested in the General Assembly, the court expressly held could not be delegated by the Legislature, "not even to the people themselves; for they have forbidden it by the solemn expression of their will, that the legislative power *shall* be vested in the General Assembly, much less can it be relinquished to a *portion* of the people, who cannot even claim to be the exclusive depositories of that part of the sovereignty retained by the whole community."

In 5 Watts & Sergeant, 283, Chief Justice Gibson, in a few terse words expressed the true principle. "Under a well balanced constitution, the Legislature can no more delegate its proper function than can the judiciary."

The Legislature of Delaware had on the 19th of February, 1847, passed an act, "authorizing the people to decide by ballot whether the license to retail intoxicating liquors shall be permitted among them" (framed upon the plan of our act of 7th April, 1846), and under an election held under it, in New Castle county, there was a majority against license. The question of its constitutionality came up before the Court of Appeals, in June term, 1847, and is reported in Rice v. Foster, 4 Harrington's Reports, 479. The court, after hearing a most elaborate and exhaustive argument by very distinguished counsel, were *unanimously* of opinion the law was unconstitutional, as it was a delegation of the law-making power to the people.

It is a striking fact, that two separate courts of the last resort, in two adjoining States, whose constitutions both provide, that the legislative power of the State "shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives," in the same year should have decided on the same grounds the two similar laws to be unconstitutional and void. Two such decisions upon a constitutional question affecting the personal rights of the citizens, and their right to follow certain trades and business, should have an overwhelming authority in the case before us. On the 3d May, 1871, an act was passed entitled "An act to allow the voters of the Twenty-second Ward of the city of Philadelphia to vote on the question of granting licenses to sell intoxicating liquors."

The first three sections simply provide the machinery for a vote at the next annual municipal election, and at the annual municipal election, every third year thereafter by the voters of the ward, on the question of license or no license, by written or printed ballots.

The fourth section enacts, "that whenever by the returns of the election in the Twenty-second Ward, it shall appear that there is a *majority against* license, it *shall not be lawful* for any license to issue for the sale of spirituous, vinous, malt, or other intoxicating liquors in said ward, at any time thereafter, until at an election as above provided, a majority of the voters of said ward shall vote in favor of a license."

By whom is this law enacted? Clearly not by the Legislature, but by the voters, without discussion, and in secret, no man knowing how his next door neighbor votes, nor his reason for casting his ballot as he has chosen to do. The question, therefore, of license or no license, is decided by a body whom the constitution has stripped of all legislative power or authority. This is a legislative question, purely, and must be decided by the legislative body itself, openly and publicly, and the yeas and nays may be called at the desire of any two members, and be entered on the journals. The question, shall license be issued in the Twenty-second Ward, could only be decided by the legislative body, who *never* would have answered it affirmatively. This act is therefore unconstitutional and void, and is covered by the two decisions of 1847.

The act of 1846 embraced only vinous and spirituous liquors; the act of 1871 extends it to malt or other intoxicating liquors, including lager beer, cider, and every possible liquor which may produce intoxication. It is a *prohibitory* law, and is intended as an entering wedge to the stringent prohibitory laws of Vermont and Massachusetts. But the 5th section, following up the prohibitory action under the 4th section, makes all sales of intoxicating liquors in the Twenty-second Ward criminal offences, punishable with a fine of fifty dollars, and confinement in the house of correction or county jail for the period of six months for the first offence, and for the second and each subsequent offence, a fine of one hundred dollars, and confinement in the house of correction or county jail for the period of one year. Thus the unconstitutional surrender of legislative power to a small body of men, in a contracted locality, enables them to add new crimes to our criminal code, and to inflict on their fellow citizens punishment of unwonted and uncalled for severity.

If this be a constitutional enactment, why may not the Legislature devolve this power upon a minority of the voters, say one-fourth, or make it depend upon the ballot of a single voter? If they can give the power to a majority they certainly can to a minority.

The cases cited in opposition to Parker v. Commonwealth, bear no resemblance to that case, or to the one before us. The case of the common school law, was considered in Parker v. The Commonwealth and distinguished, and the same decision was arrived at as to a similar school law in Delaware by the Court of Appeals in Rice against Foster. The other cases as to the removal of county seats, the choice of sites for public buildings, or the subscriptions to railroad stock, are mere acts of executive administration, not laws. The present case is one of morals, of a strong prohibitory character, proscribing certain trades and business heretofore lawful, creating new crimes, inflicting severe punishments, with a power of repeal, all dependent upon the votes of the citizens of the ward, whom the Legislature has vested with the full law-making power. The object is plain, to force total abstinence upon a population of twenty-three thousand souls. The Legislature never would have passed such an act by a direct vote upon a call of yeas and nays.

In 1870, the population of the city was 674,020, which is rapidly increasing, and it is clear that a prohibitory law proscribing every fluid but the waters of the Schuylkill and the Delaware cannot be enforced, and it is only necessary to look at the history of such legislation in Massachusetts and its capital, the city of Boston.

The first movement for an entirely prohibitory liquor law, was made in the State of Massachusetts, in the summer of 1847, and a petition for that purpose, numerously signed, was presented to the Legislature at its next session, in the wint r of 1848. It was referred to a special committee, who reported a bill which, though warmly supported, failed to become a law. In 1851, the Legislature of Maine passed their prohibitory law, adopting the measure proposed in Massachusetts, with the addition of what is called the destruction clause; Massachusetts passed prohibitory statutes in 1852, 1855, and 1858, the two last of which were the foundation of chapter 86, of the general statutes of that State of 1860, "of the manufacture, sale &c., of intoxicating liquors."

By this chapter, 86, a commissioner is appointed annually by the governor, with the advice and consent of the council, to purchase and sell spirituous and intoxicating liquors of a pure quality, to the several city and town agents appointed under the provisions of the chapter, and to regularly appointed agents in cities and towns of other of the New England States, *and to no other person*. He is to establish a place of business in Boston, and all liquors kept for sale by him shall be analyzed by one of the State assayers, and his sales shall be made for cash, and at a price not exceeding an advance of five per cent. upon the actual cost, together with the cost of such analysis.

The mayor and aldermen, or selectmen of every city and town, are to appoint on the first Monday of May, annually, for one year, one or more suitable persons, as agents of such places, to purchase and sell spirituous or intoxicating liquors, to be used in the arts, or for medicinal, chemical and mechanical purposes, *and no other*, and every agent must purchase of the commissioner.

Druggists may sell for medicinal purposes only, pure alcohol to other druggists, apothecaries and physicians, known to be such. "A chemist, artist, or manufacturer, in whose art or trade they may be necessary, may keep at his place of business, spirituous liquors for use, in such art or trade, *but not for sale;* and any person may manufacture or sell cider for other purposes than that of a beverage, and unadulterated wine for sacramental purposes."

"Ale, porter, strong beer, lager beer, cider, and all wines, shall be considered intoxicating liquors, within the meaning of this chapter, as well as distilled spirits, but this enumeration shall not prevent any other pure or mixed liquors from being regarded as intoxicating."

The county commissioners, and the mayor and aldermen of the city of Boston may, on the first Monday of May, annually, authorize such persons as apply to them in writing, to manufacture spirituous or intoxicating liquors, and to sell the same in quantities not less than thirty gallons, to be exported, or to be used in the arts or for mechanical purposes in the State, such authority to continue for one year from the date thereof.

The 30th section provides penalties for all unlawful sales of spirituous or intoxicating liquors, and the 31st section provides, "That whoever is a manufacturer of spirituous or intoxicating liquor for sale, or a common seller in violation of the provisions of this chapter, shall, for one violation, pay fifty dollars and be imprisoned in the house of correction not less than three nor more than six months; for a second violation, shall pay the sum of two hundred dollars and be imprisoned six months in the house of correction; and for any subsequent violation, shall pay the sum of two hundred dollars and be imprisoned twelve months in the house of correction."

Provision is also made for searching for and seizing liquors intended for sale, forfeiting the same, and selling what is suitable for medicinal, chemical or mechanical purposes, and destroying what is unfit.

By the 61st section, "all payments or compensations for spirituous or intoxicating liquors sold in violation of law, whether in money, labor, or personal property, shall be held to have been received without consideration, and against law, equity and good conscience."

By section 60 "all intoxicating liquors kept for sale, and the implements and vessels actually used in selling and keeping the same, contrary to the provisions of this chapter, are declared to be common nuisances."

Under this statute, and subsequent statutes intended to prevent the sale of all intoxicating liquors as a beverage, and limiting their sale to be used in the arts or for mechanical and chemical purposes, or for medicinal purposes, a continued scene of litigation has been kept up during 41 volumes of the Reports of the Supreme Judicial Court of Massachusetts, beginning with 11 Cushing. Every volume has its full share, and in one volume there are 36 cases growing out of this attempt,

(*Continued on page* 95.)

LEGAL GAZETTE.

Friday, March 21, 1873.

JOHN H. CAMPBELL,
EDITOR.
THEODORE F. JENKINS,
ASSOCIATE EDITOR.

THE DISTRICT COURT.

The following important act of Assembly has just been passed and approved by the governer.

Be it enacted by, &c. That the act of April fifth, one thousand eight hundred and sixty-seven, entitled "An act regulating equity jurisdiction in Philadelphia county," is hereby repealed, and the equity jurisdiction of the District Court for the City and County of Philadelphia, is hereby restored as before the passage of said act.

TAX ON RAILROAD DIVIDENDS.

We publish to-day the decision of the United States Supreme Court, delivered last week, in the cases of Barnes et al. v. The Railroad Companies. These cases have excited great attention, and the decision holding as it does, that the tax upon the dividends declared by the companies in December of 1869, but not payable until January of the following year (in two of the cases the dividends were not only payable, but were declared also in 1870), was a tax upon the companies themselves, and not upon the individual stockholders, and that they were taxable as income of 1869, has occasioned great surprise. The general impression seemed to be that the reverse ruling of Justice Strong, in the Circuit Court below, would be sustained. A strong dissenting opinion by that judge, concurred in by Chief Justice Chase, and Justices Davis and Field, was also delivered with the opinion of the majority of the court. Owing to the pressure upon our columns by reason of the "local option" decision, which we also publish to-day, we have been compelled reluctantly to crowd out this dissenting opinion. Next week we will endeavor to present it in full to our readers, with more extended comment than we have space now to afford it.

We have been compelled to omit this week several invaluable decisions of the Supreme Court of the United States, of the Supreme Court of Pennsylvania and of several of the Pennsylvania courts of Common Pleas. We would inform our correspondents and others, who have kindly forwarded us copies of the decisions referred to, that we have these decisions all in type ready for publication in our next and subsequent issues.

It seems that the wills of celebrated men will somehow get into the courts. Recently in this State we have had a law suit over Thaddeus Stevens' will; in New York, they have just concluded the fight about Horace Greeley's, and now the Supreme court of Illinois has rendered a decision in the matter of the will of Stephen A. Douglas. Verily, if a man leaves a will, he cannot rest in peace.

A bill has been reported in the Illinois House of Representatives, providing that "If any officer, State, county, city, town or village shall be intoxicated in the discharge of his official duties, he shall for the first offence, be fined ten dollars; for the second, twenty dollars; and for the third be removed from office."

On Saturday, March, 15th, 1873, Joel B. McCamant, Esq., of Schuylkill county, was, upon motion of James Ellis, Esq., of the same county, admitted to practice in the Supreme Court of Pennsylvania. Mr. McCamant is at present a member of the Constitutional Convention, and is widely and favorably known in the region of the State from which he hails.

EASTERN DISTRICT.

Supreme Court of Pennsylv'a.

FAUST v. HAAS.

A purchaser at a sheriff's sale, who by trick or artifice deters a party in interest from bidding, will be held a trustee *ex maleficio* for such party.

Error to the Court of Common Pleas of Schuylkill county.

Opinion by SHARSWOOD, J. Delivered March 10th, 1873.

It is perfectly well settled, that in the administration of equity in the courts of this State, through common law forms, the judge sits as a chancellor, assisted by the jury, who are to determine the credibility of the witnesses, and the effect of conflicting testimony. But the conscience of the judge as a chancellor must be satisfied of the sufficiency of the evidence, if believed. If it be too vague, uncertain or doubtful, to establish the equity set up, it is his duty to withdraw it from the jury, either by a non-suit or a binding instruction in his charge, as the case may require. McBarrar v. Glass, 6 Casey, 133; Todd v. Campbell, 8 Ibid. 252; Bennett v. Fulmer, 13 Wright, 162; Miller v. Hartle, 3 P. F. Smith, 111; Church v. Ruland, 14 Ibid. 441.

But applying this principle to the evidence in this case, we think that there was quite enough to satisfy the conscience of a chancellor, that Haas should be decreed to be a trustee for Faust. It is an undisputed fact, that the property was bid off at sheriff's sale by Mr. Graeff, as attorney for Faust. The relation in which he stood to Faust, was a confidential one, and he acknowledged the trust. To whom the deed was to be made, was not then finally arranged; but it was afterwards distinctly agreed, Haas being a party, that if the mortgage to the Tamaqua Saving Fund Association could remain, the balance of the purchase money should be raised and paid by Haas, under an agreement that Faust was to have three and six months to pay it back, and was also to reimburse Haas any assessments he might subsequently have to pay on the mortgage. Mr. Graeff testified: "I stated to the parties at the time, that this arrangement ought to be in writing, but I had no time that day to write it; but that I would have the deed acknowledged on Monday, and bring the deed home with me, and draw up the writing, and they were to come on the next Monday, and I was to deliver the deed to Haas." When they came to settle at the sheriff's office, it appeared that there was interest due on a dower right, which was prior to the mortgage, and the attorney of the savings fund insisted that this interest should be paid before he would agree that the mortgage should remain. In consequence of this difficulty, the arrangement was not carried out. But anticipating no such difficulty, Mr. Graeff had directed that the sheriff's deed should be made to Haas, and acknowledged, which had accordingly been done. Haas then raised the full amount of the bid, paid it to the sheriff, and received from him the deed. This was done without the knowledge and consent of either Graeff or Faust. He then claimed, and now claims to hold the property as his own, absolutely. That this was a breach of good faith on the part of Haas, cannot be doubted. It was not merely the violation of a parol agreement. He obtained the legal title by an artifice, by getting possession of the deed without the consent of those who alone had a right to direct to whom it should be delivered. Mr. Graeff, the actual purchaser at the sheriff's sale, and Faust, for whom he had bought. Haas, indeed, by a previous agreement with Faust, by which Faust was to secure him the payment of a judgment which he held on the premises, by an assignment of all his (Faust's) interest in his father's estate after his mother's death, had promised that he would not be a bidder at the sale. "That," says Mr. Graeff, "was clearly the understanding."

Under these circumstances, we are of opinion that Haas was a trustee for Faust, *ex maleficio*, not within the prohibition of the statute of frauds, which having been intended to prevent fraud, is not itself to be made the instrument of one. It is certainly true, that if a man buys at sheriff's sale, or otherwise, and pays his own money for the purchase, no verbal agreement, before or afterwards, to hold for another, will make him a trustee. Fox v. Heffner, 1 W. & S. 372; Jackman v. Ringland, 4 Ibid. 149; Barnett v. Dougherty, 8 Casey, 371. But where artifice and trick are resorted to in order to procure the property at an undervalue, as per example, by deterring bidders at a sheriff's sale, or in any other way, the rule is different. It will be sufficient to refer to Gilbert v. Hoffman, 2 Watts, 66; McKennan v. Pry, 6 Ibid. 137; Brown v. Dysinger, 1 Rawle, 408; Haines v. O'Connor, 10 Watts, 313; Bugle v. Wentz, 5 P. F. Smith, 369; Zingenfelter v. Ritchey, 8 Ibid. 485; Seichrist's Appeal, 16 Ibid. 237. "Although," says Mr. Justice Agnew, in the case last cited, "no one can be compelled to part with his own title by force of a mere verbal bargain, yet when he procures a title from another, which he could not have obtained except by a confidence reposed in him, the case is different. Then if he abuse the confidence so reposed, he is converted into a trustee *ex maleficio*. The statute which was intended to prevent frauds turns against him as the perpetrator of a fraud." We think, therefore, the learned judge below erred in directing the jury that the plaintiff was entitled to recover. He should have submitted the case to them upon the whole evidence, with instructions that if they believed that Haas obtained possession of the sheriff's deed *mala fide*, their verdict should be for the defendant.

In the view we have taken of the case, it follows also, that the evidence offered by the defendant, and rejected, which forms the subjects of the first and second assignments of error, was relevant, and should have been admitted, and that which was offered by the plaintiff, and received, which is complained of in the third assignment, was irrelevant, and should have been rejected.

Judgment reversed, and a *venire facias de novo* awarded.

HEIST v. HART.

1. **In the case of negotiable paper, a contemporaneous parol agreement is inadmissible to vary the effect of the written contract.**
2. **Though a note given to effect a fraud, is as between the parties a nullity, yet it is good in the hands of a *bona fide* holder for a valuable consideration.**

Error to the Court of Common Pleas of Bucks county.

Opinion by SHARSWOOD, J. Delivered March 10th, 1873.

The question raised by the first assignment of error is, whether there was sufficient evidence to submit to the jury that the plaintiff below, the endorsee of the note in suit, before he took it, had notice of the alleged fraud in the sale of the patent right which formed its consideration. It is not pretended that distinct notice of the fraud was given to him, or even that the Heists gave him notice generally that they had been defrauded. Unaccompanied with any allegation that there was a representation or warranty at the time of the contract, that the machine was to produce certain results, the mere statement that it did not work right was no defence to the note. Nor was the fact that Hevner had agreed not to negotiate the note, and to renew it until it could be paid out of the profits, any more available even as between the parties. Such a parole agreement, though made at the time, is inadmissible in evidence, to vary the effect of the written contract in the case of negotiable papers. Hill v. Gaw, 4 Barr, 493; Mason v. Graff, 11 Casey, 498. Hart understood this, for he told Heist that if such was the agreement, the note should not have been made negotiable on its face, and Heist assented to it. The information communicated by the Heists to Hart, so far from notifying him of any defence, was calculated to mislead him to believe that there really was none. A mere general notice that there was some defence, and that the note would not be paid, might be enough to put a party on inquiry. Hart may have been bound to ask the maker what was his defence. When he does so, however, and is only told what is clearly no defence, there is nothing which ought to impeach his *bona fides*.

The first assignment of error is not sustained.

Nor is there any ground for the second error assigned. Conceding that the production of the assignment of the patent right for Pennsylvania, by Harris & Olion to Hevner, for the consideration of $40,000, and the representation by Hevner that he had paid that sum, when, in fact, the true consideration was only four or five thousand dollars, and that the larger amount had been inserted by Hevner's request, to enable him to impose upon the purchasers of county rights, was a fraud which between the parties, avoided the note, and conceding that the price of this was sufficient to entitle the makers after notice, to require the holder to prove that he had given value; yet, the evidence of Hart, which was entirely uncontradicted, was that he had paid $1,800 for it. The charge of the learned judge below, so far as regarded this point, that if the jury believed the evidence, they should find for the plaintiff, was, therefore entirely correct.

Judgment affirmed.

Orphans' Court of Philad'a.

ESTATE OF ALBERT SOLEY, a minor.

The court will not make any order in favor of a person with whom a ward is residing against the consent of his guardian.

Opinion of the court by PAXSON, J.

In this case the maternal grandfather of the minor asks for an order upon the guardians to pay him $4 per week for the board and clothing of said minor, from February 21st, 1872, to September 11th, 1872.

The guardians are entitled under a previous order of the court, to expend the weekly sum aforesaid for this purpose. The difficulty in this case is, that during the period referred to, the said minor has been residing with his said grandfather in Bucks county, not only without the consent, but against the consent of his guardians. While this state of things exists we will not make any order in favor of the grandfather. To do so would, perhaps, encourage relatives in interfering with the delicate relations of guardian and ward. Let the minor be promptly returned in good faith to his guardians. When that is done, the grandfather will be in a position to ask the aid of this court in enforcing any just claim.

For the present we decline to make an order.

Court of Quarter Sessions.

CITY v. WILLIAMSON.

Property in the possession of a married woman is presumed to be the property of her husband. The onus is upon her to show that it is her separate estate, and how and from whom she acquired it.

Opinion by PAXSON, J. Delivered March 15th, 1873.

This case was heard before my brother Ludlow a few weeks since, and resulted in an order upon the defendant to pay $6 per week for the support of his wife, and that he enter security in the usual sum to comply with said order. Instead of doing so, the defendant fled our jurisdiction, and is now in contempt. The Guardians of the Poor thereupon issued a warrant of seizure under the act of Assembly, under which the house and furniture of the defendant were levied upon. On Saturday last a motion was made on behalf of the defendant to quash the warrant. This motion was overruled by the court, upon the ground that the defendant was in contempt, and not entitled to be heard. The motion to quash was thereupon renewed on behalf of Mary McNicholls, who claims to be garnishee. This motion was also overruled. An affidavit was then filed by Mary Williamson, alleging that the property seized under the warrant belonged to her, and not to the defendant. Mary McNicholls and Mary Williamson are one and the same person. This woman formerly lived with the defendant and his wife in Ireland, and was the cause of their domestic troubles. Subsequently she came to this country. The faithless husband and father deserted his wife and children, followed Mary McNicholls to this city, and married her. The whole of these proceedings were reviewed by my brother Ludlow in his very able opinion, which it is proper to say was fully concurred in by all the members of the court. We unite our condemnation to his of the conduct of this defendant. The affidavit filed does not aver the marriage of the affiant with defendant. The learned counsel, however, claimed upon the argument that she was his wife. For the purposes of his case we will hold her to all the consequences of the relation which is claimed for her. One of those consequences is that the property in her possession is presumed to be the property of her husband. The onus is upon her to show that it is her separate estate, and how and from whom she acquired it. This she has not done. The affidavit is a mere assertion that the property is her separate estate, but it contains nothing to negative the presumption of law that the money to purchase it was supplied by her husband. This renders it unnecessary for us to decide what would be the proper practice where a disputed question of fact is raised as the ownership of property seized under a warrant of this description. The warrant of seizure is confirmed.

[Head notes of decisions reported in 16th Wallace, soon to appear.]

Supreme Court, United States.

LEGAL TENDER.

1. A cargo was shipped from Canada to New York, October, 7th, 1864, when gold was 101 per cent. above legal tender notes of the United States. The cargo was wrecked soon after, on the Hudson. On libel in the admiralty of New York, and on appeal from the District Court, the Circuit Court, on the 26th of March, 1870, when gold was only 12 per cent. above notes, gave the libellants a decree for the value in gold of the cargo on the day and at the place of shipment, converting that value, at the same time, into legal tender notes, at the rate at which such notes stood as compared with gold on the day of shipment, that is to say, when gold was 101 per cent. above legal tender notes, or in other words, when it required $201 legal tender notes to buy $100 of gold. On appeal to this court (the difference between gold and notes having now sunk to about 9 per cent.), *Held*, that this decree was right. The Vaughan and Telegraph, 258.

2. A decree ordering payment in coin of a debt contracted before the passage of the legal tender acts reversed, on the authority of the legal tender cases (12 Wallace, 475). Bigler v. Waller, 298.

LIEN IN ADMIRALTY.

1. While courts of admiralty are not governed by any statute of limitations, they adopt the principle that laches or delay in the judicial enforcement of maritime liens, will, under proper circumstances, constitute a valid defence. The Key City, 653.

2. No arbitrary or fixed period of time has been, or will be established, as an inflexible rule, but the delay which will defeat such a suit must, in every case depend on the peculiar equitable circumstances of that case. Ib.

3. When an admiralty lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defence will be held valid under shorter time and a more rigid scrutiny of the delay than when the claimant is the party who owned the property when the lien accrued. Ib.

Supreme Court, United States.

BARNES, KERNS, AND MAGILTON v. PHILADELPHIA AND READING R. R. CO.

SAME v. LEHIGH VALLEY R. R. CO.

SAME v. LAKE SUPERIOR AND MISSISSIPPI R. R. CO.

SAME v. PHILADELPHIA AND READING R. R. CO.

The defendant, a railroad company, declared a dividend in money upon December 22d, 1869, as part of their earnings, profits, income and gains made, and which accrued between the 1st of July of that year and the 1st of December of the same year, but the dividend was not made payable to stockholders until the 17th of January following. Due return of said dividend being made, the U. S. Revenue authorities assessed under authority of section 122, act of July 13th, 1866, a tax of five per centum on said dividend, as income for 1869, which the company refused to pay. The collector thereupon distrained upon the goods of the company, who denying the legality of the tax, brought an action of trespass against the collector in the State court. This action was afterwards removed to the Circuit Court of the United States, and upon a demurrer by the plaintiff below to a plea by defendants below, judgment was entered for the company. The defendants below sued out a writ of error and removed the cause into this court, which reversed the judgment of the court below, holding as follows:

1. **The tax, by the very terms of the act imposing it, is a tax *on the railroad company*, and not on the individual stockholders.**
2. **The fact that the same section of the act imposing the tax (section 121) authorizes the company to deduct and withhold from all payments on account of any interest or coupons and dividends, the tax of five per centum, does not alter the character of the tax.**
3. **Payment of the tax by the company is an absolute requirement, just as much so as if the company were the real owner of the dividends.**
4. **The dividend being on earnings of the company for a period entirely in the year 1869, is taxable as earnings for that year.**

In error to the Circuit Court of the United States for the Eastern District of Pennsylvania. December Term, Nos. 15, 16, 17, and 18, 1872.

Mr. Justice CLIFFORD delivered the opinion of the court, at Washington, D. C. March 10th, 1873.

Power to lay and collect taxes for Federal purposes, being vested exclusively in Congress, it becomes necessary, whenever the validity of such a tax is drawn in question, to examine the act imposing the tax, as the question in every case must necessarily depend upon its true construction, unless it appears that the tax is not apportioned as required, or not uniform, or the object taxed is one not taxable for such a purpose.

Railroad companies indebted for any money for which bonds or other evidences of indebtedness have been issued, payable in one or more years after date, subject to interest, or with coupons representing interest, are by the one hundred and twenty-second section of the act of the thirteenth of July, 1866, made liable to the internal revenue tax imposed by that section.

Provisions upon the subject differing essentially from those contained in that section had previously been enacted, but the Congress, on that day, amended the corresponding section in the prior law, by striking out all after the enacting clause, and inserting in lieu thereof the section under consideration, which also provides that "any such company that may have declared any dividend in scrip or money, due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company, carried to the account of any fund, or used for construction, shall be subject to, and pay a tax of five per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens. (14 Stat. at Large, 139.)

By the act incorporating the railroad company, it was provided that the dividends of so much of the profits of the company as it should appear advisable to the managers, should be declared at least twice in every year, payable to the stockholders subsequent to the expiration of ten days from the time it was so declared.

Apart from that it also appears that the railroad company on the twenty-second of December, 1869, declared a dividend in money amounting in the whole to the sum of one million five hundred and twenty-seven thousand five hundred and thirty-one dollars and fifty-nine cents on their capital stock, as part of their earnings, profits, income, and gains made, and which accrued between the first of July of that year and the first of December of the same year. None of these matters are controverted, but the dividend, though it accrued during the period described and was declared at the date specified, was made payable to the stockholders on the seventeenth of January following, as appears by the record.

Due return of the said dividend, as required by law, was made by the railroad company to the assessor of the first collection district, and the proper revenue authorities assessed a tax of five per centum upon the said dividend, amounting to the sum of seventy-six thousand three hundred and seventy-six dollars and fifty-eight cents, which the railroad company was required to pay within the period prescribed by law.

Payment of the tax having been refused, after due notice given and demand made, the collector and the other two defendants as his deputies, distrained the goods and chattels mentioned in the declaration to secure and enforce the payment of the tax, penalty, and interest, as directed in the warrant of the assessor. Distraint was made in due form, but the corporation plaintiffs, denying the legality of the tax, brought an action of trespass against the collector and his deputies in the State court to test that question, and the record shows that the suit, on the petition of the defendants, was regularly removed into the Circuit Court of the United States for trial. Both parties appeared in the Circuit Court, and the plaintiffs having filed their declaration, the defendants pleaded the general issue, and also a special plea, in bar of the action, setting up substantially the same matters as those set forth in the preceding statement. Issue was joined upon the first plea, but the plaintiffs demurred to the second, insisting that the matters pleaded do not constitute any defence to the action which is the principal question in the case. Judgment was rendered for the plaintiffs in the Circuit Court, and the defendants sued out a writ of error and removed the cause into this court.

Questions of importance to the parties, it may be conceded, are presented in the record for the decision of the court, but it must be admitted that they are all mere questions as to the construction of the act imposing the tax, as it is not pretended that the object taxed is one not taxable for Federal purposes, nor that the regulations prescribed for the assessment and collection of the tax are subject to any constitutional objections. Stripped of every difficulty of that kind, as the case confessedly is, the great central question which arises is, what did the lawmakers mean when they enacted that "any such company that may have declared any dividend in scrip or money, due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable?"

Congress, it is insisted by the United States, intended to tax that accrued fund in the hands of the railroad company, in whatever form it might be, whether it existed as accumulated interest, or in cou

pons representing interest, or in a dividend declared, or in a special fund of any kind, and without respect to the time of payment, or the person or persons to whom it was ultimately payable. Every element of that proposition is denied by the plaintiffs, and as a means of refuting it, they have entered into an extended and critical review of all the principal features of the prior acts providing for the collection of internal revenue duties.

Where a section or clause of a statute is ambiguous, much aid, it is admitted, may be derived in ascertaining its meaning, by comparing the section or clause in question with prior statutes *in pari materia*, but it cannot be admitted that such a resort is a proper one where the language employed by the Legislature is plain and free of all uncertainty, as the true rule in such a case is to hold that the statute speaks its own construction.

Much criticism is bestowed upon the corresponding provisions in the prior acts, in order to show that Congress never intended to tax the railroad company at all, and that the tax in view of the circumstances, cannot be sustained against the shareholder as a tax on income for the half year specified in the statement, as the dividend was not made payable to the stockholder until the seventeenth of January of the succeeding year, and the court, if the tax could be regarded as one imposed upon the shareholder, would be inclined to concur with the plaintiffs, that a dividend, neither due nor payable to the shareholder within a given year, could not be taxed to the shareholder as income of that year, under the internal revenue laws which were in operation at the time the tax in question was assessed and collected.

Concede all that, and still the court is of the opinion that the concession cannot benefit the plaintiffs, as the tax, by the very terms of the act imposing it, is a tax on the railroad company, to be assessed and collected in the manner and by the means prescribed in the act imposing the tax, and having come to that conclusion it will, not be necessary to examine very critically the machinery enacted in prior laws for the assessment and collection of income taxes against individuals, as the court is of the opinion that those regulations afford little or no aid in solving any material question involved in this record.

Attention was called during the argument to the fact that the railroad company is authorized, by the same section which imposes the tax, to deduct and withhold from all payments on accounts of any interest or coupons and dividends, due and payable as aforesaid, the tax of five per centum, and that the payment of the amount of the tax so deducted from the interest or coupons, or dividends, and certified by the president or treasurer of the company, is made a discharge to the company for the amount of the tax so paid, deducted, and withheld, except where the company may have otherwise contracted.—(14 Stat. at Large, 139,)

Attempt is made to invoke that provision, as showing that the tax is a tax on the shareholder and not a tax on the railroad company, but the court is unable to perceive that the argument has any foundation whatever, as the provision does not contain a word inconsistent with the preceding part of the section, which in terms imposes the tax upon the railroad company.

Beyond doubt those two provisions should be construed together, and when so construed they are perfectly consistent, and show to the entire satisfaction of the court that the plaintiffs are liable to pay the tax in controversy. They are so liable because it appears that they, as such company, having been indebted for money, issued bonds, or other evidences of indebtedness, payable with interest, or with coupons representing interest, in one or more years after date, and that they declared a dividend in money due or payable to their stockholders as part of the earnings, profits, income, or gains of such company, and the section provides that such a company, under such circumstances, shall be subject to and pay a tax of five per centum on the amount of all such interest or coupons, dividends or profits, and authorizes the company to deduct and withhold the amount of the tax from the dividend due or payable to their stockholders.

Different regulations for the assessment and collection of the income taxes of every kind were prescribed in the prior laws imposing internal revenue duties, but they were not in all respects satisfactory, and many controversies had arisen, calling in question the action of the revenue officers in their efforts to enforce the collection of that branch of the public revenue. Contrariety of decision had resulted in some instances, and the Circuit Court had decided in one case that a railroad company could not deduct and withhold the amount of such a tax from a dividend due and payable to a non-resident alien, the presiding justice being of opinion that the language of the prior act did not warrant the conclusion that Congress intended to include such holders of the bonds or certificates in the category of persons liable to such an assessment.—(Railroad Co. v. Jackson, 7 Wall. 269; Jackson v. Railway Co., 2 Int. Rev. Rec. 174.)

Congress, accordingly, in order to remove those difficulties, imposed the tax upon the railroad company, and enacted that the company should pay the same whenever and wherever the dividend should be payable, and to whatsoever party or persons the same should belong, showing beyond the possibility of doubt that Congress intended to hold the railroad company absolutely and solely liable for the tax, reserving to the company the right, which is equally unqualified, of deducting and withholding from the dividend the amount of the tax, whether the dividend was due or payable to the stockholder before or subsequent to the payment of the tax, and wholly irrespective of the question whether the stockholder was a resident or non-resident, or citizen or non-resident alien.

Payment of the tax by the company is an absolute requirement, just as much so as if the company were the actual holder of the bonds and the real owner of the dividends, whether they deduct and withhold the amount from the dividends or not, and the fact that the company is permitted to do so, if they see fit, does not in the slightest degree change the relation of the company to the United States, as the taxpayers under that section of the law imposing internal revenue duties.

Confirmation of that view is also derived from the regulations for the assessment and collection of the tax contained in the same section, which require that a return shall be made and rendered to the assessor or assistant assessor on or before the tenth day of the month following that in which said interest, coupons, or dividends become due and payable, and as often as every six months, and that the return shall contain a true and faithful account of the tax, with a declaration annexed thereto, of the president or treasurer of the company, verifying that statement under oath or affirmation.

All these regulations apply to the company, and the provision is that the company, if they make default, either in rendering the return, or in the payment of the tax, shall forfeit as a penalty the sum of one thousand dollars, and that the tax and the penalty shall be assessed and collected as in other cases of neglect or refusal.

Special reference is made by the plaintiffs to the regulation enacted in the one hundred and nineteenth section of the act of the second of March, 1867, that "taxes on income herein imposed," shall be levied on the first day of March in each year, and be due and payable on or before the thirtieth day of April in the same year, as inconsistent with the theory assumed by the United States, but the court is not able to perceive that the objection is entitled to any weight, as the income taxes therein imposed are required to be assessed on the incomes of individuals, and the one hundred and seventeenth section of the same act expressly authorizes the individual to omit from his return of gains, profits, and income the amount of income received from institutions or corporations whose officers, as required by law, withhold a per centum of the dividends made by such institutions, and pay the same to the officer authorized to receive such payments. Important amendments were made by that act to some of the sections of the prior act, but the one hundred and twenty-second section, under which the tax in controversy was assessed, was left in full force and operation, without any change, alteration, or modification of any kind.

Such a dividend as that made by a railroad company is not required to be included in the return made by the shareholder of his gains, profits, and income, but is expressly required by law to be returned by the president or treasurer of the railroad company, as before explained, and the act of Congress in terms provides, that the Company shall be liable to and pay the tax, no matter when or where, or to whatsoever party or persons the dividend may be payable.—(14 Stat. at Large, 139 and 478.)

Prior to that time the rule had been different, as the one hundred and sixteenth section of the act of the third of March, 1865, expressly required that the amount of income received from such institutions by a shareholder, should be included in his return to the assessor, but the power to lay and collect taxes for Federal purposes is vested in Congress, and Congress having repealed that provision and substituted another in its place, requiring the return to be made by the president or treasurer of the company, and having finally authorized the shareholders to omit the amounts received from that source from their returns, the argument would seem to be concluded, unless it be assumed that some one or all of these regulations transcend the power of Congress under the Constitution, which is not pretended.—(13 Stat. at Large, 479; 14 Stat. at Large, 478.)

Argument to show that a railroad company may be taxed for Federal purposes is certainly unnecessary, as the theory is not controverted, and the proposition that the dividends of such a company are the proper objects of such taxation, is also self evident. Congress may tax such a dividend before it is paid to the holders of the securities, either as the property of the company or of the shareholders, at the election of Congress; nor can either party have any just ground of complaint if proper regulations are enacted to apportion and distribute the burden.

Power to tax either the company or the shareholder being admitted, the only question which can arise in this case, is a question of construction, and the court is of the opinion that the act of Congress imposes the tax in controversy upon the railroad company. Having come to that conclusion, it is not necessary to enter into any discussion of the question whether the action of trespass will lie in such a case against the collector of the revenue. He acts under a warrant or other process from the assessor, and it may well be doubted whether he can be regarded as a trespasser, unless it appears that he exceeds his jurisdiction. Several cases decide that the party taxed must pay the tax and bring assumpsit to recover back the money.—(Philadelphia v. Collector, 5 Wall. 731. Assessor v. Osborn, 9 Wall. 574.)

Neither party, however, raised any such question in the court below, nor has it been discussed in this court, and in view of those facts the court is not inclined to decide it at the present time.

Three other cases were heard at the same time which depend upon the same principles as the case just decided. They are as follows: (1) Barnes & al. v. The Lehigh Valley Railroad Co., in which the tax, as in the preceding case, was levied upon the dividend. (2) Same v. The Lake Superior and Mississippi Railroad Co., in which the tax was levied upon the half-year's interest for the period specified in the preceding statement. (3) Same v. The Philadelphia and Reading Railroad Co., in which the tax is also levied upon the interest for the same half-year, as in the next preceding case.

Judgment is reversed in each of the four cases, and the respective causes are remanded for further proceedings, in conformity to the opinion of the court.

[Attest.] D. W. MIDDLETON,
C. S. C. U. S.

George H. Bristow, Esq., and *George H. Williams*, U. S. attorney general, for plaintiffs in error.

Chapman Biddle, Theodore Cuyler, and *James E. Gowen, Esqs.*, for defendants in error.

BARNES AND KERNS v. HARRISBURG, PORTSMOUTH, MT. JOY, & LANCASTER R. R. CO.
SAME v. PHILADELPHIA & TRENTON R. R. CO.

Though the dividend in these cases was not *declared* by the railroad companies until after January 1st, 1870, yet it being upon the earnings for a period of time wholly within the year 1869, the same rule applies as in the preceding cases. So, likewise, the tax upon an instalment of semi-annual interest falling due the 1st of January, 1870, follows the same rule.

December Term, Nos. 19 and 20, 1872.

Mr. Justice CLIFFORD delivered the opinion of the court, at Washington, March 10th, 1873.

In error to the Circuit Court of the United States, for the Eastern District of Pennsylvania.

Internal revenue taxes were assessed against the corporation plaintiffs by the assessor of the first collection district, charged with that duty, and the plaintiffs denying the legality of the assessment refused to pay the tax, and the collector having distrained the goods and chattels mentioned in the declaration, as the means of enforcing payment, the plaintiffs brought an action of trespass against him and his deputy, claiming damages for the alleged unlawful seizure and detention of the goods and chattels.

Enough appears in the record to show that the plaintiffs are a railroad company; that being indebted for money to a large amount, they issued bonds for the same, or other evidences of indebtedness, payable with interest, or with coupons representing interest, in one or more years subsequent to their date. On the tenth of January, 1870, the railroad company declared a dividend in money amounting to the sum of forty-three thousand five hundred and sixty-seven dollars and sixty-three cents on their capital stock, as part of their income and gains made and which accrued between the first of July, 1869, and the first of January following.

Apart from the dividend, an instalment of semi-annual interest also fell due at the same time, amounting to twenty-one thousand dollars, which accrued during the same six months for which the dividend of the income and gains was declared. Due return was made by the railroad company of the amount of the dividend and interest to the assessor of internal revenue for the first collection district, and a tax of five per cent. on the amount was assessed by the proper revenue authorities, which is the tax in controversy, and for which the distraint was made, as alleged in the pleadings.

Detailed statement of the pleadings is unnecessary, as they are the same as in the preceding case, and all the questions presented for decision are the same, except one, which will be made the subject of special examination. Judgment was rendered for the plaintiffs in the Circuit Court, and the defendants brought a writ of error and removed the cause into this court.

Such a dividend, declared by such a company, in money, due or payable to their stockholders as part of the earnings, profits, income, or gains of the company, it was decided in the preceding case, rendered the company liable to the tax of five per cent. on the amount of such in-

come or gains, as more fully explained in the opinion delivered in that case, and the court is of the opinion that the tax on the semi-annual instalment of interest is within the same principle, and that it must be governed by the same rule.

Suppose that is so, still it is insisted by the plaintiffs that the rule there adopted is not applicable in this case, as the dividend was not declared within the six months specified in the pleadings, and because neither the dividend nor the interest was due or payable to the stockholders until the tenth of January following. Beyond doubt the two cases differ in that respect, and the question in this case is whether the admitted fact that the dividend was not declared within the half-year during which the income and gains were made, takes the case out of the rule adopted in the other case.

Much weight would be due to that suggestion if the tax was a tax upon the shareholder, but the court has already decided that the tax imposed by that provision is a tax upon the railroad company, and the court adheres to that conclusion, which is confirmed by the fact that the object made taxable by that section is not only "any dividend declared," but the language also extends to "all profits of such company carried to the account of any fund, or used for construction," showing that Congress intended that such company shall be subject to and pay a tax of five per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may ultimately belong.

Tested by these considerations, it is quite clear that it is the fund which accrued within the half-year which Congress intended to tax, and the record shows that every dollar of the fund taxed in this case accrued within the last six months of the year preceding the time when the dividend was actually declared.

Although the dividend was not declared until the tenth of January, 1870, yet it is true that the object taxed is the fund which accrued within the last six months of the preceding year, and it is certain that the fund taxed does not include a dollar of the income or gains of the company for the succeeding year. Concede that, and still it is insisted by the plaintiffs that the dividend cannot be regarded as income and gains of the company for the six months specified in the pleadings, because it was not actually declared as such by the company within that period, but the court is not able to adopt that construction of the act, as it would enable the company to postpone the payment of such a tax for six months, or even for a year, whenever they pleased, by omitting to declare a dividend, which would be inconsistent with the plain intent of Congress, as manifested by the language employed in the section imposing the tax.

Taxes illegally exacted under the revenue laws of the United States may be recovered back, if paid under protest, in an action of assumpsit against the collector, but the person taxed cannot enjoin the collector from enforcing payment, and very grave doubts are entertained whether trespass against the collector is a proper remedy under existing laws. No such error, however, having been assigned in the case, the court will not decide the point at the present time.—(14 Stat. at Large, 475, sec. 10.)

Barnes and others v. The Philadelphia and Trenton Railroad Company, No. 20 on the calendar, was also argued at the same time, and must be disposed of in the same way, as it depends upon the same rule of decision; it appearing that the tax was assessed on a dividend and a fund from profits, income, and gains set apart for construction and repairs.

Judgment reversed in each of these cases, and the respective causes are remanded for further proceedings in conformity to the opinion of the court.

[Attest.] D. W. MIDDLETON,
U. S. C. U. S.

(*Continued from page* 91.)

to force its citizens to drink only water. These cases form a very large portion of the legal literature of Massachusetts, and exhibit the folly of enforcing total abstinence, by a law which is broken every day and every hour in the city of Boston.

It is notorious, that liquor may be had in every hotel, restaurant and oyster saloon in Boston. The law is, in fact, a dead letter, the evil being to encourage deception, falsehood and fraud, and to accustom citizens to a daily violation of law.

Messrs. Reuter & Alley, of Boston, are the most extensive brewers in the United States, producing 118,000 barrels of ale per annum.

In a very able article in the British Quarterly Review for April, 1872, on the licensing system, written by a true friend of temperance, we find the following: "Boston is the chief city of the State of Massachusetts, in which the sale of intoxicating liquors is prohibited. When an investigation was set on foot, into the working of the prohibitory law in Boston, it was found that there were about 2000 places where liquor could be obtained." The author of a new and interesting book on the United States, says, with reference to the prohibitory legislation on liquors: "Wherever an overwhelming temperance sentiment exists, wherever, in short, the majority of the people are opposed to the use of liquors, prohibitory legislation succeeds." In all other cases it has proved a failure. In Massachusetts, the people were spending £2 per head on strong drinks in the face of the Maine liquor law. "We are all for the Maine law," said a man to Mr. Macrea, "but we are agin its enforcement." The law had in fact gone further than popular sentiment would bear it out.

The brewers in Philadelphia produce 600,000 barrels of malt liquor annually, giving employment to nearly one thousand men, and consuming in its manufacture a million and a half bushels of barley, of the value of $1.10 per bushel.

Ale is a healthy liquor, and lager beer is a favorite beverage, particularly of our large German population.

The question of license or no license is to be submitted to the citizens of the city of Philadelphia, at the general election in October, and if the vote is against license, then the city will be under a prohibitory liquor law during the whole centennial celebration, to which we have invited the whole country. On the 4th of July, 1776, every patriot drank to the Independence of the thirteen States. Shall it be, that on the 4th of July, 1876, all we can lawfully offer to our guests on this great anniversary, will be a glass of Schuylkill water, seasoned with a lump of Knickerbocker ice?

I am a strong believer in temperance. For twenty-five years of my life I drank nothing but water, but a dangerous illness made a strong stimulant an absolute necessity, and by the advice of my physician, I am obliged occasionally to resort to it. Some of my friends, older than myself, have drank wine all their lives, and are temperate men. I believe in moral suasion as the true means of advancing the temperance cause, but I do not believe in a prohibitory law, which would reduce us to the condition of Boston.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in March, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

Jan. 31, Hannah P. Quigg, Administratrix of ANN QUIGG, dec'd.
" 31, Thomas A. Mullin, Guardian of MULLIN'S minors.
Feb. 1, Maria M. Wharton et al., Executors of GEORGE M. WHARTON, dec'd.
" 1, Charles F. Linton, Administrator of CHARLES H. FOWLER, dec'd.
" 4, Helen L. Harrington et al., Executors of MAURICE A. HARRINGTON, deceased.
" 5, Jos. S. Kennedy, Executor of SUSAN JONES, dec'd.
" 5, James Brady, Executor and Trustee of LAWRENCE BLOOMER, dec'd.
" 7, John S. Derr, Executor of JOHN DERR, dec'd.
" 7, Franklin B. Colton, Executor of VIRGINIA M. HARRIS, dec'd.
" 7, Franklin B. Colton, Administrator of JOHN BERNADOW HARRIS, deceased.
" 7, Wm. D. Lewis, Administrator of Wm. D. LEWIS, JR., dec'd.
" 7, James Hull, et al., Exec'rs of NANCY W. CRAIG, dec'd.
" 7, Wm. Harper, JR., et al., Executors of WILLIAM HARPER, dec'd.
" 8, Robert Wilson et al., Executors of PETER D. LEWIS, dec'd.
" 10, Annie Yeager, Administratrix of WM. YEAGER, dec'd.
" 10, Thomas Shaw, Administrator of THOS. SHAW, SR., dec'd.
" 10, John Seiser, Executor of MATTHEW PLEIS, dec'd.
" 11, Joshua H. Morris, Guardian of EDWARD M. WISTAR, late minor.
" 11, Samuel Welsh et al., Acting Trustees of John M. Boyd, under the will of ISAAC BOYD, deceased.
" 11, Catharine Wurfflein et al., Administators of ANDREW WURFFLEIN, deceased.
" 11, Robert Patterson et al., Executors of HELLEN H. PATTERSON, dec'd.
" 11, Samuel Christ et al., Executors of SUSAN A. WAYLON, dec'd.
" 12, Washington Bastian et al., Executors of GEORGE BASTIAN, dec'd.
" 12, John McCandless, Administrator of DAVID McCANDLESS, deceased.
" 12, Joseph Lake et al., Executors of BERNARD GOCKELN, dec'd.
" 13, Francis R. Cope, Administrator of ELIZABETH S. BROWN, dec'd.
" 13, Thomas W. Ayers, Administrator of SAMUEL W. AYERS, JR., dec'd.
" 13, Robert Patterson, Executor of ELIZABETH SNYDER, dec'd.
" 13, Benjamin H. Kauffman, Administrator of FITZSIMMONS CALHOUN, deceased.
" 14, Franklin Shoemaker, Executor of MARY ANN WILLIAMS, dec'd.
" 14, Wm. McGeorge, Jr., Guardian of CARRIE E. V. C. MERSHON, late minor.
" 14, WM. McGeorge, Jr., Guardian of HORACE DEAN, late minor.
" 14, Alexander C. McCurdy, Administrator of DR. ANSON H. PLATT, deceased.
" 15, Henry C. Streler, Administrator of ANTON SEIBEL, dec'd.
" 15, David Winebrener, Guardian of ALLEN W. ARMSTRONG, late minor.
" 15, Philip Wagner, Trustee under the will of LAVINIA CARTER, dec'd.
" 17, Collins W. Walton et al., Executors of SAMUEL D. WALTON, dec'd.
" 18, Frances Robinson, Administratrix of JAMES ROBINSON, dec'd.
" 19, Jenneta Henning, Administratrix of GEPHART HENNING, dec'd.
" 20, Mary Ann Ehrlen, Administratrix of CHRISTIAN EHRLEN, dec'd.
" 20, Theodore Kitchen et al., Executors of JOHN S. KITCHEN, dec'd.
" 20, J. G. Rosengarten, Administrator of FRANZ STOCK, dec'd.
" 21, Frederick Schneider et al., Administrators of GOTTLEIB FREDERICK BLUMHARDT, dec'd.
" 21, Henry Mohr, Executor of ANNA MARIA SCHAFFER, dec'd.
Feb. 21, Henry Closking et al., Executors of JOHN BURK, dec'd.
" 21, William J. Thomason, Administrator d. b. n. c. t. a. and Trustee of WILLIAM PILLING, dec'd.
" 24, Robert Riddle, Acting Executor and Trustee of FRANCIS MILLER, deceased.
" 24, Sarah Potts et al., Executors of WM. POTTS, dec'd.
" 24, Louisa Loudenslager, Administratrix of CHRISTOPHER H. LOUDENSLAGER, dec'd.
" 24, Charles H. Hutchinson et al., Executors of J. PEMBERTON HUTCHINSON, dec'd.
" 24, Theophilus Harris, Exec'r of MARY GENTRY, dec'd.
" 24, Catharine Brugger, Administratrix of JOHN BRUGGER, dec'd.
" 25, Mary Twells, Administratrix of EDWARD TWELLS, dec'd.
" 25, George Trotter, Surviving Trustee of MARY JANE TROTTER, under the will of Thomas Hart, dec'd.
" 25, George W. Schenck et al., Administrators of MARY SCHENCK, dec'd.
" 25, The Girard Life Ins. Co., &c., Acting Trustee of ENOCH LANING, deceased.
" 25, George Foster, Executor of MARY HAYS, dec'd.
" 25, Uselma C. Smith, Guardian of DUVAL, minors.
" 25, James Markoe, Guardian of WALTER and HERBERT COX and MARY FIELD, minors.
" 26, John P. Thompson, Surviving Executor and Trustee under the will of ABRAM SHALKOP, dec'd.
" 26, A. P. Spinney, Executor of JOHN S. DYE, dec'd.
" 26, Matilda Bigot, Administratrix of ALPHONSE BIGOT, dec'd.
" 26, James Alexander, Administrator of REBECCA VINCENT, dec'd.
" 26, The Girard Life Ins. Co., &c., Administrators of EDWARD MAGARGE, deceased.
" 26, The Girard Life Ins. Co., &c., Executors of WM. COFFIN, dec'd.
" 26, Benjamin Homer et al., Executors of HENRY HOMER, dec'd.
" 27, Richard Peltz, Administrator of JOHN T. JONES, dec'd.
" 27, J. H. Butler et al., Executors and Trustees of E. H. BUTLER, dec'd.
" 27, Elijah Cox, Guardian of A. COX, minor.
" 27, Susan Murphy, Executrix of THOS. MURPHY, dec'd.
" 27, Eli K. Price, Trustee of MARY L. RAMBORGER, under the will of Mary E. Heartle.
" 27, Elizabeth B. Hopkins, Administratrix c. t. a. of ELIZABETH J. HOPKINS, dec'd.
" 27, Robert Guy, Administrator of SAMUEL ROGERS, dec'd.
" 27, Henry Vollmer, Executor of WM VOLLMER, dec'd.
" 27, Thomas Neilson et al., Trustees under the will of ROBERT NEILSON, deceased.
" 27, Thomas Neilson et al., Trustees for DAVIS COLCORD et al., under the will of Robert Neilson, dec'd.

WILLIAM M. BUNN,
feb 28-4t Register.

THE JUROR: BEING A GUIDE TO citizens summoned to serve as jurors. Containing information as to the manner of drawing and selecting jurors; their rights, privileges, liabilities, and duties; reasons for exemption from service, and mode of arriving at and rendering verdicts. By Andrew Jackson Reilly, officer of the District Court for the city and county of Philadelphia. Revised by E. Cooper Shapley, Esq., of the Philadelphia Bar, and secretary of the Board for Selecting and Drawing jurors for the city of Philadelphia. Philadelphia John Campbell & Son, Law Booksellers and Publishers, 740 Sansom Street, 1873.

In connection with "THE JUROR" it is proposed to have an appendix containing a directory of the principal practising attorneys of the State of Pennsylvania, as information needed by jurors when favorably impressed with the learning, skill or eloquence of those before them. The circulation of this work is already assured to the extent of five thousand copies the ensuing year, in different parts of the State. Members of the Bar will please

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M. THOMAS & SONS, AUCTIONEERS.

REAL ESTATE SALE, MARCH 25.

Will include—

Spruce, Nos. 1527 and 1529—Very Valuable Hotel Location—2 Four-story Brick Residences, 44 feet front, 240 feet deep. They have the modern conveniences.

Old Front street, Westmoreland street, Ontario street, Rorer street, D and E streets and Hart lane—Squares of Ground, Dwelling and Barn—Trustees' Peremptory Sale—Estate of Leonard Jacoby, dec'd. See plans.

Old Front street and Hart lane—16 Very Desirable Lots. Same Estate.

Ellsworth, No. 1120—Two-story Brick Dwelling.

Montgomery avenue, Nos. 910 and 914—2 Valuable Three-story Brick Stores and Dwellings. Immediate possession.

Morris, No. 142—Genteel Three-story Brick Dwelling.

Marriott, Nos. 841, 843, 845 and 847—4 Three-story Brick Dwellings. Trustee's Peremptory Sale—Estate of Wm. F. Hughes, deceased.

Crans' court, in the rear of the above—16 Three-story Brick Dwellings—Same Estate.

Dock, No. 235—Valuable Business Location—Lot, formerly occupied by Jones' Hotel—22 feet front. Peremptory Sale.

Eleventh and Montgomery avenue, S. W. corner—Business Stand—Three-story Brick Tavern and Dwelling, with a Three-story Brick Store and Dwelling adjoining on Eleventh street.

Chatham, No. 516—Genteel Three-story Brick Dwelling. Executors' Sale.—Estate of Nicholas Petry, dec'd.

Rittenhouse, No. 16, Germantown—Three-story Brick Factory. Administrator's Sale—Estate of Leonard Fisher, dec'd.

Indiana and Rohrer, N. W. Corner—Lot. Peremptory Sale.

Frankford road, above Dauphin—Three-story Brick Store and Dwelling and Stable. Executors' Peremptory Sale—Estate of Jas. Beatty, dec'd.

Chester County, Pa.—Desirable Farm, 52 Acres, 2½ miles from Coatesville, ½ a mile east of Old York Road Station on the Wilmington and Reading Railroad.

Seventh, (South,) No. 1331—Three-story Brick Dwelling.

Mount Vernon, No. 1928—Modern Four-story Brick Residence. Has the modern conveniences. Immediate possession.

Walnut, No. 3817—Modern Two-story Brown Stone Residence, with Mansard Roof. Has all the modern improvements and conveniences.

Buck's County, Pa—Desirable Farm, 90 Acres.

Ground Rent, $45 a year.

REAL ESTATE SALE, APRIL 1.

Will include—

Twenty-first, (South,) No. 316, Corner of Granville—Modern Three-story Brick Residence. Has the modern conveniences. Immediate possession.

Forty-fourth, South of Huron—Modern Three-story Residence. Has the modern conveniences. Immediate possession.

Ridge avenue, No. 2208—Business Stand—Three-story Brick Store and Dwelling, extending through to Turner street—2 fronts.

Ridge avenue, adjoining the above—Lot—2 fronts.

West Main street, Coatesville, Chester Co., Pa.—Valuable Business Stand—Three-story Stone Hotel, known as the "Midway Hotel." 2 acres.

Everett, No. 1204—Genteel Three story Brick Dwelling. Orphans' Court Sale—Estate of John O'Neil, dec'd.

Sixth, (North,) No. 2233—Modern Three-story Brick Residence. Has the modern conveniences.

Market, No. 219—Very Valuable Business Stand—Five-story Iron Front Store, extending through to Front street—2 fronts.

Diamond, No. 2911—Genteel Three-story Brick Dwelling.

Beach, Nos. 1076 and 1078—Large and Valuable Factory.

Allen, South of Shackamaxon, in the rear of the above—Valuable Lot.

Beach, No. 1080—Large and Valuable Three-story Brick Residence, with Side Yard.

Eighth, (North,) No. 925—modern Four-story Brick Residence, 25 feet front—Has the modern conveniences. Immediate possession.

Christian, No. 2109—Modern Three-story Brick Dwelling.

REAL ESTATE SALE, APRIL 8.

Will include—

Front, (South,) No. 512—Large and Valuable Three-story Brick Residence—Executors' Sale—Estate of Marietta Whitecar, dec'd.

Whitecar's Row (between Fifth and Sixth and Locust and Spruce), Nos. 7 and 8—2 Three story Brick Dwellings—Same Estate.

2 Well secured Irredeemable Ground Rents, each $36 and $55 a year—Same Estate.

China Hall—Very Desirable Country Seat, 12 Acres, River Delaware, known as "China Hall," 2 miles below Bristol, Pa.

Vine, No. 1116—Very Desirable Three-story Brick Residence. Has the modern conveniences. Immediate possession.

Oxford, No. 2204—Genteel Three-story Brick Dwelling. Orphans' Court Sale. Estate of Hunterson, minors.

JAMES A. FREEMAN, & CO. AUCTIONEERS.

No. 422 WALNUT STREET.

REAL ESTATE SALE AT THE EXCHANGE

MARCH 26, 1873.

Orphans' Court Sale.—Hancock street. Four Three-story Brick Court Houses, above Thompson street, 17th Ward. Lot 20 x 87½ feet. Estate of Wm. Harris, dec'd.

Orphans' Court Sale.—Hancock street. Valuable Two-story Brick Manufacturing Buildings, above Thompson street. Lot 60 feet on Hancock, and extending through 160 feet to Mascher street, on which it fronts 80 feet. Same Estate.

Orphans' Court Sale.—Thompson street. 6 Desirable Building Lots, corner of Hancock street, each 16 feet front on Thompson street by 70 feet deep. Same Estate.

Orphans' Court Sale.—Thompson street. Three-story Brick Dwelling, with Frame Kitchen attached, 96 feet east of Hancock street. Lot 33 feet front on Thompson street by 70 feet deep. Same Estate.

Orphans' Court Sale.—Thompson street. Three-story Brick Dwelling, 16 feet 2 inches west of Mascher street. Lot 15 feet 3 inches front on Thompson street by 70 feet deep. Same Estate.

Orphans' Court Sale.—Thompson and Mascher streets. Building Lot at the N. W. corner, 16 feet 2 inches on Thompson street by 70 feet on Mascher street. Same Estate.

Plan and Survey of the whole at the Auction Store.

Orphans' Court Sale.—1131 South Eighth street. Three-story Brick Store and Dwelling, below Passyunk road. Lot 15 x 60 feet. $30 ground rent. Estate of Ellen McCloud, a minor.

Orphans' Court Sale.—1133 South Eighth street. 3 Three-story Brick Store and Dwellings, below Passyunk road. Lot 15 x 60 feet. $30 ground rent. Estate of Jane McCloud, a minor.

Executors' Absolute Sale.—560 East York street. Genteel Three-story Brick Dwelling, with back buildings and conveniences. Lot 18 x 67 feet, 19th Ward. Estate of Arthur Rogers, dec'd.

249 North Fifth street.—Desirable Three-story Brick Dwelling, with conveniences. Lot 17½ x 87½ feet, above Race street.

3301 Sansom street.—Neat Brown Stone Residence with Mansard roof and back buildings, has all the modern conveniences. Lot 15 x 75 feet along 32d street. $3000 may remain.

553 Carpenter street.—Two-and a half-story Brick Store and Dwelling, 7 rooms. Lot 13 x 48 feet. $500 may remain on mortgage.

2025 Coates street.—Business Stand—Modern Three-story Brick Grocery Store and Dwelling, with Back Building and conveniences corner of Corinthian avenue. Lot 20 x 87 feet. $4,000 may remain. Immediate possession.

Sale of Personal Property on the Premises. Including Cows, Carriages, Harness, Household Furniture, &c. On Saturday, March 22d, 1873, at 1 o'clock, P. M., will be sold without reserve, at the residence of E. W. Heston, Fifty-second and Lancaster avenue, Hestonville. The personal property, including 10 Cows, 1 thorough bred Durham Bull two years old, Carriages, Harness, Sleigh, Dearborn Wagon, Trace Chains, Straw and Corn Fodder by the bundle, Farming Implements, Potatoes, &c.

Household Furniture.—Sofas, Chairs, Cottage Furniture, 1 Bed Lounge, Tables, Bedstead, Hat Rack, Cook Stove, lot of fancy Chickens, &c.

Assignees' Peremptory Sale on the Premises.—Large Brick Manufacturing Building, Steam Engine, Boiler, Machinery, Lumber, Horse, Wagon, &c. On Monday Morning, April 7th, at 10 o'clock, will be sold on the Premises Nos. 2017 and 2019 Howard street, 19th Ward, the Large Three-story Brick Cabinet Manufacturing Building. Lot 36 x 108 feet, after the Real Estate will be sold by Catalogue the entire stock of Machinery, Steam Engine, Boiler, Planing, Smoothing, Boring and Joining Machines, Saws, unfinished work, large stock of Well Seasoned Lumber, Horse, Wagon, Harness, &c.

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TWENTY-NINTH JUDICIAL DIST.

Court of Common Pleas of Lycoming County.

STACK v. O'HARA.

1. A Catholic priest duly ordained, and appointed pastor of a church, may file his bill against the bishop of his diocese for a wrongful interference with the exercise of his office as pastor.
2. Such an injury is local, and within the spirit and meaning of the act of 1859, relating to the service of bills in equity upon non-resident defendants.
3. On a motion to dismiss a bill for want of jurisdiction, the allegations therein contained must be regarded as capable of being proved.

Opinion by GAMBLE, P. J. Delivered March 10th, 1873.

The question before the court arises upon a motion of defendant's counsel to quash the service of the bill and subpœna issued thereon.

1st. Because the defendant resides beyond and without the jurisdiction of the court.

2d. Because the court had no jurisdiction over the subject matter, or the person of the defendant.

3d. Because the joinder of other parties complainant was without their authority and fraudulent, and could not give to the court jurisdiction; and

4th. Because the said suit in equity is not concerning goods, chattels, lands, tenements, or hereditaments, etc., situate or being within the jurisdiction of the court.

When the subpœna was awarded in this case to be served on the defendant residing or being out of the county of Lycoming, there were eight other parties complainant on the record who claimed to be members of the Church of the Annunciation, situate in this county, contributors in money in aid of the purchase and erection of the church and premises, pewholders in the same and of those for whose use the legal title to the same was held by the defendant, and charged that the defendant had illegally attempted to remove the pastor of said church, and prayed the court to enjoin the defendant from interfering in any way or manner with the exercise by the Rev. M. P. Stack of his office of pastor of said church, except as provided by the laws of the Catholic Church, in which the defendant was a bishop.

After the granting of the preliminary injunction as prayed for, and on the day appointed for hearing a motion to dissolve the same, six of these parties plaintiff presented their petitions under oath, alleging that their names had been used without their authority, and praying the court to dismiss the bill, &c. On the same day affidavits of defendant and others were filed in the cause, and a motion entered by defendant's counsel to dismiss the bill for reasons filed. Two days thereafter the petition of one other of those parties plaintiff similar in tenor was filed. An affidavit filed by the remaining plaintiff, M. P. Stack, denied that their names had been used without authority, &c.

After argument, the court allowed those parties to withdraw as parties complainant, without prejudice to the remaining complainant.

It is contended in this argument that the jurisdiction of the court having attached, was not affected by the withdrawal of these parties plaintiff.

It is also contended that there was a personal service of this bill on the defendant in this county on the 11th day of November, 1872. Without stopping to consider these propositions, I proceed to the one more clearly established in my judgment, namely, that this court has such jurisdiction of the subject matter in controversy as to authorize and require the process to issue as directed by the act of Assembly of April 6th, 1859. That act provides that it shall be lawful for any court of this commonwealth, having equity jurisdiction, upon special motion of the plaintiff or plaintiffs in any suit in equity, which has been instituted therein concerning goods, chattels, lands tenements or hereditaments, or for the perpetuating of the testimony concerning any lands, tenements, &c., situate or being within the jurisdistion of such court, or concerning any charge, lien, judgment, mortgage, or incumbrance thereon, &c., to order and direct that any subpœna or other process to be had in such suit, be served on any defendants therein, then residing or being out of the jurisdiction of such court, wherever he, she, or they may reside or be found. By the act of Assembly of June 16th, 1836, the jurisdiction and powers of a court of chancery are conferred upon the courts of common pleas so far as relates to the supervision and control of unincorporated societies or associations and the care of all trust moneys and property.

The plaintiff's bill in this suit claims and avers that he is a regularly ordained priest in the ministry of the Catholic Church, and as such was designated and duly appointed, in the year 1866, pastor of the Non-German Catholics of Williamsport, and charged with the duty of organizing a parish or congregation of such persons, the procuring of means for the erection of a church edifice, the erection of the same, and ministering therein.

That through his diligent exertions, means were collected, and a church edifice known as the Church of the Annunciation was erected and dedicated to worship in 1868, and that he, the plaintiff, is the duly constituted priest or pastor of said church and congregation, entitled to do and perform the faculties and functions of a regularly ordained priest of the Catholic Church, in the said church at Williamsport, and in and among the said congregation.

That on or about the 6th day of November, 1871, he received from the defendant, as bishop of the diocese in which the said Church of the Annunciation is included, a note, charging that his administration of the affairs connected with the said church had been such that he, the bishop, was compelled to remove him and leave the church vacant, and forbidding him to exercise any priestly functions in Williamsport, and avers that the defendant continues to enforce such removal, and forcibly to deprive him of the revenue, rights, and perquisites, and the exercise of the faculties and functions pertaining to his said office of pastor to the said church and congregation.

That he is not aware that he has been guilty of any mal-administration of the affairs of said church, or any act done or duty left undone which could justly subject him to ecclesiastical censure or punishment. That no specification of any offence has been made against him, no hearing or trial of any kind whatever accorded to him. That the action of the defendant and its attempted enforcement of the same in this regard, is unauthorized by and contrary to the laws of the Catholic Church and to the law of the land; and praying that the defendant may be restrained from depriving the plaintiff from the pastorate of said church, or in any manner interfering with the exercise of his office of pastor of the same, except as is provided by the laws of the Catholic Church in which said defendant is a bishop.

If the complaints and charges specified in this bill are established by the proof (and we must so regard them upon this question of jurisdiction), a court of equity alone can give the specific relief prayed for; all that could be recovered in a court at law would be damages, hence, a court of equity is the appropriate tribunal to grant the relief sought for in this suit. But the proceedings of the Court of Common Pleas, when sitting in equity, like actions in the common law courts, are either local or transitory; local when they involve the control over property, real or personal, having its *situs* within the county; transitory when their decrees are to effect only the conscience of the defendant. When the relief sought is to be accomplished by personal restraint or control, the service of the process on the defendant, within any county, gives jurisdiction to the court of that county without regard to locality. In other words, the jurisdiction is transitory, following the person of the defendant, because the decree is to be enforced only by personal restraint. But when the subject matter of the controversy is local, or the enforcement of the decree may involve the exercise of direct control over property, the jurisdiction is necessarily limited to the court of that county where the property is situated. Thus arose the necessity often of sending the process of the court, in such cases, beyond its territorial jurisdiction, or else denying to parties injured, any adequate remedy. To meet this necessity the act of the 6th of April, 1859, before recited, was enacted, embracing in the most comprehensive language all suits concerning goods, chattels, lands tenements or hereditaments, situated or being within the jurisdiction of the court. The definition of chattels real, given by Coke I., Inst. 118, "are such as concern or savor of the realty, as terms for years of land, the next presentation to a church, &c., and these are called real chattels, as being interests issuing out of or annexed to real estate."

According to the common law of England the appropriate remedy for the disturbance of the right of presentation to a church or ecclesiastical benefice, was an action of *Quœre Impedit*, which is classed as a local action. (1 Bouvier's Law Dictionary, title Action, p. 52; 3 Blackstone's Commentaries, 246.) In defining local and transitory actions, Blackstone says: "They are local when founded on privity of estate, where posession of land is to be recovered, or damages for an actual trespass, or for waste affecting land, but for injuries that might have happened anywhere, as debt, slander, &c., they are transitory. (3 Blackstone's Commentaries, 294.)

The injury complained of here is local, and could not have happened elsewhere; the complainant avers that he is not only suffering illegal and unauthorized ecclesiastical domination, in being forbidden to exercise his ministerial functions, but also that he has been ousted of the possession and deprived of the use, occupancy, and enjoyment of the church and the means of ministering to the congregation, and asks to be reinstated in the possession and enjoyment of the same. The case as presented in the bill necessarily involves the question of the plaintiff's right to occupy the church building for a qualified purpose, or in other words, his right of possession of real estate within the jurisdiction of this court, a species of title none the less a right from being qualified, and which must be adjudicated in the appropriate local tribunal. To give the relief asked for, the *locus in quo* must be in the absolute jurisdiction of the court. We think, therefore, that the subject matter

of this suit is within the spirit and meaning of the act of 1859, entitled "An act to authorize execution of process in certain cases in equity, concerning property within the jurisdiction of the court, and on defendants not resident or found therein." P. L., p. 387; Eby v. Cowan, Legal Gazette, January 19th, 1872.

The motion to quash the service of the bill and subpœna issued thereon is overruled, and the rule to demur, answer or plead, is enlarged and extended for fifteen days from this date.

Messrs. *Maynard* and *Par er*, for motion.

Hons. *Wm. H. Armstrong* and *Henry C. Parsons*, counsel for plaintiff, contra.

Supreme Court, United States.

BARNES, KERNS, AND MAGILTON v. PHILADELPHIA AND READING R. R. CO.

SAME v. LEHIGH VALLEY R. R. CO.

SAME v. LAKE SUPERIOR AND MISSISSIPPI R. R. CO.

SAME v. PHILADELPHIA AND READING R. R. CO.

SAME v. HARRISBURG, PORTSMOUTH, MT. JOY, AND LANCASTER R. R. CO.

SAME v. PHILADELPHIA AND TRENTON R. R. CO.

1. The 120th, 121st, 122d and 123d sections of the act of Congress, June 30th, 1864, relate to the tax on income, whether derived from any source whatever, imposed by the 116th section, and their sole purpose was, not to impose *a new tax*, but to provide a different mode of collection from the taxpayer.
2. The tax upon dividends made, and interest payable, by railroad, canal, turnpike, canal navigation and slack-water companies, for the payment and collection of which provision was made by the 122d section, was a tax on income, within the meaning of section 116, and not a different and independent tax.
3. That the tax upon all income, without regard to its source, *derived* or *received* by the taxpayer prior to January 1st, 1870, expired with the close of the next preceding year.
4. The dividends declared by defendants in error, not being payable until after the 1st of January, 1870, were not taxable as income of 1869.

In error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. Justice STRONG dissenting. December Term, 1872. Delivered, March 10th, 1873.

I am unable to concur in the construction which a majority of my brethren have given to the acts of Congress relative to the income tax, and consequently I dissent from the judgments which have been directed in these cases. The reasons for this dissent I propose now to give, as briefly as I can.

Whatever may be said of the earlier acts of Congress, that of June 30th, 1864 (13 Stat. at Large, p. 284), as amended by the acts of 1866 and 1867, provided a complete system of taxation upon incomes. The 116th section, which is the first that had reference to the subject (14 Stat. at Large, 477), enacted that there should be levied, collected and paid annually upon the gains, profits, and income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, *interest*, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, *or from any source whatever*, a tax of five per centum on the amount so derived over one thousand dollars, and that a like tax should be levied, collected, and paid annually upon the gains, profits, and income of every business, trade, or profession carried on in the United States by persons residing without the United States and not citizens thereof. The same section declared that the tax therein provided for should be assessed, collected, and paid upon the gains, profits, or income for the year ending the 31st day of December next preceding the time for levying, collecting, and paying said duty. What that time was directed to be, as well as the duration of the tax, was defined by the 119th section, which enacted as follows: "That the taxes on incomes herein imposed shall be levied on the 1st day of March, and be due and payable on or before the 30th day of April in each year."

No language could be more comprehensive. It embraces income of every description, whether derived from labor or property, and it particularly mentions income derived from *interest* and *dividends*, adding the words, "or from any source whatever." It is not to be doubted that it includes income derived from dividends on stock held in railroad companies, and income received as interest on bonds of such companies. This section, I think, is the only one that imposes any income tax. All the other sections, from the 117th to the 123d inclusive, are classified under the title "income," and they relate to it, but they are provisions for the ascertainment of the amount, and for the collection of the tax. None of them impose any new or different tax upon the taxpayer. They all have reference to that income made taxable by the 116th section. That, it was known, might be derived from various sources, and provision was made for ascertaining its amount, as well as for collecting the tax upon every item composing it. The 117th section, as amended by the act of 1867, required that there should be included in the estimate, *inter alia*, the share of any person of the gains and profits of all companies, whether incorporated or partnership, who would be entitled to the same if divided, whether divided or otherwise, "except the amount of income received from institutions or corporations whose officers, as required by law, withhold a per centum of the dividends made by such institutions, and pay the same to the officer authorized to receive the same, and except that portion of the salary or pay received for services in the civil, military, or naval, or other service of the United States, including senators, representatives, and delegates in Congress, from which the tax has been deducted." But these exceptions recognize the dividends and interest received from such companies, and the gains from the salaries or pay of United States officers, as a part of the taxpayer's income. It is his share of the gains and profits of the companies, or corporations, and not the gains of the companies themselves which the exceptions direct shall not be included. The reason of this is too obvious to escape notice, unless it be forgotten that the 117th section is but part of a system for levying and collecting an income tax. If it be construed, as it must be, in connection with the other sections relating to the same subject, it is plain that its purpose was to ascertain only that part of a person's incomes, the tax upon which the next following section (the 118th) required should be paid by the taxpayer himself to the collector, leaving that part of his income, which consisted of his share of the gains and profits of institutions or corporations whose officers, as required by law, withheld a per centum of its dividends, and paid the same to the officer authorized to receive it, to be ascertained, and the tax thereon to be collected by the companies themselves. A special mode of collecting the tax on such dividends, interest, and government salaries was intended to be provided, and was actually provided.

Passing by the 118th and 119th sections, which relate to the manner of making returns, of that part of a taxpayer's income, the tax upon which he is required to pay directly to the collector, I come to the 120th, 121st, 122d, and 123d sections. They all relate to that portion of the taxpayer's income excepted by the 117th section from the return which he is required to make to the assessor by the 118th section. They provide for the collection of the tax upon that portion. The 120th imposes a duty of five per centum on all dividends in scrip and money thereafter declared due, wherever and whenever the same shall be payable to stockholders, policy-holders, or depositors, as part of the earnings, income, or gains of any bank, trust company, or savings institution, and of any fire, marine, life, or inland insurance company, either stock or mutual. This tax the banks and other institutions described were required to pay, and they were authorized to withhold from all payments made on account of any dividends or sums of money that may be due and payable as aforesaid, the said duty of five per centum. It is unnecessary to notice particularly the 121st section.

The 122d section enacted "that any railroad, canal, turnpike, canal navigation or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, * * * shall be subject to and pay a tax of five per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens, and said companies are hereby authorized to deduct and withhold from all payments on account of any interest or coupons, and dividends, due and payable as aforesaid, the tax of five per centum, and the payment of the amount of said tax so deducted from the interest or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupons on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise."

The 123d section enacted that there should be levied, collected, and paid on the excess above one thousand dollars of all salaries of officers of the United States, a tax of five per centum, and it required paymasters and disbursing officers to deduct and withhold said tax when making payment to such officers.

All these sections, I think, relate to the tax upon income, whether derived from interest, dividends, or from any source whatever, imposed by the 116th section, and their sole purpose was, not to impose a new tax, but to provide a different mode of collection from the taxpayer. The dividends, interest, and salaries mentioned in them were not required by the 117th and 118th sections to be included in the general estimate, or in the return made to the assistant assessor, because their amount was as certainly ascertainable by the corporations or officers required to collect the tax, as it could have been by any return of the taxpayer, and it was more easily and certainly collectable.

I need not say more upon this branch of the case. If there could be a doubt in any mind that the tax for the collection and payment of which provision was made in the 122d section, was a part of that imposed upon income by the 116th, it must be set at rest by the decision in Jackson v. The Northern Central Railway, a case tried in the Circuit Court of the United States for the District of Maryland, and subsequently removed here. The primary question in that case was whether the tax on interest payable by railroad companies (namely, the tax spoken of in the 122d section) was chargeable against non-resident aliens, and it was ruled by the chief justice that it was not. The ruling was based upon the position that the tax on such interest was the same as that imposed by the 116th section of the act of 1864, viz., a part of the income tax, and that as the 116th section did not include non-resident aliens, the tax on interest spoken of in the 122d was not chargeable against them—the deduction of five per cent. being only a mode of collecting the income tax. This decision was subsequently affirmed in the Supreme Court, 7 Wallace, 262, and the language of the court was as follows: "The decision was placed mainly upon the ground that, looking at the several provisions bearing upon the question, and giving to them a reasonable construction, it was believed not to be the intent of Congress to impose an income tax on non-resident aliens; that they were not only not included in the description of persons upon whom the tax was imposed, but were impliedly excluded by confining it to residents of the United States and citizens residing abroad [an exclusion only found in the 116th section], and that the deduction from the prescribed income of the interest on these railroad bonds, when paid by the companies, was regarded as simply a mode of collecting this part of the income tax. We concur in this view." I understand this case as determining several things: *First*, that the 116th and 122d sections of the act of 1864 are parts of one system, devised for income taxation; *Second*, that the tax on railroad dividends, and on interest of railroad indebtedness, is not a different tax from that imposed upon income generally; and, *Third*, that the 122d section was intended merely to provide a special mode of collection for a part of the tax.

This decision was made, it is true, before the act of 1864, as amended by the act of 1866, had been again amended by the act of 1867, but the later amendment made no other change in the law than extending its provisions so as to embrace dividends and interest payable to non-resident aliens. Regarding it, then, as an incontrovertible proposition, that the tax mentioned in the 122d section is not a different tax from that imposed by the 116th; that it is a part of the tax levied upon income generally, no matter from what source derived, and that the purpose of the section was to provide a special mode of collection of the tax upon income consisting of railroad interest and dividends, I cannot comprehend why it did not expire with the expiration of the tax upon other income. When that expired was determined by the 119th section, which was in the following words: "The taxes on incomes herein imposed shall be levied on the first day of May, and be due and payable on or before the thirtieth day of June of each year, until and including the year 1870, and no longer." Whatever else this clause may mean, it manifestly embraces in terms taxes on income from any source; all income upon which the act imposes a tax. It excepts none. It does not speak of taxes on income, a return of which is required to be made by the taxpayer to the assessor, but its language is "taxes on incomes herein imposed." As the 119th section imposed no tax, the reference must be to the income tax imposed by all parts of the act; to all of them, as well as those upon railroad dividends, &c., as well as those imposed upon dividends of telegraph, manufacturing, or other companies, or upon income from any source.

The clause is also a clear enactment that the income to which it refers should not be subject to a tax, unless derived or received prior to January 1st, 1870. No one who carefully reads the whole act can doubt that the 119th section must be construed in connection with the 116th, and that it speaks of the income made taxable by that section. That enacted, as has already been noticed, that the tax thereby imposed, including the tax on income derived from dividends and interest, should "be assessed, collected, and paid upon gains, profits, and income for the year ending the 31st day of December next, preceding the time for levying, collecting, and paying said tax." Incontestably, therefore, though the last annual tax was required to be levied on the 1st of March,

1870, it was required to be a tax on the income of the year 1869. Hence it is plain, the provision that the taxes on income should be levied on the 1st of March in each year, until and including the year 1870, and no longer, must mean that the income of 1870 should not be subject to taxation.

I think, therefore, these two propositions are beyond any reasonable doubt, or I should so think, were it not that a majority of my brethren are of a different opinion.

1. The tax upon dividends made, and interest payable, by railroad, canal, turnpike, canal navigation, and slack-water companies, for the payment and collection of which provision was made by the 122d section, was a tax on income within the meaning of the 116th section, and not a different and independent tax.

2. That the tax upon all income, without regard to its source, "derived" or "received" by the taxpayer prior to January, 1st, 1870, expired with the close of the next preceding year.

These conclusions are demanded, I think, alike by the letter of the act of Congress and by its spirit. To my mind they seem to be the only reasonable construction that can be given to it. I see nothing to warrant the belief that Congress intended to impose a burden upon income from one species of property, greater or longer continued than that imposed upon income from other property, or that they intended to discriminate against Federal officers and compel them to pay a tax on their salaries, after taxes upon all other salaries had ceased. The dividends received by a shareholder of a railroad company, or a canal, turnpike, or slack-water navigation company, or of a banking, trust, or insurance company, are, in every sense, as much his income as are the dividends he may receive from any other company; for example, a bridge, or a manufacturing corporation. So is the interest received for loans to a railroad company as truly income of the bondholder, as is the interest received by him from permanent loans to any other corporation, or to natural persons. Was it the intention of Congress to enact that one who lent his money to a telegraph company, or to a mining or manufacturing company, should be exempt from a tax upon his interest received after December 31st, 1869; but that one who lent to a canal or railroad company should continue to pay the tax indefinitely and for all time? Is such a reasonable construction of the act of 1864 and its amendments? I cannot believe it. I cannot attribute to Congress any such injustice. The act shows no intent to make any such discriminations. Yet such discriminations are made, if the tax mentioned in the 122d section, as well as that mentioned in the 123d, did not expire when the tax on other income expired.

I come now to the question—important to be considered in view of the pleadings in these cases—whether the tax mentioned in the 122d section was a tax upon the railroad companies, or a tax upon the stockholders and bondholders of those companies. In regard to this there ought to be no doubt. If it was a tax upon the railroad company, then the income of the stockholders and bondholders, derived from their dividends and interest, was exempt from all income tax, although the 116th section taxed income derived from any source, including interest and dividends. Such income was not to be returned to the assessor, and if not taxed in the mode designated in the 122d section, it was not taxed at all. To such an absurdity the construction that the section lays a tax upon the railroad company for its income, inevitably leads.

But look now at the language of the section. It required any railroad company indebted for any money for which bonds or other evidence of indebtedness have been issued, bearing interest, payable one or more years after date, or any such company that should declare any dividend *as part* of the earnings, profits, or gains of such company, should be subject to, and pay a tax of five per centum on all such interest, dividends, or profits, whenever and wherever the same should be payable, and to whatsoever party or person the same should be payable, *and authorized the companies to deduct and withhold from all payments on account of any* interest or dividends, due and payable as aforesaid, the tax of five per centum. It further enacted that the payment of the amount so deducted from the interest or dividends should discharge the company from that amount of the dividend, or interest, due to the stockholder or bondholder. It is too clear for argument that this was a collection of the tax from the stockholder, or creditor, and not from the company, and we have, in effect, so decided in the tonnage-tax cases to-day. Not a dollar was to be taken from the treasury of the company. The tax was to come wholly from the share, or the bondholder. The company was constituted the mere tax collector, and was made liable only in default of its duty as such. If authorities are needed in support of so plain a proposition, they may be found in Jackson v. Railroad Company, cited above, and in Haight v. Railroad Company, 6 Wallace, 15—both construing this act. Indeed, in some of the States this mode of collecting a tax from shareholders and bondholders of corporations has of late been frequently adopted, and, so far as I know, it has never before been thought that the tax in such cases was a tax upon the companies, instead of a tax upon their shareholders or creditors. As well might it be claimed, that when a tax collector is charged with the amount of the duplicate of taxes he is empowered by his warrant to collect, the taxes are laid upon him, and not upon those from whom he is required to collect them.

But the opinion of the majority of my brethren, that by the 122d section Congress intended to tax the railroad companies for *their* gains, profits, and income, and not to tax their bondholders and shareholders, leads to a very remarkable result. The interest due from the companies to their creditors—interest which accrued in 1869—is treated as income of the *companies* for that year, and they are taxed for it. Such is the effect of the judgments entered. The companies are compelled to pay an income tax, not upon what they received, but upon what they were obliged to pay to their creditors. A construction of the act of Congress that leads to such a result cannot be right. It seems to me the fact, that the tax was exacted out of interest payable by the companies, as well as from dividends declared and payable by them, demonstrates that Congress had in view, in the 122d section, not the income of the companies, nor a tax upon them for it, but the income of share and bondholders, and a tax upon them. Railroad companies were taxed upon their gains in another section (the 103d). They were not intended to be taxed in this.

Holding it, then, to be very clear that this section imposed no new tax, and that its design was merely to provide a mode of collection of a part of the income tax imposed by the 116th section upon the holders of the bonds and stock of railroad companies, the question is not, in my judgment, what the majority of the court considers it to be, whether the income upon which the tax in controversy in these cases was attempted to be levied, was the income of the railroad companies for 1869, but whether it was the income of the stockholders and bondholders for that year. In two of the cases the dividends were declared in December, 1869, but were made payable in January, 1870. They were not, therefore, receivable until 1870. In all the other cases the dividends were declared, and the interest fell due in the year last mentioned. True, the dividends were out of profits made by the companies in 1869, and the interest on the debt due by them accrued in that year. But were the dividends and the interest income of the stockholders and bondholders then? Plainly, that which was the income of the companies in one year may not have been the income of their shareholders or creditors until the next. If it was not their income until 1870, it was not taxable against them, and the tax claimed in these cases is, as I have shown, a tax upon them. That nothing was income of the taxpayers until it was receivable by them is most apparent. The act itself sufficiently shows this. It was income "derived" or received, either actually or potentially, that alone was made taxable. The tax was levied "*whenever*" and wherever the dividends or interest should become payable. The companies were required to render returns to the assessors, or assistant assessors, on the tenth day of the month following that in which the interest, coupons, or dividends became "*due and payable.*" (Vide sec. 122.) The tax was an excise. It was taking out of the income a part of it, and it must, therefore, have been a tax upon something received, or receivable—something out of which the tax could be paid when exacted. And such was the uniform construction given to the act of Congress by the government, until after the tax had expired. Prior to the act of 1864 there was a tax on dividends of three per cent., and when by that act the rate was raised to five per cent., the commissioner of internal revenue issued a circular, dated July 1st, 1864, declaring that 'all dividends payable on and after July 1st, 1864, no matter when declared, are subject to the duty of five per centum." I have no doubt, therefore, that the dividends declared, and the interest accrued, must be regarded as income of the stockholders, or bondholders, for the year in which they became payable. It is quite immaterial, then, that the profits of the companies were made, or that the interest on their debt accrued, in 1869. They were not the taxpayers, and the tax was not levied upon their income. It was levied only upon that part of their gains or the interest due from them, which had become payable to, and, therefore, income of their shareholders and bondholders. Those persons have paid taxes upon the full income of six entire years under the act of 1864. The judgments in these cases compel them to pay a tax upon their income for six years and a half, when all other persons whose income was derived from interest or dividends in other companies, were relieved at the expiration of six years. In my judgment, the act of Congress warrants no such injustice.

I think the judgments in all the cases should be affirmed, and I am authorized to say that the chief justice and Justices Davis and Field concur in this dissent.

D. W. MIDDLETON.
C. S. C. U. S.

SEVENTH JUDICIAL DISTRICT.

Court of Common Pleas of Bucks County.

DOBBINS v. URLGUS.

1. Attachment executions are collateral processes to the regular actions between the parties for the same debt or duty, and are not incompatible with them, except so far as they actually interfere in their enforcement, or endanger the rights of some of the parties.
2. As collateral process they are under the control of the courts, as in other cases, where several remedies are employed for the same debt or injury.
3. An attachment execution will not be set aside, because process had been issued to collect the debt secured by the judgment, or a mortgage, its cumulative security, before the attachment was levied.
4. The rule is, that the plaintiff may have as many forms of execution as the law may afford, and pursue them all at the same time, until satisfaction be obtained upon one of them.
5. If there appeared to be an attempt to look up the assets of the defendant, and oppress him by attaching an amount of property far beyond the sum of the debt, or to multiply costs against him, the court would interfere, and set aside such oppressive writs.

Rule to set aside all execution.

Opinion of the court by Ross, P. J.

This rule was applied for, and the defendant now asks that it shall be made absolute, because process had been issued to collect the amount secured by the judgment, and the mortgage, its cumulative security, at the time this writ issued.

The defendant contends that the plaintiff has no right to more than one form of execution at a time; and until it appears that the execution proper will not produce satisfaction, he cannot resort to another execution, or process in the nature of an execution.

In dealing with questions which arise under our statutes, in relation to attachment executions, it is well to bear in mind the remark of C. J. Lowrie, in Kase v. Kase, 10 C. 130, that "an attachment execution procedure is such a complete departure from all common law forms, that we ought hardly to think of applying to it the apparent analogies of common law practice, until we have proved their fitness." An attachment execution is neither an original writ, nor is it of the same species, even if it belongs to the same genera, as an execution proper. Its real nature and character is well defined by Coulter, J., in Fitzimmon's Appeal, 4 Barr, 250, who says: "The whole process of attachment is but auxiliary to the old mode of execution, for the purpose of reaching what could not be touched or reached in that way. It bears, in all its features, unequivocal marks of being designed to aid the enforcement, and not to extinguish the effects of judgments." Adopting the same view, C. J. Lowrie, in Kase v. Kase, *supra*, declares that "attachment executions are collateral processes to the regular actions between the parties for the same debt or duty, and are not incompatible with them, except so far as they actually interfere in their enforcement, or endanger the rights of some of the parties. As collateral process, they are under control of the courts, as in other cases, where several remedies are employed for the same debt or injury." Vide, 5 W. & S. 222; Tams v. Wardle, 2 C. 102; Newlin v. Scott, 4 Wr. 309; Pontius v. Nesbitt et al.

The general rule unquestionably is, that the plaintiff may have as many forms of execution as the law may afford, and pursue them all at the same time until satisfaction is obtained. 4 Wr. 309; Davis v. Scott, 1 Miles, 52. and vide, authorities, *supra*. This rule has been extended to attachment executions. In Tams v. Wardle, *supra*, it was expressly ruled that the plaintiff might have an attachment execution, although an *alias fieri facias* was pending unexecuted and unreturned; and in Pontius v. Nesbitt, *supra*, it was held, that a second attachment execution might issue upon the same judgment, while a former one was still pending. These authorities would seem to abundantly demonstrate the right to issue an attachment execution, pending execution process upon the same judgment, or a cumulative security. No hardship can result to any one from this practice; for, as said by C. J. Lowrie, in Kase v. Kase, *supra*, "The particular process is under the control of the court, so far as to see that it is not used incautiously." If there appeared to be an intent to look up the assets of the defendant, or oppress him by attaching an amount of property far beyond the sum of the debt, the court would promptly intervene. Until such a state of facts be shown, the plaintiff can sustain his attachment process, and thus protect his debt by attaching sufficient property to satisfy it. It is not alleged here that the process was impetrated with any vexatious or oppressive intent; but the motion to set aside was based upon purely technical grounds.

It is apparent from what has been said, that the rule must be discharged.

N. C. James, Esq., pro writ.
R. Watson, Esq., contra.

LEGAL GAZETTE.

Friday, March 28, 1873.

JOHN H. CAMPBELL, EDITOR.
THEODORE F. JENKINS, ASSOCIATE EDITOR.

This week we publish Judge Strong's dissenting opinion in the cases of Barnes et al. v. The Railroad Companies. We are again compelled to crowd out a number of valuable decisions and other reading matter.

Supreme Court of Pennsylv'a.

EDMINSTER v. HARRIS.

The question whether a note or other security for debt is received as payment, is for the jury.

Error to the Court of Common Pleas of Bradford county.

Opinion by SHARSWOOD, J. Delivered March 17th, 1873.

If there had been any evidence in the case that the plaintiff had accepted Harris and Saltmarsh as his debtors, it would still have been a question for the jury. Hart v. Boller, 15 S. & R. 162. The fact that Edminster being one of the company, and also a creditor, agreed to an arrangement by which an assessment was to be made on the different members, and payments to be made, or notes given to Harris and Saltmarsh sufficient to pay all the debts—did not in law amount to a release of the company and an agreement to look to Harris and Saltmarsh alone. Even if the entire amount had been raised and paid to those gentlemen, where is the evidence that the plaintiff was to be responsible for their fidelity or solvency, beyond the amount of his assessment, which he was bound to pay under the agreement, and which if not paid would be a set-off to his claim in this suit? The plaintiff on the witness stand expressly denied that he had ever agreed to look to Harris and Saltmarsh, and we think on the whole case it should have been submitted to the jury to determine whether there was any such agreement.

Judgment reversed and *venire facias de novo* awarded.

Court of Common Pleas, Philadelphia,

IN EQUITY

WEST PHILA. PASSENGER RAILWAY CO. v. SAMUEL C. PERKINS et al., PUBLIC BUILDING COMMISSIONERS,

1. **The franchise of building and using a railroad is private property, of which the owner cannot be deprived, except by clear and unquestionable authority, exercised within the reserved powers of the constitution.**
2. **The act of 1870, authorizing the erection of public buildings, does not empower the commissioners to take up the tracks of the Market street railway.**
3. **The right to lay railway tracks having been exercised, the grant of power therefor is exhausted.**
4. **A railway company accepting without legislative sanction the use of tracks, changing its line as originally laid, would imperil a forfeiture of its franchises.**

Opinion of the court, by ALLISON, P. J., Delivered March 22d, 1873.

The motion made and argued by the defendants asks the court to dissolve the preliminary injunction granted on the 14th of October, 1872. The order restrained the defendants, until hearing, from removing, cutting, or in any manner interfering with or disturbing the track of the passenger railway of the West Philadelphia Passenger Railway Company, upon Market street, between Merrick and Juniper streets, as the same now exists, or from abridging or preventing their use or enjoyment.

The averments of the bill are not denied; on the contrary, they are fully confessed by the defendants, and the motion before us rests solely upon the act of Assembly, approved the 5th of August, 1870 (P. L. of 1871, page 1548), to provide for the erection of public buildings to accommodate the courts, etc., in the city of Philadelphia.

The defendants claim that this act confers not only the authority, but imposes upon them the duty of erecting the proposed buildings upon the ground now covered by the track of the railway of the plaintiff, and assert their intention to proceed to take up said track upon Market street, between Merrick and Juniper streets.

Have they the authority, as the case now stands, to carry into effect this purpose?

The act of August 5th, 1870, gives forth no uncertain or doubtful utterance. The commissioners have full power to procure plans for the buildings, employ all necessary agents to construct them, to do "all other acts necessary in their judgment to carry out the intent of said act in relation to said public buildings. They may make all needful contracts which are made valid and binding in law upon the city, and they shall have authority and are empowered to vacate so much of Market and of Broad streets as they may deem needful." It does not appear from the bill filed by the plaintiffs that there has been any formal execution of this power to vacate the portions of those streets which lie between Merrick and Juniper streets; but in the most practical manner they are about to take them from the public as highways, and to take them from the plaintiffs also for the use of the railway, thus cutting their track in two, and depriving them of all lawful connections between the portions of the track which extend eastward and westward from the site of the buildings to be erected.

There are, however, important considerations set up in the bill against this admitted purpose of the defendants. The plaintiffs claim a grant from the Legislature, approved May 14th, 1857, to use the portion of Market street in question for the construction of their railway (P. L. 1858, page 585). This grant gives to them the authority to construct a double or single track of railway from the intersection of Till, now Fortieth street and Washington or Market street, extending eastward along said Washington and Market street to Delaware Third street; a power which was carried into effect shortly after this act became a law. The railway built under this authority has been in constant use from the first hour of its completion, the corporation has therefore lost none of its powers or franchises by failure to use them; nor is it pretended that there has been any relinquishment or surrender of such powers by the company.

Upon the faith of this grant, the plaintiffs have expended their money, built and stocked their roadway, and have ever since been subject to constant and heavy outlay in the working of their road. That the property thus acquired, both as to corporate franchises and actual investment of capital, is of great value, will not be questioned. All this is the private property of the plaintiffs, which they are entitled to hold and to enjoy, as against all claimants, except such as can show a superior title; even against the State itself, unless it is taken away from them by clear and unquestionable authority, and by the exercise of a right within the reserved powers of the constitution, expressed or implied. But it is upon the constitution that the plaintiffs plant themselves in resisting this attempt to take from them their property under the act of Assembly, which is claimed by the defendants as their protection and justification.

Private property may not be taken for public use unless compensation is first made or secured to the owner. This has not been done, or attempted even to be done by the defendants; they have not sought to condemn this property that they may use it for a public purpose; they do not claim that, under the general laws of the commonwealth, the city or the State is bound to make compensation, or that by any known legal machinery, the defendants can make good out of the public treasury the loss which will fall upon them by the substantial destruction of their corporate franchises and capital invested. Of what force then is the direction contained in the act of 1870, to vacate portions of Broad and Market streets, and to use them as the site of the new public buildings? The answer is easily found in the constitutional prohibition referred to. As it stands, it is a dead letter, so far as it involves the destruction of the rights of property of the plaintiff, or the appropriation of such property, without paying or securing just compensation to the plaintiffs.

It is true that defendants have proposed to give a new line or route of railway to the plaintiffs, as a substitute for that which they intend to take from them. This route diverges from complainants' tracks at their intersection with Merrick street, and is carried around the north and south side of the site of the new buildings, intersecting again with the present railway at Broad and Juniper streets. These lines of railway have already been constructed by the defendants. This would be satisfactory, if it were not for two substantial objections—first, the plaintiffs have not the power to accept the offer of the defendants; and, second, the defendants possess no such rights as they propose to confer on the plaintiffs. The authority to lay a railway on Market street having been exercised under the grant of power by the Legislature, such power is exhausted. This right cannot be exercised over again, under the original grant, and new and different tracks be laid down in place of those already constructed; much less can a track or tracks upon different streets not specially authorized, be accepted or used for railway purposes in lieu of the present railway on Market street.

It is equally clear that the law under which the defendants are proceeding to construct public buildings, does not confer upon the city of Philadelphia the right either to build a railway upon the streets surrounding the ground to be occupied by the buildings, nor does it authorize the Market street company to construct such railway, or to acquire or use any corporate franchises thereon. This offer, therefore, though showing a proper desire on the part of the defendant to protect the plaintiffs from injury to their corporate rights and property, must be regarded as wholly failing in its purpose, and in any event would be subject to the acceptance of the plaintiffs. Such acceptance, being without legislative sanction, could not be attempted even to be carried into effect by plaintiffs without peril of forfeiture of the unquestionable rights which they now possess.

The order of the 14th of October, 1872, is therefore continued until final hearing, or until the further order of the court. Should a satisfactory arrangement be entered into, under proper legal sanction, by the parties to this suit, a modification or abnegation of the order may be applied for hereafter.

Register's Court.

In re WILL OF FRANCIS SMITH, deceased.

A republication of a will when reduced to writing, must be proved in the same manner as testamentary dispositions.

Appeal from the decree of the register of wills, admitting the will to probate.

Opinion by PEIRCE, J. Delivered March 22d, 1873.

This case comes up on two grounds: 1, For an issue to test the validity of the will; and 2, upon the insufficiency of the probate made before the register.

The decedent made his will 26th August, 1864, and signed his name to it. He made a codicil to it dated 17th April, 1858, and made his mark to it. Republication of it was subsequently made in the following words:

"I, Francis Smith, have this twenty-first day of June, 1870, had the above will and codicil read to me, and I do hereby republish the same, and being blind and unable to see, I have directed and authorized Edward Olmstead to sign to this republication my name. FRANCIS SMITH,

By Edward Olmstead, at his request.

Signed in our presence by Edward Olmstead, for Francis Smith, he being incapable from blindness to sign his name, and so signed at the request and by the direction of the said Francis Smith.

John Horn, Jr. Benjamin F. Levy.

The witnesses to the republication of the will and codicil, upon their oath and affirmation, say, that they were present and did see and hear Francis Smith, deceased, the testator therein named, republish and declare the same as and for his last will and codicil thereto, and that at the doing thereof he was of sound disposing mind, memory, and understanding, to the best of their knowledge and belief.

Was this a sufficient proof of a republication, made under the peculiar circumstances, and with the formalities of this republication?

The act of 1833 directs that every will shall be in writing, and unless the person making the same shall be prevented by

the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise such will shall be of no effect.

That there may be a parol republication of a will since the act of 1833, was decided in Campbell v. Jamison, 6 Barr, 498. The proof made before the register in this case, goes no further than the proof of a parol republication. But the republication having been reduced to writing, by direction of the testator, as is alleged, and executed in the peculiar manner provided by the act, when signed by another person for him, we think, should be proved, as such testamentary dispositions are required to be proved.

It is essential to the probate of a will, to which the alleged testator did not sign his name, that it should be proved by two witnesses, that he was so infirm by reason of his last sickness as to be unable to write his name, and that it was signed for him by some person in his presence, and by his express direction. Greenough v. Greenough, 1 Jones, 489; Asay v. Hoover, 5 Barr, 21; Cavett's Appeal, 8 W. & S. 21; Ruoff's Appeal, 2 Casey, 219.

It was said at the argument of this case, that the will and codicil were proved independently of the proof of this republication, and thatr, therefore, it was not necessary to make proof of the republication. But republication may be an important part of a testamentary disposition; and, therefore, where republication of a will has been made, and especially when made in writing and annexed to the will, it forms a part of the instrument. A will is said to be ambulatory until the death of the testator; that is, it is subject to alteration, revocation, republication, and to incidents independent of any direct acts of the testator on it himself, such as marriage, birth of children, death of beneficiaries, &c.

Thus, before the act of 1833, republication of a will, carried with it the after acquired real estate of a testator. A republication of a will, which forgives debts due from children, discharges a bond taken between the making of the will and its republication. Hutchinson's Appeal, 11 Wright, 84.

A codicil duly executed, revives and republishes the will to which it refers, unless there is an expressed intent to the contrary; and this although there was a second will between the first will and the codicil thereto; and although the codicil to the first will contained no words of republication of the first will, or of revocation of the second will. Neff's Appeal, 12 Wright, 501.

A will speaks for certain purposes from its date, and from the date of every republication of it. And in a case such as this, where the mental capacity of the testator to make a will is brought in question, the state of the testator's mind at the time of republication may be a question of the most vital importance.

Therefore, as probate of this republication has not been made in the manner required by law, it must be sent back to the register, to take further proof of it.

It would not be proper to consider at this time the other question, of the mental capacity of the alleged testator to make a will, as the further proof to be taken by the register may give a new direction to the proceeding, or may otherwise have a bearing on the questions involved in the case.

The appeal is sustained, and the instrument of writing purporting to be the last will and codicil of the decedent, and the republication thereof, is remitted to the register of wills, with instructions to take further proof of said alleged republication, as is herein indicated.

Court of Quarter Sessions.

COMMONWEALTH v. POWELL.

A visitor at a public place of amusement is entitled to any unoccupied seat which has not been *bona fide* sold. He cannot obtain a right to a seat so sold by the proprietor's neglecting to mark it taken.

Motion for a new trial.

Opinion of the court by PAXSON, J. Delivered March 22d, 1873.

This case raises an interesting question touching the rights of persons visiting places of amusement. The defendant is a special officer at Wood's Museum. On the evening of last Thanksgiving day, the prosecutor, George Keen, purchased a ticket of admission to said museum; he entered, and took his seat in that portion of the building for which the ticket had been sold. At that time there were few persons in the house, and the ushers were commencing to mark the seats as "taken." The one selected by the prosecutor had not been so marked, but immediately upon his taking it, he was informed by the defendant, that the said seat had been sold, and requested at the same time to occupy another and equally eligible one in the vicinity. This the prosecutor refused to do; whereupon the defendant forcibly removed him. For doing so, the defendant was prosecuted, and convicted of assault and battery.

A visitor at a theatre or other place of amusement is entitled to a seat. This right to some extent depends upon the character of his ticket. If for a reserved seat, he has a right to that particular seat. If not reserved, then to any one he may find unoccupied, and which had not previously been sold to another. I instructed the jury, that if the prosecutor selected a seat in that portion of the building called for by his ticket, and that there was nothing upon the said seat to indicate that it was "taken," and no notice had in fact been given prosecutor prior thereto, that it had been sold to some one else, he had a right to occupy it, and the act of the defendant in ejecting him therefrom was an assault and battery. Subsequent reflection has satisfied me that it is not so much a question of notice as of whether there had been an actual *bona fide* sale of that particular seat to a third party. If so, no neglect on the part of the proprietor of the museum in marking said seat as "taken," could give the prosecutor a right to that which some one else had previously bought and paid for. It will be seen that my instructions were too broad. The jury may have been misled. For this reason the defendant must have a new trial. Next to being right, nothing affords me so much pleasure as to correct a mistake.

The rule to show cause why a new trial should not be granted is allowed, and the same rule is now made absolute.

Recent Decisions.

ENGLAND.

COURT OF EXCHEQUER. HILTON v. AUKESON, November 21st, 1872.

1. An owner or occupier of lands, though bound to take care that his cattle do not wander from his own land, and stray upon the land of another, is under no legal obligation to put up or maintain a fence so as to prevent the cattle of his neighbor straying upon his land; such an obligation can only be founded upon a statutory obligation, or some agreement or covenant.

2. The plaintiff was the occupier of a field, which was separated from a field in the occupation of the defendant by a hedge or fence. In consequence of this fence being out of repair, the plaintiff's cattle strayed into the field of the defendant, and were seized by him as a distress damage feasant. Upon an action brought by the plaintiff for this seizure of the cattle, the pleadings raised the issue of whether or not the defendant was bound to repair the hedge through which the cattle escaped, and the only evidence of liability consisted in the practice for fifty years and upwards, of the defendant and his predecessors to repair such hedge.

3. *Held*, that this was in itself no proof of such liability.—27 *J. T. N. S*, 519.

UNITED STATES CIRCUIT COURTS.

CIRCUIT COURT, U. S., DISTRICT OF CALIFORNIA.

Decision per SAWYER, Cir. J.

1. It is a general rule that forfeitures are not favored, and that provisions in contracts for forfeitures are strictly construed.

2. These principles apply to forfeitures in policies of insurance for non-payment of premiums when due. Forfeitures provided for in policies of insurance are for the benefit of the party insuring, and may be waived by such party.

3. Where, subsequent to the accruing of a forfeiture, under the conditions of a life policy for non-payment of premiums, the insurer, with knowledge of the facts, by its own acts, or those of its agents, recognizes the contract as still subsisting, and manifests an intent not to take advantage of the forfeiture, and does not act prior to the death of the assured, indicating a purpose to claim a forfeiture, the court will be justified in finding a waiver of the forfeiture.

4. In *such cases* the liability of the insurer accrues on the death of the assured, and it is too late afterwards to claim for the first time, the benefit of a forfeiture. —*Pacific Law Reporter*, Feb. 25, 1873.

UNITED STATES SUPREME COURT.

GRAY, COLLECTOR, v. DARLINGTON. December Term 1872, per Field, J.

1. In 1865 the plaintiff being the owner of certain U. S. treasury notes, exchanged them for United States five-twenty bonds, and in 1869 sold the bonds at an advance of $20,000 over the cost of the treasury notes: *Held*, that the advance in value of the bonds during this period of four years over their cost realized by their sale, was not subject to taxation as gains, profits or income of the plaintiff for the year in which the bonds were sold.

2. That the advance in the value of property during a series of years can in no just sense be considered the gains, profits or income of any one particular year of the series, although the entire amount of the advance be at one time turned into money by a sale of the property.

3. The court construes the statute, states the subject of taxation, and the exceptions to the general rule of the assessment thus prescribed.—Ed. *Legal News*.—5 *Chicago Legal News*, 253.

SUPREME COURT, UNITED STATES

DEXTER v. HALL et al. December Term 1872. Error to C. C. U., S. for District of California.

1. The power of attorney of a lunatic, or of one *non compos mentis*, is void.

2. When evidence has been given tending to show the insanity of a grantor, and other evidence tending to show his sanity, a medical expert cannot be asked his opinion respecting that person's sanity or insanity, forming his opinion from the facts and symptoms detailed in the evidence.

3. Such a witness may be asked his opinion upon a case hypothetically stated, or upon a case where the facts are certain and found; but he will not be allowed to determine from the evidence what the facts are, and to give his opinion upon them.

4. Under the California statutes of limitations, a plaintiff in ejectment who has established a legal title in himself, is presumed to have had actual possession of the land within five years next prior to the commencement of his suit, unless an actual adverse possession by another is affirmatively proved.—5 *Pacific Law Reporter*, 41.

UNITED STATES COURTS.

U. S. CIRCUIT COURT, D. OF OREGON NIGHTINGALE et al. v. OREGON CENTRAL R. R. Co. et al. In equity. Decided January 27th, 1873, per Deady, Cir. J.

1. The attorney of a party has the exclusive control of the conduct and management of a suit, and neither the party nor his agent or attorney in fact has any authority to sign a stipulation for a continuance.

2. Counsel in a suit is not authorized to represent his client, except in the argument on hearing before the court.

3. A printed name is not his signature.—5 *Pacific Law Reporter*, 43.

CALIFORNIA.

SUPREME COURT OF CALIFORNIA. POWNALL v. HALL. January Term, 1873.

1. A payment in counterfeit notes, though in good faith made, is no payment.

2. A payment in part of spurious notes is bad *pro tanto*, and to that extent is no payment.

3. A redemption under such payment is ineffectual and invalid.

4. But if a qualified redemptioner is only presented in his *bona fide* attempt to redeem, by an innocent mistake, and he properly plead it, equity will relieve.—5 *Pacific Law Reporter*, 46.

ILLINOIS.

SUPREME COURT OF ILLINOIS. MYERS v. THE PEOPLE. Decided February 18th, 1873, per McAllister, J.

1. Jurisdiction of county courts. *Held*,

that the act of 1872 extends the jurisdiction of county courts throughout the State, and that the clause limiting it to counties of one hundred thousand inhabitants is unconstitutional and void.

2. The liquor law of 1872.—The court construes several sections of the liquor law of 1872, states the mode of proceeding under it, and what an information should contain. The conviction of the party is sustained.—5 *Chicago Legal News*, 255.

NEW YORK.

SUPREME COURT OF NEW YORK. GILBERT et al. Assignees, etc. v. PRIEST.

1. In an action by an assignee in bankruptcy to set aside a conveyance, alleged to have been made in fraud of the bankruptcy law, *held*, that the State court had jurisdiction.—7 *A. L. J.*, 119.

[Head notes of decisions reported in 16th Wallace, soon to appear.]

Supreme Court, United States.

LIBEL IN ADMIRALTY.

A bill of lading endorsed and sent to the consignees, who make, on the receipt of it, advances on the cargo, gives the consignees sufficient title to maintain a libel in admiralty against a vessel by whose tortious collision with the vessel in which the cargo consigned to them was coming, the cargo has been wrecked and lost. The Vaughan and Telegraph, 258. And see The Thames, 98.

LIGHTS AT SEA AND ON RIVERS.

1. A boat fastened to shore and out of the proper path of vessels navigating in a port, is not bound in the absence of harbor regulation requiring it to keep a light on deck. The Bridgeport, 116.

2. Although one vessel may be sailing at night with lights other than those whose use is made obligatory on her by acts of Congress, and may by actually misleading another vessel tend to cause a collision, yet this will not discharge the other vessel if she, on her part, have suffered herself to be misled by the wrong lights when, if she had been intelligently vigilant, other indications would have pointed out or led her to suspect that the vessel was not what her lights indicated. The Continental, 345.

MANDAMUS.

Cannot perform the office of appeal or writ of error, and will not lie to a circuit judge to compel him to entertain jurisdiction of a cause on appeal from the District Court, he having once decided that the case—a controversy between a captain and crew of a Prussian vessel, and brought by appeal before him from the District Court—was not within his jurisdiction, but, under a treaty stipulation, within that of the Prussian consul alone. Ex parte Newman, 152.

MINISTERIAL OFFICERS.

Protected, when acting in obedience to process or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts, and render judgment thereon. Erskine v. Hohnback, 613.

MORTGAGE.

To redeem property which has been sold under a mortgage, as is alleged irregularly, the whole mortgage money must be tendered, or if suit be brought, be paid into court. Collins v. Riggs, 491.

MORTGAGEE.

A mortgagee claiming under a proceeding which purported to be a foreclosure, but which was a void proceeding, is not liable for rents and profits unless he have actually received them. Bigler v. Waller, 297.

MOTION FOR REHEARING.

In an equity suit. The granting or refusal to grant by the highest court of the State, not a subject for review by the Supreme Court of the United States. Steines v. Franklin County, 15.

NATIONAL BANKS.

1. May be sued in any State, county, or municipal court in the county or city where located, having jurisdiction in similar cases. Bank of Bethel v. Pahquioque Bank, 383.

2. Do not lose corporate existence by mere default in paying circulating notes, and upon the mere appointment of a receiver. Ib.

3. May be sued though a receiver have been appointed and is acting. Ib.

4. The decision of the receiver against the validity of a claim presented to him for a dividend is not final; the creditor may proceed afterwards to have the validity of the claim judicially adjudicated in a suit in a proper State court, against the bank. Ib.

ORIGINAL BILL.

Where a bill does not relate to some matter already litigated in the same court by the same persons, and which is not either in addition to, or a continuance of, an original suit, it is an original bill, not an ancillary one. Christmas v. Russell, 69.

PARTIES.

1. In a suit in the Circuit Court of the United States by a distributee of the estate of a decedent to recover a distributive share, the mere fact that the administrator is ordered to account before a master does not make parties all who were entitled to distribution, nor authorize a decree in their favor. Hook v. Payne, 252.

2. If such persons do not appear before the master, no decree can be made for or against them, because they would not be bound thereby. Ib.

3. If they should appear and claim an interest, if there are controverted matters between them and the administrator outside of the mere accounting to be made by him, this can only be decided on proper pleadings and regular hearing by the court. Ib.

4. A bill which seeks to set aside a fraudulent receipt obtained by an administrator from one distributee, and to recover the amount coming to that distributee, is not a suit in which all other persons interested in the estate can be heard, unless they are made parties, or make themselves parties to the suit in some appropriate mode. Ib.

5. A mortgagor who, on a revived bill against the personal representatives, attempted to charge his mortgagee's estate with profits because of a foreclosure which though really void, had been gone through with in form (the mortgagee being the supposed purchaser), and has had his bill dismissed, with a decree that he is still owner and liable for unpaid mortgage money, cannot object, on error, that the decree did not order the heirs of the formal purchaser (the purchaser himself being dead) to convey, if the bill have not made such heirs parties, or if they have not been called in. Bigler v. Waller, 298.

PARTNERSHIP.

Where one partner, R. M., affixed his name and seal to an instrument whose *tenor* set forth that "R. M. & Sons, by R. M., one of the firm, had thereto set their hands and seals," the instrument may be regarded as the deed of all the partners on proof that prior to the execution, the others had authorized R. M. to execute the instrument, and after execution, with full knowledge acquiesced in what he had done. Gibson v. Warden, 244.

PATENTS.

I. General principles relating to.

1. In patents for design, the thing patented is the peculiar and distinctive appearance of an article to which the appearance is given; the sameness of effect upon the eye. Gorham Company v. White, 511.

2. If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, and sufficient to induce him to purchase one, supposing it to be the other, the one first patented is infringed by the other. Ib.

3. Where in a patent for an improvement in the process of manufacturing cast iron railroad wheels, only vague and uncertain directions could be given as to the degree of foreign heat to be applied in any particular case, there, when a patentee in his specification establishes a maximum and a minimum, the ascertainment of the proper intermediate degree may be left to the skill and judgment of the operator practicing the process. Mowry v. Whitney, 620.

4. It is as true of a process invented as an improvement in a manufacture, as it is of an improvement in a machine, that an infringer is not liable to the extent of his entire profits in the manufacture. Ib.

5. In such a case the question to be determined is, what advantage did the infringer derive from using the invention, over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits, and that advantage is the measure of profits to be accounted for. Ib.

6. When a patent is for an entire process made up of several constituent steps or stages, the patentee not pretending to be the inventor of those constituents, his claim to the process as an entirety does not secure to him the exclusive use of the constituents singly. What is secured is their use when arranged in the process. Ib.

7. The profits recoverable from an infringer are the measure of the patentee's damages, and though called profits are really damages, and unliquidated until a final decree is made. Ib.

8. Interest upon unliquidated damages is not generally allowable, and should not be allowed before a final decree for profits. Ib.

9. What language will transfer an extension and renewal of a patent made under the acts of July 4th, 1836, and May 27th, 1846. Nicolson Pavement Company v. Jenkins, 452.

II. Mode of vacating.

10. The ancient mode of annulling or repealing the king's patent was by *scire facias*, generally brought in the chancery where the record of the instrument was found. Mowry v. Whitney, 434.

11. In modern times the Court of Chancery, sitting in equity, entertained a similar jurisdiction by bill when the ground of relief is fraud in obtaining the patent, and in this country it is the usual mode in all cases, because better adapted to the investigation and to the relief to be administered. Ib.

12. But *scire facias* could only be sued out in the English courts by the king or his attorney general, except in cases where two patents had been granted for the same thing to different individuals, and the sixteenth section of the act of July 4th, 1836, concerning patents for inventions, is based upon analogous principles. Ib.

13. Both upon this authority and upon sound principle, no suit can be brought to set aside, annul, or declare void, a patent issued by the government, except in the class of cases above mentioned, unless brought in the name of the government or by the authority or permission of the attorney general, so as to be under his control. Ib.

POSSESSION

And actual reception of profits necessary to charge a mortgagee buying on a supposed foreclosure, but one really void. Bigler v. Waller, 298.

PRESUMPTION.

A *prima facie* exists that the military and fiscal officers of the United States have done their duty. United States v. Crusell, 1.

PURCHASER WITHOUT NOTICE.

1. When two corporations united their vessels and other property used in navigation, and formed a new corporation, in which no money was paid by either party, and in the contract of consolidation made arrangements for the payment of the debts of one or both before any dividends should be declared in the new stock, the new corporation cannot avail itself of the doctrine applicable to such a purchaser without notice; and a lien, three years and a half old, will be enforced against one of the vessels so transferred to the new corporation. The Key City, 653.

2. A person purchasing for value in one State under a will probated in it, on a surrogate's order of another State, where the decedent died, admitting the will to probate there, will be protected in his purchase against heirs-at-law, though after the purchase the surrogate's order have been reversed by the highest court of the State where the order was made, and the supposed will declared null; the reversal having been made after the sale and after the devisee in the will had sold out all his interest under it to the heirs-at-law; and the purchaser from the devisee not having been made a party to the proceedings setting the surrogate's order aside. Foulke v. Zimmerman, 113.

Acts of Assembly—1873.

A supplement to an act to permit the voters of this commonwealth to vote every three years on the question of granting licenses to sell intoxicating liquors, approved twenty-seventh March, one thousand eight hundred and seventy-two.

Whereas, Under the provisions of the first section of the act approved twenty-seventh March. one thousand eight hundred and seventy-two, there is or may be some doubt as to the time of holding elections on the question of license or no license, in certain cities and boroughs wherein the municipal elections hereto fore by law fixed do not occur upon the same day, as in the townships of the county wherein said cities or boroughs are located.

SECT. 1. Be it enacted by the Senate and House of Representatives of the commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That now it is hereby declared to be the true intent and meaning of said act, that the election under the provisions of the first section thereof, should be held in all the election districts and precincts of any county, including the cities and boroughs therein situated, upon the same day, and whenever by law the municipal elections in any city or borough occur at a different date from the municipal elections in the townships of the county in which said city or borough or boroughs may be holden, the election upon the question of license in said city or borough, or boroughs, may, and shall be held upon the day now fixed by law for holding township elections in such county, and by the proper officers thereof, under the provisions of the first section of the act to which this is a supplement.

SECT. 2. Whenever upon the passage of this supplemental act, the day of township elections in any county may have passed, in which county there were any city, borough or boroughs in which the annual municipal elections have not been held, the qualified voters in said city, borough or boroughs in any such county, may vote upon the question of license on the day of the annual municipal election for such city, borough or boroughs, for the year one thousand eight hundred and seventy-three, when such annual municipal election occurs on or before the third Friday of March, and triennially thereafter; but when such municipal elections in any such city, borough or boroughs do not occur on or before the third Friday of March, then in any such case the election upon the question of license shall be held on said third Friday of March, and not later. The votes for or against license in any such borough or boroughs shall be added to and counted with the votes for and against license polled in the townships of the county in which said borough or boroughs may be located, the same as if cast on the same day as the township elections. And the votes for and against license in any city shall be counted and certified to the court or board of license commissioners, as the case may be separate from the vote of the townships and boroughs in any county wherein said city may be located, and if a majority vote of such city is against license, then no license shall be granted for such city, but if a majority vote of such city is for license, then license may be granted for such city.

SECT. 3. The proper election officers of each election district in any such city, borough or boroughs, are hereby authorized and required to hold and conduct an election upon the day or days mentioned in the law to which this is a supplement, or in this supplemental act, and the election officers shall be entitled to pay therefor as for like services in holding other elections: *Provided*, The election occurs on a day different from the municipal election.

SECT. 4. If an election in any city, ward, or borough has been already holden under the act to which this is a supplement, or under any special act, wherein the question of license or no license has been voted upon, though not upon the day of any municipal election in such city or borough, such election is hereby declared to be legal and valid.

SECT. 5. In all cases where elections have heretofore been held in any township, ward, or borough, or in any district of any city or county of this commonwealth, under the provisions of any special act heretofore passed, authorizing the citizens thereof to vote on the question of granting license for the sale of liquors the qualified electors of such wards, districts, or boroughs shall not be debarred from voting under the provisions of the act to which this is a supplement, by reason of their having voted as aforesaid, or by reason of any provision or limitation in any special act whatever; but all the qualified voters of every county and city in the State, shall be entitled to vote on the question of granting license, in such manner and under such restrictions as are provided in this act, and the act to which it is a supplement.

SECT. 6. That the act entitled "An act to regulate the sale of intoxicating liquors in the county of Allegheny," approved April third, one thousand eight hundred and seventy-two, was not intended to repeal the act to which this is a supplement, but the same is hereby declared to be in as full force and effect as if the act approved April third, one thousand eight hundred and seventy-two, had never been passed, and that the election provided for to take place under and in pursuance of said act of March twenty-seventh, one thousand eight hundred and seventy-two, shall be held on the third Friday of March, one thousand eight hundred and seventy-three, and every third year thereafter in the several wards, boroughs and townships in said county of Allegheny, not excepted in said act.

SECT. 7. That all elections held in the year one thousand eight hundred and seventy-three, under this act, and the act to which this is a supplement, eight days' notice of said election shall be sufficient, and that all elections held thereafter under this act, and the act to which it is a supplement, notice of said election shall be given as is required by the provision of the act to which this is a supplement: *Provided*, That the provisions of this act shall not be so construed as to repeal or affect any special law prohibiting the sale of intoxicating liquors, or the granting of licenses in any district wherein the same is prohibited by existing laws; and it is further declared to be the true intent and meaning of section three, of the act to which this is a supplement, that so much of said section as prohibits the issuing of license by any court or board of license commissioners, in any district where there is a majority against license, shall apply to all officers authorized by existing laws to issue licenses for the sale of spirituous, vinous, malt, or other intoxicating liquors, or any admixture thereof.

SECT. 8. That the qualified electors of the city and county of Philadelphia shall be entitled to vote on the question of granting licenses, in such manner and under such restrictions as are provided in this act and the act to which this is a supplement, at the first municipal election held in the city and county of Philadelphia, for the year eighteen hundred and seventy-three, and every three years thereafter, at the annual municipal elections.

Approved March 6th, 1873.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in April, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

Feb. 28, Isaac H. Macdonald, Administrator of NANCY TOLAND, dec'd.
" 28, Francis Lucas, Executor of FRANCIS R. LUCAS, dec'd.
" 28, John G. Kuhnle, Executor of CATHARINE ELLIS, dec'd.
Mar. 1, Emma Harvey, Administratrix of LOUIS C. L. HARVEY, dec'd.
" 3, Maria B. Hunsworth et al., Executors and Trustees of JOHN HUNSWORTH, dec'd.
" 3, Adam Schmunck et al., Executors of VALENTINE STEITZ, dec'd.
" 3, Eugene Linnard, Guardian of MARY DUNHAM.
" 4, Mary J. Heiler, Administratrix of SCARBOROUGH TATHAM, dec'd.
" 4, George Erety, deceased, Executor of ANN ELY, deceased, as filed by William Erety and Horace B. Shoemaker.
" 5, Charles M. Lukens, Administrator of GEORGE M. SNYDER, dec'd.
" 6, John Ashbridge, Administrator of JACOB HARRIS, dec'd.
" 6, Nettie E. Schoneman, Executrix of JACOB NATHAN, dec'd.
" 7, Clara H. Thomas, Administratrix of EDWIN L. THOMAS, dec'd.
" 8, I. Wistar Evans et al., Executors of CATHARINE EVANS, dec'd.
" 8, Emily M. Whartenby, Executrix of HARRIET S. WHARTENBY, deceased.
" 8, Stephen R. Snyder, Guardian of FREDERICK GETZ, late minor.
" 8, George Wood, Executor of GILBERT GAW, dec'd.
" 8, Charles H. Meyer, Administrator of ADOLPH H. PICKERT, dec'd.
" 10, James L. Bulligan et al., Executors of BRIDGET FITZGERALD, dec'd.
" 11, Charles J. Piggott, Administrator of JOHN T. PIGGOTT, dec'd.
" 12, Eliza Bready, Guardian of WILLIAM C. O. ELY, dec'd.
" 13, William J. Gibb et al., Executors of JOHN GIBB, dec'd.
" 13, Michael Jennings, Administrator of EDWARD LYNCH, dec'd.
" 14, Robt. C. Bennett, Surviving Executor of JOHN DAVISON, dec'd.
" 15, Catharine Nepley et al., Executors of JOHN N. NEPLEY, dec'd.
" 15, Charles Este, Administrator of FRANCIS A. ROSS, dec'd.
" 15, Alexander Black, Administrator of WILLIAM K. ROBINSON, dec'd.
" 17, Samuel J. Sharpless et al., Trustees under the will of Townsend Sharpless of ALICE M. BROWN.
" 17, Samuel J. Sharpless et al., Trustees under the will of Townsend Sharpless of LYDIA J. HUNN.
" 17, Samuel J. Sharpless et al., Trustees under the will of Townsend Sharpless of ANNA R. SHARPLESS AND HER CHILDREN.
" 17, Hester S. Reeves, Executrix of JAMES S. REEVES, dec'd.
" 17, Joshua H. Morris, Executor of CHAS L. DESAQUE, dec'd.
" 17, Albert D. Fell et. al., Executors of PENROSE FELL, dec'd.
" 18, Catharine Miller, Administratrix of JAMES MILLER, dec'd.
" 18, The Provident Life and Trust Company, Guardians of BERTHA ROSENSTEIN, dec'd.
" 18, William Moyn, Administrator of WM. HIDDIMAN, dec'd.
" 18, Sarah T. Woodcock, Administrator of WILLIAM WOODCOCK, dec'd.
" 18, Harriet Barrett et al., Executors of NATHAN BARRETT, dec'd.
Mar. 21, Rudolph P. McCall, Administrator of JOSEPH W. BURTON, dec'd.
" 21, Catharine Harkins (Doyle), Administratrix of JOHN DOYLE, dec'd.
" 21, James K. Neulis, Guardian of GEO. NEULIS, a minor.
" 21, Mary A. Garber, Administratrix of SARAH GEHMAN, dec'd.
" 21, Meyer Gans, Guardian of JULIA GANS.
" 22, Peter Leeten, Administrator of SUSANNAH WADE, dec'd.
" 22, Frederick Narr et al., Administrator of WILLIAM G. VOGEL, dec'd.
" 22, Kate L. Moffett, Administratrix of THOMAS MOFFETT, dec'd.
" 22, Ann Jane McWhinney, Administratrix of ARTHUR McWHINNEY, deceased.
" 22, James Larkens, Executor of JAMES GALLAGHER, dec'd.
" 22, Samuel G. Flood, Executor of MARY H. CROZIER, dec'd.
" 24, Helen McCutcheon, Guardian of McCUTCHEON minors.
" 24, Athalin E. Edwards et al., Executors of IGNATIUS EDWARDS, dec'd.
" 24, William Harris, Jr., Administrator of SAMUEL Y. ADDIS, dec'd.
" 24, Eliza A. Mart, in Administratrix of JOHN MARTIN, dec'd.
" 24, Mary Rockhill et al., Executors of THOMAS C. ROCKHILL, dec'd.
" 25, Charles H. Gross, Surviving Executor of CHARLES HEEBNER, dec'd.
" 25, Margaret Story (late Burnet), Administratrix of JOHN BURNET, Jr., dec'd.
" 25, James Noble, Executor of JEREMIAH DUNBAR, dec'd.
" 25, Ellwood Davis, Executor of BENJAMIN DAVIS, dec'd.
" 25, Antone Schraudt, Executor of WM. STEFFEN, dec'd.
" 25, Cornelius K. Gibson Administratrix of CHARLES M. GIBSON, dec'd.
" 26, Ellen M. Treanor, Executrix of MICHAEL TREANOR, dec'd.
" 26, Philip S. P. Conner, Administrator of SAML. EMLEN RANDOLPH, deceased.
" 26, Cecelia Miller, Administratrix of JNO. H. MILLER, dec'd.
" 26, John Levering, Jr., Administrator, &c., of JOHN N. SHUGARD, dec'd.
" 26, James Peoples, Executor of ELLEN LACEY, dec'd.
" 26, Joshua Pusey, Administrator of CHARITY KENSEY, dec'd.
" 27, Caroline F. Byrnes (late Allen), Administratrix of AND. M. ALLEN, deceased.
" 27, Wm. I. Shaw, Administrator of SARAH SHAW, dec'd.
" 27, David E. Hance, Administrator of ABRAHAM JORDAN, dec'd.
" 27, D. S. Cadwallader et al., Administrators, &c., of SARAH B. CADWALLADER, dec'd.
" 27, William H. Mills, Administrator of JOHN MILLS, dec'd.
" 27, Mary Jane Moore, Administratrix of JANE TAYLOR, dec'd.
" 27, Joseph R. Lyndall et al., Executors of WILLIAM BALLENGER, dec'd.
" 27, Sarah A. Albright et al., Executors of WILLIAM L. ALBRIGHT, dec'd.
" 27, John L. Shoemaker et al., Executors of ASHTON ROBERTS, dec'd.
" 27, Rachael L. Wise, Administratrix of SUSANNA DUYLASS, dec'd.
" 27, Elizabeth Gorgas et al., Administrators of CHARLES GORGAS, dec'd.
" 27, Joseph Bacon, Administrator of MARGARET E. BACON, dec'd.
" 25, Jane E. Rogers, Administratrix of WILLIAM ROGERS, dec'd.
" 27, John Wistar Evans et al., Surviving Residuary Trustees under the will of THOMAS EVANS, dec'd.
" 27, Michael Feyney et al., Executors of DENNIS KANE, dec'd.
" 27, Joseph Bacon et al., Surviving Executors and Trustees under the will of DAVID BACON, dec'd.

WILLIAM M. BUNN,
mar 28-4t Register.

Legal Gazette.

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Supreme Court United States.

THE PHILADELPHIA AND READING RAILROAD COMPANY, Plaintiffs in Error, v. THE COMMONWEALTH OF PENNSYLVANIA.

1. Each State has the power, at its discretion to tax its own internal commerce, and the franchises, property, or business of its own corporations, so that inter-state intercourse, trade, or commerce be not embarrassed or restricted.
2. The act of the Legislature of Pennsylvania of August 25th, 1864, imposes a tax on the freight transported in or through the State, and so far as it applies to articles carried through the State, or taken up in the State and carried out of it, or taken up without the State and brought into it, is unconstitutional and void.

In error to the Supreme Court of the State of Pennsylvania.

Opinion of the court delivered by Mr. Justice STRONG, at Washington, March 10th, 1873.

This is a writ of error to the Supreme Court of Pennsylvania, and we are called upon to review a judgment of that court affirming the validity of a statute of the State, which the plaintiffs in error allege to be repugnant to the Federal Constitution.

The statute was enacted on the 25th of August, 1864, and was entitled "An act to provide additional revenues for the use of the commonwealth." Its first section enacted "that the president, treasurer, cashier, or other financial officer of every railroad company, steamboat company, canal company, and slackwater navigation company, and all other companies now or hereafter doing business within this State, and upon whose works freight may be transported, whether by such company or by individuals, and whether such company shall receive compensation for transportation, for transportation and toll, or shall receive tolls only, except turnpike companies, plank road companies, and bridge companies, shall, within thirty days after the first days of January, April, July, and October of every year, make return in writing to the auditor general, under oath or affirmation, stating fully and particularly the number of tons of freight carried over, through, or upon the works of said company, for the three months immediately preceding each of the above mentioned days; and each of said companies, except as aforesaid, shall, at the time of making such return, pay to the State treasurer, for the use of the commonwealth, on each two thousand pounds of freight so carried, tax at the following rates: "first, on the product of mines" (and other articles), "two cents;" "second," on another class of articles, three cents, and on a third class five cents. The section further enacted, that "when the same freight shall be carried over different but continuous lines, said freight shall be chargeable with tax, as if it had been carried but upon one line, and the whole tax shall be paid by such one of said companies as the State treasurer may select and notify thereof; corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls received for such use, are authorized to add the tax hereby imposed to said tolls, and collect the same therewith, but in no case shall tax be twice charged on the same freight carried on or over the same line of improvements. Provided that every company now or hereafter incorporated by this commonwealth, whose line extends into any other State, and every corporation, company, or individual of any other State holding and enjoying any franchises, property, or privileges whatever in this State, by virtue of the laws thereof, shall make returns of freight, and pay for the freight carried over, through, and upon that portion of their lines within this State, as if the whole of their respective lines were within this State."

It is the validity of this statute which is now assailed, and the case we have before us presents the question whether, so far as it imposes a tax upon freight taken up within the State and carried out of it, or taken up outside the State and delivered within it, or, in different words, upon all freight other than that taken up and delivered within the State, it is not repugnant to the provision of the Constitution of the United States, which ordains "that Congress shall have power to regulate commerce with foreign nations and among the several States," or in conflict with the provision that "no State shall, without the consent of Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The question is a grave one. It calls upon us to trace the line, always difficult to be traced, between the limits of State sovereignty in imposing taxation, and the power and duty of the Federal Government to protect and regulate inner State commerce. While, upon the one hand, it is of the utmost importance that the States should possess the power to raise revenue for all the purposes of a State government, by any means, and in any manner not inconsistent with the powers which the people of the States have conferred upon the general government, it is equally important that the domain of the latter should be preserved free from invasion, and that no State legislation should be sustained which defeats the avowed purposes of the Federal Constitution, or which assumes to regulate or control subjects committed by that Constitution exclusively to the regulation of Congress.

Before proceeding, however, to a consideration of the direct question whether the statute is in direct conflict with any provision of the Constitution of the United States, it is necessary to have a clear apprehension of the subject and the nature of the tax imposed by it. It has repeatedly been held that the constitutionality or unconstitutionality of a State tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. This was decided in the cases of Bank of Commerce v. New York City, 2 Black, 620; in the Bank Tax Case, 2 Wallace, 200; Society for Savings v. Coite, 6 Wall. 594; and Provident Bank v. Massachusetts, 6 Wallace, 611. In all these cases it appeared that the bank was required by the statute to pay the tax, but the decisions turned upon the question, what was the subject of the tax, upon what did the burden really rest, not upon the question from whom the State exacted payment into its treasury. Hence, where it appeared that the ultimate burden rested upon the property of the bank invested in United States securities, it was held unconstitutional, but where it rested upon the franchise of the bank, it was sustained.

Upon what, then, is the tax imposed by the act of August 25th, 1864, to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried. The companies are required to pay to the State treasurer for the use of the commonwealth, "on each two thousand pounds of freight so carried," a tax at the specified rates. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight. And when it is observed that the act provides "where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried upon one line, and the whole tax shall be paid by such one of said companies as the State treasurer may select and notify thereof," no room is left for doubt. This provision demonstrates that the tax has no reference to the business of the companies. In the case of connected lines thousands of tons may be carried over the line of one company without any liability of that company to pay the tax. The State treasurer is to decide which of several shall pay the whole. There is still another provision in the act which shows that the burden of the tax was not intended to be imposed upon the companies designated by it, neither upon their franchises, their property, or their business. The provision is as follows: "Corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and to collect the same therewith." Evidently this contemplates a liability for the tax beyond that of the company required to pay it into the treasury, and it authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. It carries the tax over and beyond the carrier to the thing carried. Improvement companies, not themselves authorized to act as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their charters in the rates of toll they are allowed to charge. Hence the right to increase the tolls to the extent of the tax was given them in order that the tax might come from the freight transported, and not from the treasury of the companies. It required no such grant to companies which not only own their roadway, but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. They can, therefore, add the tax to the charge for transportation without further authority.—(Vide Boyle v. The Reading Railroad Company, 54 Penna. State, 310; Cumberland Valley Railroad Company's Appeal, 62 Penna. State, 218.) In view of these provisions of the statute, it is impossible to escape from the conviction that the burden of the tax rests upon the freight transported, or upon the consignor or consignee of the freight (imposed because the freight is transported), and that the company authorized to collect the tax and required to pay it into the State Treasury is, in effect, only a tax gatherer. The practical operation of the law has been well illustrated by another when commenting upon a statute of the State of Delaware, very similar to the one now under consideration. He said, "the position of the carrier under this law is substantially that of one to whom public taxes are farmed out—who undertakes by contract to advance to the government a required revenue, with power by suit or distress to collect a like amount out of those upon whom the tax is laid. The only imaginable difference is, that, in

the case of taxes farmed out, the obligation to account to the government is voluntarily assumed by contract, and not imposed by law, as upon the carrier under this act; also, that different means are provided for raising the tax out of those ultimately chargeable with it."—(Chancellor Bates in Clarke v. Phil., Wil. and Balt. R. R. Co.)

Considering it, then, as manifest that the tax demanded by the act is imposed, not upon the company, but upon the freight carried, and because carried, we proceed to inquire whether, so far as it affects commodities transported through the State, or from points without the State to points within it, or from points within the State to points without it, the act is a regulation of inter-state commerce. Beyond all question the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one State to another was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States. A power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the State to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the States. In his work on the Constitution, sec. 1,057, Judge Story asserts that the sense in which the word commerce is used in that instrument, includes not only traffic, but intercourse and navigation. And in the Passenger Cases, 7 How. 416, it was said: "Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight." Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the States it must have been principally by land when the Constitution was adopted.

Then, why is not a tax upon freight transported from State to State a regulation of inter-state transportation, and, therefore, a regulation of commerce among the States? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the State, and in taking them out? The present case is the best possible illustration. The Legislature of Pennsylvania has in effect declared that every ton of freight taken up within the State and carried out, or taken up in other States and brought within her limits, shall pay a specified tax. The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the State, may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines. It would hardly be maintained, we think, that had the State established custom-houses on her borders, wherever a railroad or canal comes to the State line, and demanded at these houses a duty for allowing merchandise to enter or to leave the State upon one of those railroads or canals, such an imposition would not have been a regulation of commerce with her sister States. Yet it is difficult to see any substantial difference between the supposed case and the one we have in hand. The goods of no citizen of New York, New Jersey, Ohio, or of any other State, may be placed upon a canal, railroad, or steamboat within the State for transportation any distance, either into or out of the State, without being subjected to the burden. Nor can it make any difference that the legislative purpose was to raise money for the support of the State government, and not to regulate transportation. It is not the purpose of the law, but its effect, which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in inter-state trade. We are not at this moment inquiring further than whether taxing goods carried because they are carried is a regulation of carriage. The State may tax its internal commerce, but if an act to tax inter-state or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State. Nor is a rule prescribed for carriage of goods through, out of, or into a State any the less a regulation of transportation, because the same rule may be applied to carriage which is wholly internal. Doubtless a State may regulate its internal commerce as it pleases. If a State chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another State, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the State.

We may notice here a position taken by the defendants in error, and stoutly defended in the argument, that the tax levied, instead of being a regulation of commerce, is compensation for the use of the works of internal improvement constructed under the authority of the State and by virtue of franchises granted by the State; in other words, that it is a toll for the use of the highways, a part of which, in right of her eminent domain, the State may order to be paid into her treasury. We are asked, if the works were in her own hands, if she were the owner of them, what provision in the Federal Constitution would forbid her to increase her revenue by an increase of the charge of transportation over them? When in the hands of creatures exercising her franchises, what clause in any instrument forbids her to tax the franchises, and to authorize the tax to be added to existing tolls and franchises?

That this argument rests upon a misconception of the statute is to our minds very evident. We concede the right and power of the State to tax the franchises of its corporations, and the right of the owners of artificial highways, whether such owners be the State or grantees of franchises from the State, to exact what they please for the use of their ways. That right is an attribute of ownership. But this tax is not laid upon the franchises of the corporation, nor upon those who hold a part of the State's eminent domain. It is laid upon those who deal with the owners of the highways or means of conveyance. The State is not herself the owner of the roadways, nor of the motive power. The tax is not compensation for services rendered by her or by her agents. It is something beyond the cost of transportation or the ordinary charges therefor. Having no ownership in the railroads or canals, the State has no title to their income, except so far as she reserved it in the charters of the companies. Tolls and freights are a compensation for services rendered, or facilities furnished to a passenger or transporter. These are not rendered or furnished by the State. A tax is a demand of sovereignty; a toll is a demand of proprietorship. The tax levied by this act is therefore not a toll. It is not exacted in compensation for the use of the roadway; and if it were, the right to make terms for the use of the roadway is in the grantee of the franchises, not in the grantor. But, in truth, the State has no more right to demand a portion of the tolls which the grantees of her franchises may exact, than she would have to demand a portion of the rents of land which she had sold. She may tax by virtue of her sovereignty, and measure the tax by income, but the income itself is beyond her reach. All this, however, is abstract and apart from the case before us. That the act of 1864 was not intended to assert a claim for the use of the public works, or a claim for a part of the tolls, is too apparent to escape observation. The tax was imposed upon freight carried by steamboat companies, whether incorporated by the State or not, and whether exercising privileges granted by the State or not. It reaches freight passing up and down the Delaware and the Ohio rivers, carried by companies who derive no rights from grants of Pennsylvania, who are exercising no part of her eminent domain; and, as we have noticed heretofore, the tax is not proportioned to services rendered, or to the use made of canals or railways. It is the same, whether the transportation be long or short. It must therefore be considered an exaction, in right of alleged sovereignty, from freight transported, or the right of transportation out of, or into, or through the State—a burden upon inter-state intercourse.

If, then, this is a tax upon freight carried between States, and a tax because of its transportation, and if such a tax is in effect a regulation of inter-state commerce, the conclusion seems to be inevitable, that it is in conflict with the Constitution of the United States. It is not necessary to the present case to go at large into the much debated question whether the power given to Congress by the Constitution to regulate commerce among the States is exclusive. In the earlier decisions of this court, it was said to have been so entirely vested in Congress, that no part of it can be exercised by a State. Gibbons v. Ogden, 9 Wheaton, 1; Passenger Cases, 7 How. 283. It has, indeed, often been argued, and sometimes intimated by the court, that so far as Congress has not legislated on the subject, the States may legislate respecting inter-state commerce. Yet, if they can, why may they not add regulations to commerce with foreign nations beyond those made by Congress, if not inconsistent with them, for the power over both foreign and inter-state commerce is conferred upon the Federal Legislature by the same words. And certainly it has never yet been decided by this court, that the power to regulate inter-state, as well as foreign commerce, is not exclusively in Congress. Cases that have sustained State laws alleged to be regulations of commerce among the States, have been such as related to bridges or dams across streams wholly within a State, police or health laws, or subjects of a kindred nature, not strictly commercial regulations. The subjects were such as in Gilman v. Philadelphia, 3 Wall. 713, it was said, "can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively." However this may be, the rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted, are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. Cooley v. Port Wardens, 12 How. 299; Gilman v. Philadelphia, *supra*; Crandall v. The State of Nevada, 6 Wall. 42. Surely transportation of passengers or merchandise through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed. The produce of western States may thus be effectually excluded from eastern markets, for though it might bear the imposition of a single tax, it would be crushed under the load of many. It was to guard against the possiblity of such commercial embarrassments, no doubt, that the power of regulating commerce among the States was conferred upon the Federal Government.

In Almy v. The State of California, 24 How. 169, it was held by this court, that a law of this State imposing a tax upon bills of lading for gold or silver transported from that State to any port or place without the State, was substantially a tax upon the transportation itself, and was, therefore, unconstitutional. True, the decision was rested on the ground that it was a tax upon exports, and subsequently in Woodruff v. Parham, 8 Wall. 123, the court denied the correctness of the reasons given for the decision, but

they said at the same time, the case was well decided for another reason, viz.: that such a tax was a regulation of commerce —a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons between one State and another, which is within the rule laid down in Crandall v. Nevada, 6 Wall. 35, and with the authority of Congress to regulate commerce among the States.

In Crandall v. The State of Nevada, where it appeared that the Legislature of the State had enacted that there should "be levied and collected a capitation tax of one dollar upon every person leaving the State by any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire," and required the proprietors, owners and corporations so engaged to make monthly reports of the number of persons carried, and to pay the tax, it was ruled that though required to be paid by the carriers, the tax was a tax upon passengers for the privilege of being carried out of the State, and not a tax on the business of the carriers. For that reason, it was held, that the law imposing it was invalid, as in conflict with the Constitution of the United States. A majority of the court, it is true, declined to rest the decision upon the ground that the tax was a regulation of inter-state commerce, and therefore beyond the power of the State to impose, but all the judges agreed that the State law was unconstitutional and void. The chief justice and Mr. Justice Clifford thought the judgment should have been placed exclusively on the ground that the act of the State Legislature was inconsistent with the power conferred upon Congress to regulate commerce among the several States, and it does not appear that the other judges held that it was not thus inconsistent. In any view of the case, however, it decides that a State cannot tax persons for passing through or out of it. Inter-state transportation of passengers is beyond the reach of a State Legislature. And if State taxation of persons passing from one State to another, or a State tax upon inter-state transportation of passengers is unconstitutional, *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State, in conflict with the Federal Constitution. Merchandise is the subject of commerce. Transportation is essential to commerce; and every burden laid upon it is *pro tanto* a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the States, we regard it as established, that no State can impose a tax upon freight transported from State to State, or upon the transporter, because of such transportation.

But while holding this, we recognize fully the power of each State to tax at its discretion, its own internal commerce, and the franchises, property, or business of its own corporations, so that inter-state intercourse, trade or commerce be not embarrassed or restricted. That must remain free.

The conclusion of the whole is that, in our opinion, the act of the Legislature of Pennsylvania, of August 25th, 1864, so far as it applies to articles carried through the State, or articles taken up in the State and carried out of it, or articles taken up without the State and brought into it, is unconstitutional and void.

The judgment of the Supeme Court of the State is therefore reversed, and the record is remitted for further proceedings, in accordance with this opinion.

Justice Swayne. I dissent from the opinion just read. In my judgment, the tax is imposed upon *the business* of those required to pay it. The tonnage is only the mode of ascertaining the extent of the business. That no discrimination is made between freight carried wholly within the State, and that brought into or carried through or out of it, sets this, as I think, in a clear light, and is conclusive on the subject.

I am authorized to say, that Mr. Justice Davis unites with me in this dissent.

THE ERIE RAILWAY COMPANY, Plaintiff in Error, v. THE STATE OF PENNSYLVANIA.

In error to the Supreme Court of the Commonwealth of Pennsylvania.

Opinion of the court by STRONG, J. Delivered March 10th, 1873.

The question presented in this case is the same which we have considered and answered in the case of The Philadelphia and Reading Railroad Company v. The Commonwealth of Pennsylvania, No. —, decided at this term. The plaintiff in error is a New York corporation, which by acts of the Pennsylvania Legislature of February 16th, 1841, and March 26th, 1846, was authorized to construct its railroad through a portion of that State, paying for the privilege annually the sum of ten thousand dollars, and subjected to taxation on so much of its stock as equalled the cost of construction of that part of its road situate in Pennsylvania, in the same manner and at the same rate as other similar property was, or might be, subject.

Under the act of Assembly of the State, of August 25th, 1864, a tax was levied upon freight carried upon that portion of the road situate in Pennsylvania, either taken up within the State and carried out, or received by the company in another State for the sole purpose of being brought within it, and actually so brought. The single question now is, whether that act, so far as it taxes such freight, is constitutional. For the reasons which we have given in the case first above referred to, we hold that it is not, and consequently the judgment of the Supreme Court of the State, affirming the validity of the act, must be reversed.

The judgment is reversed, and the record is remitted for further proceedings, in conformity with this opinion.

R. A. Lamberton and *John W. Simonton, Esqs.*, of Harrisburg, *James E. Gowen, Esq.*, of Philadelphia, and *William W. McFarland, Esq.*, of New York, for the companies, plaintiffs in error.

James W. M. Newlin, Lewis Waln Smith, and *F. Carroll Brewster, Esqs.*, of Philadelphia, and *Wayne MacVeagh, Esq.*, of Harrisburg, for the State of Pennsylvania, defendant in error.

EASTERN DISTRICT.

Supreme Court of Pennsylv'a.

ETTINGER v. KEMMERER.

1. Before the declarations of a third person, alleged to be an agent of one of the parties can be received, there must be sufficient evidence of the agency, and that the declarations were within the scope of his authority. His declarations are not evidence of his agency.
2. If facts proposed to be proved were apparently irrelevant at the time of the offer, yet, if they become relevant by subsequent testimony, the error is cured.

Error to the Court of Common Pleas of Lehigh county.

Opinion by SHARSWOOD, J. Delivered March 24th, 1873.

The first error assigned is, that the court erred in not allowing the defendants to ask Ettinger, one of the defendants, who was on the stand as a witness, what E. J. Young said to him in reference to the character and ownership of the mineral right, and the ownership of the share of stock purchased by defendants. Before the declaration of a third person, alleged to be an agent of one of the parties, can be received, there must be sufficient evidence to go to the jury of the fact of agency, and that the declarations proposed were within the scope of his authority. Had it been shown that E. J. Young was the agent to sell, his declarations at the time of the sale, and as an inducement to the purchaser, would have been admissible. We must look at the state of the evidence at the time the offer was made and rejected. What the witness Fritz subsequently testified, supposing it to have been sufficient, cannot be invoked to convict the judge of error, there having been no renewal of the offer after his testimony. Now what Ettinger said, which was all that was before the court at the time of the offer, was clearly insufficient. He said he bought the share of Kemmerer, not of Young, though Young had spoken to him. "Young tried to sell ore stock; he said he was trying to sell Kemmerer's stock." Young's own declarations could not prove his agency. Clark v. Baker, 2 Wharton, 340.

The second error assigned is, that the court erred in allowing the plaintiff to ask the defendant, Ettinger, whether he bought the stock for the purposes of speculation, and whether he sold a portion, or all, and at what price, and whether he received the pay for it, and whether it is not now in the hands of other parties to whom he transferred it. The objection was general, so that if any part of the offer was admissible, there was no error in overruling the objection. It may have been irrelevant to show for what purpose the defendant had purchased the stock, but the rest of the offer was clearly relevant. No rescission of the contract was set up, and if it had been, it was material to show that the defendant had confirmed the contract after knowledge, and so far as damages resulting from the fraud, it was important as tending to show the extent of such damages. Whether the defendant knew of the lien and title when he made the contract, was a question upon which there was evidence in the cause. Even if the facts proposed to be proved were irrelevant as far as appeared at the time of the offer, yet if they became relevant by subsequent testimony, the error of the admission was cured.

The third error assigned is, that the court erred in allowing the plaintiff to prove that the lease was read at different meetings of the company, and explained in German, in the absence of evidence that the defendants or either of them were present. There was evidence that the defendant, Ettinger, was at the meeting of January 11th, 1868. He admitted that he was there, heard them talk about a lease, although he says he did not hear it read. The witness Rudolph testified that it was read at that meeting. According to the defendant's own testimony, he attended other meetings. There was no error, therefore, in the admission of this evidence.

The fourth error is, that the court erred in allowing plaintiff to introduce in evidence lease B, dated July 9th, 1869. There was evidence to be adverted to presently, that George N. Reaton, who executed this paper, had purchased the title of the original lessor, Garret N. Demott. One of the objections raised to the plaintiff's title was, that the company had forfeited all their rights under this lease from Demott, and this instrument was relevant to show that this forfeiture, if it existed at the time of the contract, was subsequently waived.

The fifth assignment is to the admission of the letter of Neighbor to plaintiff, pasted on lease A. Neighbor was a lawyer, who had been consulted on the title, who gave it as his opinion, that the title of Demott was good, and that Demott had sold the same to Reaton. As this letter was attached to the lease, every presumption existed that it was read with the lease as part of the document, on January 11th, 1868, when the defendant, Ettinger, was present. There was no error, therefore, in its admission. This also disposes of the ninth assignment.

The other errors assigned to the answers of the court may be considered together. They involve the question, whether if the representations made by the plaintiff, as to the title and character of the subject matter, to the defendant, were false and fraudulent, still, if the defendant knew all the facts, or had the means of knowledge directly within his reach, he could avail himself of this defence? Now it will be observed that the falsehood relied on, was not specified facts, but rather a fraudulent concealment of facts. Thus it was said that the company owned the lands, when in point of fact they only had a lease for five years, from April 1st, 1869. He, Kemmerer, said nothing about any one else having a right to receive a royalty besides him on the ore. He didn't say any one else had any ownership except him. Applying, therefore, the answers of the court to this state of the evidence, we find no error.

Judgment affirmed.

LEGAL GAZETTE.

Friday, April 4, 1873.

JOHN H. CAMPBELL,
EDITOR.
THEODORE F. JENKINS,
ASSOCIATE EDITOR.

We publish on page 110 the opinion of Allison, P. J., in the divorce case of Pennington v. Pennington.

REPORT OF THE JUDICIARY COMMITTEE OF THE CONSTITUTIONAL CONVENTION.

Just before the convention adjourned for its present recess, Hon. Wm. H. Armstrong, chairman of the judiciary committee of that body, presented the report of the committee. It is an exceedingly lengthy document and one deserving of the greatest possible consideration from the bar and the public generally. Numerous radical changes are made in our present judiciary system, some of them excellent, and others of them quite the reverse. On the whole, however, the report evinces great care in its preparation, and an earnest desire upon the part of the gentlemen composing the committee, to provide adequate remedies for the present evils of insufficient courts, delays in legal proceedings, etc., from which the people of this State have been suffering for a long time past. We propose in this and subsequent articles to draw attention to the principal features of the report, commending those which in our judgment are good, and condemning those that we think the contrary.

The report in substance provides as follows:

The judicial power of the commonwealth shall be vested in

I. A SUPREME COURT,

to consist of seven judges, *nominated by the governor*, by and with the advice and consent of two-thirds of the Senate; to hold their offices twenty-one years, and not to be reappointed; to be at least forty years of age; the present judges to retain office until their terms expire, and two new judges to be appointed to make up the number seven—vacancies to be filled by appointment for a full term—each judge to be chief justice in turn, as at present. The Supreme Court to have original jurisdiction in cases of habeas corpus, mandamus, quo warranto as to State officers, and commonwealth revenue cases only. The Court of Nisi Prius to be abolished. The appellate jurisdiction is to extend to all cases where the amount involved shall exceed the sum of $2,000; to cases where it is certified that the constitutionality of any State or Federal law is involved, and to all judgments of the Circuit Court in the exercise of original jurisdiction; also, to cases under the appellate jurisdiction of the Circuit Court, where the amount involved shall exceed the sum of $500, or where the judgment of the Circuit Court shall not be unanimous, or where any of the judges of the Circuit Court certify that there is a question which ought to be submitted to the Supreme Court. Five judges to be a quorum, and the concurrence of four shall be necessary to a decision. No case to be affirmed by a divided court.

II. A CIRCUIT COURT,

to consist of nine judges, eight of whom are to be *elected* at large in the State, and the ninth to be a Supreme Court judge, assigned to preside over the court when it is sitting as an appellate court *in banc*; the judges to be at least thirty-five years of age; their term of office to be sixteen years, one judge going out every two years; five judges to be a quorum *in banc*. The Circuit Court shall have original jurisdiction in each county, of cases of habeas corpus, mandamus and quo warranto; in election cases when directed by law; and in all civil cases in law and in equity, where the sum involved is over $500. It shall have appellate jurisdiction in each appellate district in all civil cases which cannot be carried by direct appeal, certiorari, or writ of error to the Supreme Court, and like jurisdiction in such criminal cases as may be conferred by law. Their decisions are not to be published by authority of the State. For the purpose of appellate jurisdiction, the State shall be divided into six circuits, viz.:

First Circuit (at Philadelphia)—Philadelphia, Chester, Delaware and Montgomery.

Second Circuit (at Harrisburg)—Dauphin, Lebanon, Lancaster, York, Adams, Franklin, Fulton, Bedford, Huntingdon, Juniata, Perry, Cumberland, Berks and Schuylkill.

Third Circuit (at Pittsburgh)—Allegheny, Washington, Beaver, Fayette, Greene, Somerset, Bedford, Fulton, Indiana, Armstrong, Butler, Lawrence, Westmoreland, Berks and Schuylkill.

Fourth Circuit (at Franklin)—Erie, Crawford, Mercer, Venango, Clarion, Forrest, Warren, Elk, Jefferson and McKean.

Fifth Circuit (at Williamsport)—Lycoming, Union, Snyder, Northumberland, Montour, Columbia, Sullivan, Clinton, Centre, Tioga, Potter, Clearfield and Cameron.

Sixth Circuit (at Wilkesbarre)—Luzerne, Carbon, Monroe, Pike, Wayne, Susquehanna, Bradford, Wyoming, Lehigh and Northampton.

For the purpose of original jurisdiction, each county shall be a sub-circuit, in which at least one term of the Circuit Court shall be held by one of the judges thereof, at the county seat every year, if required. The Legislature is to regulate the terms of the courts, and may increase the number of justices.

III. COURTS OF COMMON PLEAS.

Jurisdiction of present courts to remain as now, unless changed by law. Present judges to retain their commissions until their terms have expired. All *district courts* now established, are abolished, and their jurisdiction vested in, and the judges transferred to the courts of common pleas. The judges to be elected for ten years, and may be removed by the governor, on the address of two-thirds of each branch of the Legislature, and must be thirty years of age, and practising attorneys for five years previous to their election. Associate justices not learned in the law, are abolished.

In Philadelphia there are to be four courts of common pleas, and in Allegheny two, each court consisting of three judges, having exclusive jurisdiction of cases commenced therein. Criminal courts shall be held by common pleas judges, as at present. The present common pleas districts shall continue as they are until changed by law. Additional judges are to be elected as follows: two in Philadelphia; one in the third district; one in the fifth; two in the tenth; one in the twelfth; one in the fourteenth; one in the seventeenth; one in the nineteenth; and one in the twenty-eighth.

In Philadelphia, there shall be only one prothonotary for all the common pleas courts of that city, to be appointed by the judges for six years, and one chief clerk for each of the four courts. There shall be separate dockets for each court, except the judgment docket, which shall contain the judgments and liens of all the four courts, and of the first Circuit Court. Prothonotaries, clerks, and their subordinates to be salaried and paid out of the city treasury, into which all fees are to be paid.

4. JUSTICES OF THE PEACE.

Justices of the peace to be elected for five years; their number not to exceed one for every township, borough or ward; they may be removed upon judgment of a court of record, upon complaint of ten citizens, and due proof of misconduct or unfitness for office. In cities of over 200,000 population, there shall be in lieu of present aldermen, one police court for every 30,000 population, to be held by judges learned in the law, who have been admitted to practice at least five years, and who are to be paid by fixed salaries, all fees being paid into the city treasury. Such police judges to be elected for seven years, on a general ticket, by all the qualified voters of the city.

5. ORPHANS' COURTS.

There shall be an orphans' court, and court of quarter sessions for each county, as at present. In Philadelphia there are to be elected three judges, and in Allegheny two judges, and in any county of over 100,000 inhabitants, the Legislature may provide for the election of one or more judges, who shall be orphans' court judges, and in whom shall be vested the present orphans' and registers' court jurisdictions.

GENERAL PROVISIONS.

All laws relating to courts shall be general and of uniform operation. The Supreme Court shall prescribe a general system of practice in all the courts of the State, which shall be uniform in all courts of the same grade. In every case tried before them, the judges shall reduce the whole opinion and charge of the court to writing, and file the same of record. The Supreme Court shall appoint one reporter of its decisions for six years.

The change from an elective to an appointive judiciary, is, in our judgment, a bad one. Where the terms are long, the salaries competent, and the position one of great honor, the people can certainly be entrusted with the selection of their own judges. There have been fewer mistakes made in *electing* judges in this State, than there were under the old system of appointment. We trust the convention will not take this step *backward*. The committee have failed to report a proper system of providing as many judges as the necessities of the people require. The only way to have a simple, uniform, self-adjusting system, is to have the number of judges regulated by the *population* of the various judicial districts, as is substantially the case in France at the present day. Filling vacancies for the full instead of for the unexpired term, is another objection. The abolition of the present district courts, is, we think, a good feature, as it tends to more uniformity in our judicial system. The creation of circuit courts may or may not be a benefit to the people, accordingly as their judgments are final or not in most of the cases brought before them. To this feature of the report, we will give our serious consideration, and may possibly commend it, if it seems in the end to tend towards a more speedy administration of justice; at present we are not inclined much in its favor. The abolition of the aldermanic system in Philadelphia is a blessing, though the courts substituted for them should be constituted in a somewhat different manner. The appointment of the prothonotaries by the courts themselves, is a wise change, but should be supplemented by some provision limiting their powers over moneys received and held by them as officers of the courts.

We cannot commend strongly enough the provision requiring liens and judgments in Philadelphia to be entered in one central office, instead of in each separate court office, as at present. There are many other points that we are desirous of noticing, but our want of space compels us to stop for the present.

MINORITY REPORTS.

Six minority reports from members of the Judiciary Committee of the Constitutional Convention, were presented along with the majority report. Mr. Kane dissents from the majority on the following grounds: 1st. He is against the *appointment* of the judges, and in favor of their election by the people. 2d. He is opposed to the establishment of a circuit court.

Mr. Saml. A. Purviance is also opposed to a circuit court, and to the limitation of the jurisdiction of the Supreme Court, and to the substitution of police courts, for aldermen, in large cities.

Mr. Jas. L. Reynolds, is also opposed to a circuit court, and to the *appointment* of judges.

Mr. Dallas, is also opposed to such appointment, and to the report because it fails to provide for a non-partisan judiciary, or for minority representation; and further, because it fixes the terms of common pleas judges at ten years instead of fifteen; and because it establishes a circuit court; because it fixes a money limit to the right of appeal; because it creates four common pleas and a separate orphans' court in Philadelphia; because it makes no provision for official reporters, and because it limits the age at which judges may be eligible.

Messrs. Dallas and Cuyler join in proposing some sections in reference to the Philadelphia courts.

Mr. Broomall is in favor of leaving the judiciary system "substantially as it is."

We will pay our respects to these reports in a future issue.

In the Constitutional Convention, the committee to whom was referred the Declaration of Rights, have reported in favor of leaving that part of the constitution substantially as at present. James W. M. Newlin, Esq., a member of the committee, has filed a dissenting report, in favor of

changing the sections upon trial by jury so as to allow the parties to waive a trial if they so desire, and so as to allow three-fourths of the members of a jury to render a verdict, and in favor of so altering the latter part of section seven as to make it read, "And in all trials for libel, both civil and criminal, the truth, when published with good motives, and for justifiable ends, shall be a sufficient defence, and the jury shall have the right to determine the law and the facts under the direction of the court, as in other cases." The substance of both changes is good.

PUBLICATIONS RECEIVED.

A TREATISE ON THE LAW OF JUDGMENTS, including all final Determinations of the Rights of Parties in Actions or Proceedings at Law or in Equity. By A. C. Freeman, Counsellor at Law, Sacramento, 1873. 8vo, pp. xxxiv, 540. San Francisco, A. L. Bancroft & Co., Law Book Publishers, 1873. Price, $6.50. Received from the Publishers.

"This is the first law text book ever published on the Pacific coast." Such is the announcement on the circular of that enterprising book firm, Messrs. A. L. Bancroft & Co., of San Francisco, and to judge from appearances and a cursory examination of the work, we should say that the first original law text book of the Far West is a decided success. The mechanical part of the work is very well done, the paper, typography and general "make-up" being excellent. A treatise on the law of judgments has been wanted, and this will serve to supply that want. The only modern text book we have on the subject, is the English work by Ram, of which an American edition has been published within a few years past, but as this new work is much more comprehensive in its scope and character, and has the advantage of being by an American author, it will no doubt supersede the former. We hope its merits will be such that it will certainly do so; for we must say, we always like to see an American work take the place of an English one.

"The author of this book believes that its publication is amply justified by the importance of the subject of which it treats, by the frequency with which a correct understanding of that subject is essential to a proper and consistent administration of the law, and by the absence of any other work which even professes to treat of the matters considered in this."

We think he is fully justified in publishing it, and hope it may have an extended sale.

THE SANITARIAN. A monthly Journal. A. N. Bell, M. D., Editor. Vol. 1, No. 1. A. S. Barnes & Co., New York and Chicago.

Will evidently be a valuable publication, if the succeeding numbers will be as well prepared as this, the initial one.

THE UNITED STATES JURIST, for April, edited by James Schouler. Washington, D. C.

The present number, besides the usual amount of legal information, digests of recent decisions, etc., contains an article on "Jurisprudence as an Element of Social Science," by Emory Washburn, and a pleasant, well written, though hardly just review, of the life and character of Chief Justice Taney. The Jurist is always a welcome visitor among our exchanges.

THE AMERICAN LAW REVIEW, for April, 1873.

We have received from the Commissioners to Revise the New York Statutes, Part III. of their "First Draft." It is a large octavo volume of 761 pages, and contains the statutes relating to courts and officers of justice, and proceedings in civil cases. We have but time this week to notice its receipt.

Supreme Court of Pennsylv'a.

CHAS. B. WEBER v. SUPERVISORS OF UPPER SAUCON TOWNSHIP

1. The act of Assembly of April 14th, 1868, imposing a tax upon the owners of ore beds in a particular township of Lehigh county, is constitutional.
2. Durach's Appeal, 12 P. F. S. 491, settled the principle involved in this case. In that case it was held that while the Legislature cannot, under the name of taxation, take private property for public use without compensation, and that, therefore, a special tax on individuals or particular properties would be unconstitutional, yet in the exercise of the power of taxation, persons and things may be legitimately classified, some kinds may be assessed, and others not; and that even special exemptions are not unconstitutional.
3. The court has no power to pronounce a tax unconstitutional, merely on the ground of injustice or inequality.

Error to the Court of Common Pleas of Lehigh county.

Opinion of the court by SHARSWOOD, J. Delivered March 24th, 1873.

Hammett v. Philadelphia, 15 P. F. Smith, 146, was twice argued, each time before a full bench, and was a well considered case. The principle of it has since been reaffirmed in Washington Avenue, 19 P. F. Smith, 352. It did not question the constitutional right of the Legislature to confer upon municipal corporations the power of taxing properties benefited by local improvements for the cost of making or maintaining them, but placed upon it the just and salutary restriction that it should be limited to the special benefits conferred by the improvements, and not extend beyond them; that the Legislature could not authorize a tax to be levied on particular property in a designated locality for a general purpose, to which the whole community ought equally to contribute. Such a tax was in effect only a mode of taking private property for public use without making compensation. An examination of the facts will evince that the judgments in those cases have this extent—no more. The opinion in Hammett's case had been published immediately after the first argument though not reported until after the second. It was cited, and was the main reliance of the appellant in Durach's Appeal, 12 P. F. Smith, 491, which settled, however, the principle which seems to us to be decisive of the main question raised on this record, to wit: the constitutionality of the tax imposed upon the owners of ore beds in Upper Saucon township, Lehigh county, by the act of Assembly of April 14th, 1868 (Pamph. L. 1127). It was then held that while the Legislature cannot, under the name of taxation, take private property for public use without compensation, and that therefore a special tax on individuals or particular properties would be unconstitutional, yet in the exercise of the power of taxation, persons and things may be legitimately classified—some kinds may be assessed and others not—and that even special exemptions are not unconstitutional. There is no provision in the constitution that taxation shall be equal Sound policy requires that it should be so as far as possible. But perfect equality is not possible. Indeed, if this were necessary there could be no taxation, except such as would include every person and every thing, which would manifestly be impracticable and unjust.

It is gravely contended, however, that this court has the power to set aside unjust, unequal and improper legislation relating to taxation, and Philadelphia Association v. Wood, 3 Wright, 73, is relied on as establishing this position. There are many things contained in the opinion in that case entirely aside from the point decided, and therefore mere *obiter dicta*. All that was determined was that an act of Assembly which required all agencies for foreign insurance, trust and annuity companies in the city of Philadelphia, to pay two per cent. of their gross premiums to an association for the relief of disabled firemen, was not taxation at all, it was taking the property of A. and giving it to B., whether for a charitable or any other mere private purpose it mattered not. No doubt after money raised by taxation has reached the public treasury, it may be appropriated by the Legislature to charities or individuals. It was admitted, indeed, that the tax in that case would be clearly constitutional, if it had been levied for and paid into the public treasury, and the idea that the court could pronounce a tax unconstitutional on the mere ground of injustice or inequality, was expressly repudiated.

It has been urged, however, grounded upon an opinion expressed by Chief Justice Lowrie in the case last cited, that it is not competent for the Legislature to provide for the collection of taxes by action in the courts; that it would turn the courts into tax collectors. But all personal actions are processes for the collection of money, and the courts are no more collectors of taxes in the one case than they are collectors of private claims in the other. It is the sheriff who is the collector when it is adjudged that the tax or debt is due, and surely there is nothing incongruous in that. He is the best and most efficient of all collectors, and never objects to the performance of that function, for he is well paid for it. All that the courts are required to do is to decide whether the debt or tax is payable by the defendant, and what the amount of it is. That is a purely judicial transaction. This mode of enforcing the payment of taxes may be unusual, but what provision of the bill of rights or of the constitution of government does it infringe? As well might it be maintained that fines, forfeitures and penalties could not thus be enforced, and of examples of these the statute book is full. So municipal liens for taxes and assessments have been collected by actions of *scire facias* in the courts, and no one has ever thought that it was unconstitutional. No doubt the Legislature might provide a summary process in all cases of public claims. But what right has the citizen to complain if instead of this he is secured a trial by jury to ascertain his liability before he can be compelled to pay? He would have better ground to complain if it had been denied to him.

It is also maintained, and in this contention it must be admitted that there is much plausibility, that there are difficulties in carrying this act of Assembly into execution, by reason of the want of any provision for the ascertainment and assessment of the amount payable by each owner of an ore bed. It would have been better if the Legislature had provided that the owner should make a return of the number of tons hauled over the public roads, and in default of his doing so, authorized the supervisors to assess the amount. But can we set aside an act of Assembly, because its machinery is lame and imperfect? Our duty is to execute the legislative will in the way prescribed, when that way is constitutional, though a much better way might have been devised. We are bound to give the act a reasonable construction, *ut ne magis valeat quam perat*. When the owner refuses or neglects to pay the tax, the Legislature has imposed upon the township the burden of proving by evidence, satisfactory to a jury, all that is required to fix liability upon the owner of the ore bed. This may be unwieldy, but it is surely not unjust to the taxpayer. He can save himself from the costs of a suit, by a tender, in time, of the amount actually due. It is not a case where a valuation of property is required. It is a fixed rate upon the number of tons, and that the owner may be presumed to know, or to have the means of ascertaining, whether he is a landlord, or himself the actual occupant. It is not, indeed, expressly provided that the supervisors shall ascertain and assess the amount. But they must do so in order to maintain their suit, and recover a judgment; and they must do more; they must prove it by competent evidence. In this case, as appears by the affidavit of claim filed, there was a demand of a certain sum, and the plaintiff in error did not deny in his affidavit that the amount was correct.

Nor can it be doubted that the plaintiff in error is liable for the tax. He admits himself to be the owner of the ore bed, and in the sense of the tax laws of this commonwealth, the owner of lands is always the landlord, and not the tenant, when they are occupied under a lease. See act of April 6th, 1802, sect. 8, 3 Smith, 516; act of April 3d, 1804, sect. 6, 4 Smith, 203; act of April 15th, 1834, sect. 46, Pamph. L. 518; Caldwell v. Moore, 1 Jones, 58.

It is unnecessary to consider the contention, that the imposition of this tax impairs the obligation of the contract between the landlord and tenant, for it is too clear for argument, that a tax upon the subject matter of a contract, by whichever party it is made payable, can never produce that effect.

Judgment affirmed.

We concur in this opinion, except as it relates to the extension of Hammett v. The City, beyond the case itself.

JOHN M. READ,
H. W. WILLIAMS.

WEBER v. REINHARD.

The act in question imposes a tax upon the owners of ore beds. A rate is given, a command to pay, and then a suit and costs ordered for non-payment, without any provision for assessing or ascertaining the tax. There being no due process of law provided for the ascertainment of the taxpayer's duty, the infliction of the penalties of a suit and costs, to collect what has not been laid on the citizen by lawful process, is in violation of the bill of rights, which provides that no one shall be deprived of his property, unless by the judgment of his peers, or *the law of the land*. The act is, therefore, unconstitutional.

Dissenting opinion by AGNEW, J. Delivered March 24th, 1873.

With my views of the act of Assembly

in this case, I cannot assent to the judgment just given. The point I make upon this act is, that, when no specific tax is laid, but a rate only, the citizen is not charged with the tax, until the subject of taxation is assessed and the tax is laid upon him. Here is an act which imposes upon the owners of ore beds in a single township, a tax, at a rate of a cent and a half a ton, payable every six months, for every ton of ore mined and hauled away from their banks, over the public roads of the township, without providing for any assessment or mode of ascertaining the tax before payment, or for any redress or appeal from an unjust and exorbitant demand by the collector, and which, in default of payment of an unadjusted and unknown sum, subjects the citizen to the penalty of a suit and costs to enforce collection. The fundamental error in the opinion just read, is, in my judgment, the confounding of a *rate* fixed by the act, with the tax itself. It confounds the measure of a duty with the duty. The law furnishes a rate, but the rate is only the measure of the tax, when applied to the subject of taxation. As to each citizen, his tax is not laid until the subject is ascertained, and the rate applied to it. To escape from this dilemma, the opinion falls into a second error, by assuming in the next place, that the remedy for *non-payment* is itself an assessment. The words of the act are, "and in *default of payment*, the same to be *collected* as *debts* of like amount are collected by law." Here the law provides for *collection*, not assessment, in default of *payment*, and assumes that a debt or duty exists, which has not been laid on the taxpayer. I concede that a tax may be assessed by a judicial proceeding, though it be an onerous mode of assessment. But the vice of this law is that it establishes no mode of assessment, judicial or otherwise, but first commands payment of an unascertained sum, and then in default of payment, commands collection by a suit, and the infliction of costs. It is the most elementary principle of law, that there can be no remedy for a breach of duty, until the duty is ascertained. Under this act, no tax is individuated, and no duty imposed before collection. The act of 1844, in relation to State taxes, will serve to illustrate this subject. That act directed moneys at interest to be taxed, and fixed at the rate of three mills. Warrants of assessment were issued, and the citizen was required to make a return of the *subjects* of taxation to the assessor, and if he failed or refused, the act then directed the assessor to ascertain those subjects, and assess the tax from the best light he could obtain. Thus a tax was laid on the citizen, and the duty of payment attached. The proceeding to levy the United States income tax was similar. It is evident, that neither the three mills rate, nor the five per cent. rate was a tax, and without a proceeding to assess upon each individual his specific tax, that no tax was laid upon him, and no duty rested upon him to pay it. Had the State, or the United States, after fixing the rate only, ordered payment, and in default of payment, commanded the collector to distrain for the tax, or to bring a suit to recover it, every one could perceive the outrage on the rights of the citizen. No tax had been laid upon him, and payment would be impossible. Were any one in reply to the hardship, to say to him, well, gather up your bonds, notes and other securities, make a calculation, and assess yourself, every one would perceive its absurdity. yet that is precisely the present case. A rate is given, a command to pay, and then a suit and costs ordered for non-payment, notwithstanding not a citizen has been assessed, and not a tax ascertained. I say, that this act has not provided due process of law to ascertain the citizen's duty, and, therefore, that the infliction of the penalties of a suit and costs, to collect what has not been laid on the citizen by lawful process, is in violation of the bill of rights, which provides that no one can be deprived of his property, unless by the judgment of his peers, *or the law of the land*. The words "or of the law of the land," have been decided to mean the same thing as "due process of law." Vettar v. Wilt, 10 Wright, 450; Craig v. Kline, 15 P. F. Smith, 413.

It is too clear for argument, that the tax of an individual is the result of the rate applied to the subjects of taxation which belong to him, and consequently, that he is not taxed until the rate is applied to his property by some legal mode of adjustment. Then it is equally clear, that until his tax is legally adjusted, no duty of payment can arise, and consequently no proceeding to collect the alleged tax, is justifiable, until the tax is so adjusted and laid. The order to collect, whether by distress or by suit, before the tax is legally laid, is therefore without due process of law. Had the act directed an assessment even by a magistrate, the duty of payment would have existed, and then payment could be enforced by suit, though it be onerous to do so. But here the law visits the citizen with the duty of payment first, and assessment afterward, if a suit to collect in default of payment can be called an assessment.

It is said, the citizen may avoid suit by a tender. But a tender implies a tax to be tendered. No sum has been laid on the citizen which *he* is bound to pay, or the collector is bound to receive. The tender is impossible. If he tender what *he* believes to be just, the collector may deem it insufficient. And again, the law has made no provision, either for a return or for an account to be kept. Then it is said, the country will supply a proceeding to remedy the defect in the law. I grant, that in judicial proceedings, a court through its general powers, may supply defects of legislation. But taxation is not a judicial proceeding, and the courts have no power to supply an assessment. The case is not in the power of the court until suit is brought to collect the tax; but then it is too late, for the suit cannot be lawfully maintained until the duty has been imposed on the citizen by the assessment. If there be no mode of assessment, the law-making power only can supply it. Look at this law how you will, it is as clear as the noonday, that it has provided only a rate and no mode of laying the tax on the individual taxpayer; that it first orders payment, and in default of payment, inflicts the penalty of a suit with costs, for not performing an unimposed duty. Imagine a collector calling on a mine owner for his tax, without duplicate, assessment or known tax. How much is it? says the citizen. I don't know, says the collector. How, then, can I pay? That's your business, says the collector. No, it is not; the law did not require me to make a return, or keep an account, or assess myself. Well, I want your tax, says the man in authority. Here are five dollars. No, I want thirty dollars, rejoins the officer. I can't pay that. Well, I'll collect the tax by suit, and compel you to pay the costs. This is called taxation. I call it arbitrary exaction, without due process of law. It is evident, this act is the product of that vicious practice prevailing among legislators to object to no local bill a member from the district chooses to champion as his local measure, a custom in violation of the oath of office, and of the duty of the representative to the people of the State. I would say to those who procured this act, in the language of this court in Philadelphia Association v. Wood, 3 Wright, 73: "Considering, then, that this imposition is so extraordinary in its character, of such doubtful constitutional validity, so dangerous in its tendencies as a precedent, and so unusual in the form of its enforcement, we most respectfully decline, for the judiciary department of the government, the enforcement," &c.

Court of Common Pleas, of Philadelphia.

PENNINGTON v. PENNINGTON.

1. The act of 1854 narrows the cause of divorce in the husband's case to cruel and barbarous treatment.
2. Cruel and barbarous treatment is actual personal violence, or the reasonable apprehension of it, or such a course of treatment as renders cohabitation unsafe.
3. The act of 1855 did not enlarge the powers conferred on the courts to grant divorces, except to enable them to determine cases when the offence had been committed in another State.
4. A libel that alleges the respondent has given herself up to adulterous practices, and has been guilty of adultery, is good.

Opinion by ALLISON, P. J. Delivered March 29th, 1873.

This case has been before us in several aspects. At the instance of the husband, a divorce was decreed upon testimony taken before an examiner. Upon the application of the wife, the decree was set aside upon proof of the fact that the parties had never in fact separated; upon testimony called in support of alleged fraudulent service of requisite notice upon respondents, and that part of the testimony was taken at a place different from that set forth in the original notice without the knowledge of respondents, and upon alleged material defects in the libel. From this decree the libellant appealed, and was *non prossed* in the Supreme Court; the record was brought back on remittitur, and is now before us upon demurrers to the libel. The three specifications or assignments of causes of demurrer take exception to the sufficiency or ground for divorce, as set out in the libel. The application for divorce is on the part of the husband, under the act of 8th of May, 1854, in which it is made a cause for annulling a contract of marriage, at the instance of the husband, "where the wife shall have, by cruel and barbarous treatment, rendered the condition of her husband intolerable, or life burdensome."

The libel alleges a marriage with respondent, about the 7th of April, 1850, and assigns for cause that the respondent, Christiana Pennington, before and subsequent to the 1st of March, 1870, "offered such indignities to his person as to render his condition intolerable, and life burdensome, and thereby forced himself to withdraw from her."

This is not an exact or literal following of the act of 1854, which gives a remedy to the husband, which he did not before the passage of the act possess. It will be noticed that the pleader has entirely omitted to charge in the language of the law that the treatment which he received from his wife was cruel and barbarous, and has inserted as a substitute for cruel and barbarous treatment, indignities to his person, which rendered his condition intolerable and life burdensome; to which he has added, and thereby forced himself to withdraw from her. The last clause, if intended to meet the requirements of the act of 1854, is wholly unnecessary, as will be seen by a careful reading of it. Nothing is said about the husband being compelled to withdraw from association or cohabitation with his wife; this, therefore, may be regarded as mere surplussage, it being immaterial whether the husband remains with or withdraws himself from his wife, if it be shown that her treatment was cruel and barbarous to the extent of rendering his condition intolerable, or life burdensome.

The framing of this portion of the libel seems to have been based on the act of the 1st of March, 1815, which makes it a ground of divorce of the wife from the husband, where it could be shown that he had offered such indignities to her person as to render her condition intolerable, or life burdensome, and thereby forced her to withdraw from his house and family; for it will be seen that the ground of complaint set out in this libel, is that of indignities offered to the person of the husband. The pleader not did venture to follow the act of 1815, by alleging in the language of that act, a withdrawal by the husband from the house and family of the wife, if, indeed, a wife cohabiting with a husband, or living under the same roof with him, can in any proper sense be said to have a house and family from which the husband could withdraw himself but whether this be so or not, the act of 1854 is entirely silent upon this point. It may here be remarked, that if this was an essential part of a libel filed by a husband under the act of 1854, construing the acts of 1815 and 1854, as in *pari materia*, his allegation is evasively stated. The phrase to "withdraw himself from her," is by no means equivalent to the charge, that one was forced to withdraw from "the house and family" of the other. One implies a discontinuance of cohabitation and association, the other, a separation from the house or dwelling in which the parties had up to that time resided, and from the family as well. This, however, is explained by the fact that at the time the libel was filed, the parties were living under the same roof. There had been no actual separation, and the wife's testimony is, that even cohabitation was maintained during all the time the proceedings for divorce were in progress.

But although the act of 1815 cannot be made to apply to a case in which the hus-

band is the actor in a suit for divorce, yet inasmuch as the law of 1854 was in force when this libel was filed, it can be supported, notwithstanding the misapprehension of the pleader, if he had brought the case fairly within the requirements of the latter act. This we think he has not done; the point seems to have been expressly ruled in Jones v. Jones, 16 P. F. Smith, 497. The court say, it is evident the Legislature, in the act of 1854, intended to narrow the cause of divorce in the husband's case to cruel and barbarous treatment, leaving out indignities to the person, which are causes of divorce for the wife, under the act of 1815, under the belief, no doubt, that for the latter the husband needed no protection by a severance of the relation. This distinction, which is clearly stated by Mr. Justice Agnew, is made a material one, and grows out of the different acts of Assembly, intended to meet different classes of cases, the court holding, that while the act of 1854 intended to give relief to a husband who was treated with cruelty and barbarity by his wife, so that his condition was rendered intolerable or his life burdensome, it does not give him a standing in court, or entitle him to a divorce from his wife, where he complains merely of indignities to his person, which may fall far short of cruel and barbarous treatment, even though he may consider personal indignities as rendering his condition intoleruble and life burdensome. Personal annoyances and indignities may be made up of acts that are cruel and barbarous, but in many instances they may not even approximate to actual personal violence, or the reasonable apprehension of it, or such a course of treatment as endangers life and health, and renders cohabitation unsafe. This definition of cruel and barbarous treatment laid down by Judge King, in Butler v. Butler, 1 Parson's Equity Cases, 344, has been often approved, and is adopted by the court in Jones v. Jones, above cited.

I think it well to add to that which is already stated, that it has been questioned, notwithstanding the case of Jones v. Jones, whether under the act of March 9th, 1855, the complaint is not in this case well stated. This act does not seem to have been called to the attention of the court when considering Jones v. Jones. It empowers the Common Pleas to entertain jurisdiction of all cases of divorce for "the cause of personal abuse," or such conduct on the part of either husband or wife as renders the condition of the other party intolerable and life burdensome, notwithstanding the parties were at the time of the occurring of said causes, domiciled in another State. We do not regard this as an enlargement of the powers conferred on the courts of this commonwealth to grant divorces, except that it enables them to determine causes, the offence having been committed in another State. The term personal abuse must be considered in its application to prior laws, making personal abuse or injury amounting to legal cruelty, as defined in Butler v. Butler, and indignities to the person of the wife referred to in the act of 1815, a ground for divorce upon her application, and to cruel and barbarous treatment of the husband, which, under the act of 1854, entitles him to file his petition praying for a divorce. This, we think, is the entire scope and purpose contemplated by the act of 1855.

If this is not the true rendering of this act, then we must hold that under the term personal abuse, the husband or the wife may obtain a divorce, when the wife has not even been compelled to withdraw from the house and family of her husband, and when her life and health have not been endangered. And so also the husband may be divorced from the wife, when her treatment of him has not been barbarous or cruel.

This would be an enlargement of all prior legislation on this subject, and would give to both parties an advantage to which they are not entitled, under the acts of 1815 and 1854, on the single ground that the personal abuse was inflicted *out of our own State*. This is so unreasonable, that we cannot believe it to be the true intention of the Legislature.

The demurrers filed to this portion of the libel are sustained. But the libel also charges that the respondent has given herself up to adulterous practices, and has been guilty of adultery. This is a distinct and substantive ground for divorce, which has not been objected to, and though stated in general terms, is, perhaps, well pleaded under the long recognized practice which requires timely notification to respondent of persons, time, place, and circumstances to be proved on the trial of the cause in support of the charge.

N. B.—Since writing the foregoing opinion, my attention has been called to the case of Sterling v. The Commonwealth, 2 Grant, 162, in which I find a similar view is taken of the act of 1855, by Judge Agnew in the Quarter Sessions of Beaver county, in an opinion delivered by him in 1857, he says: "It is clear the Legislature did not intend in the act of 1855, to substitute as causes of divorce, the well defined expressions, cruel and barbarous treatment, and indignities to the person, contained in the acts of 1815 and 1854, by the indefinite term 'personal abuse,' but to rehearse existing causes, in order to reach the object of the law, by giving jurisdiction, notwithstanding the parties were at the time of the occurring of said causes, domiciled in another State."

Joseph T. Ford, Esq., for the demurrer.
Wm. H Redheffer, Esq., contra.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in April, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

Feb. 28, Isaac H. Macdonald, Administrator of NANCY TOLAND, dec'd.
" 28, Francis Lucas, Executor of FRANCIS R. LUCAS, dec'd.
" 26, John G. Kuhnle, Executor of CATHARINE ELLIS, dec'd.
Mar. 1, Emma Harvey, Administratrix of LOUIS C. L. HARVEY, dec'd.
" 3, Maria B. Hunsworth et al., Executors and Trustees of JOHN HUNSWORTH, dec'd.
" 3, Adam Schmunck et al., Executors of VALENTINE STEITZ, dec'd.
" 3, Eugene Linnard, Guardian of MARY DUNHAM.
" 4, Mary J. Heller, Administratrix of SCARBOROUGH TATHAM, dec'd.
" 4, George Erety, deceased, Executor of ANN ELY, deceased, as filed by William Erety and Horace B. Shoemaker.
" 5, Charles M. Lukens, Administrator of GEORGE M. SNYDER, dec'd.
" 6, John Ashbridge, Administrator of JACOB HARRIS, dec'd.
" 6, Nettie E. Schoneman, Executrix of JACOB NATHAN, dec'd.
" 7, Clara H. Thomas, Administratrix of EDWIN L. THOMAS, dec'd.
" 8, I. Wistar Evans et al., Executors of CATHARINE EVANS, dec'd.
" 8, Emily M. Whartenby, Executrix of HARRIET S. WHARTENBY, deceased.
" 8, Stephen R. Snyder, Guardian of FREDERICK GETZ, late minor.
" 8, George Wood, Executor of GILBERT GAW, dec'd.
" 8, Charles H. Meyer, Administrator of ADOLPH H. PICKERT, dec'd.
" 10, James L. Bulligan et al., Executors of BRIDGET FITZGERALD, dec'd.
" 11, Charles J. Piggott, Administrator of JOHN T. PIGGOTT, dec'd.
" 12, Eliza Bready, Guardian of WILLIAM C. O. ELY, dec'd.
" 13, William J. Gibb et al., Executors of JOHN GIBB, dec'd.
" 13, Michael Jennings, Administrator of EDWARD LYNCH, dec'd.
" 14, Robt. C. Bennett, Surviving Executor of JOHN DAVISON, dec'd.
" 15, Catharine Nepley et al., Executors of JOHN N. NEPLEY, dec'd.
" 15, Charles Este, Administrator of FRANCIS A. ROSS, dec'd.
" 15, Alexander Black, Administrator of WILLIAM K. ROBINSON, dec'd.
" 17, Samuel J. Sharpless et al., Trustees under the will of Townsend Sharpless of ALICE M. BROWN.
" 17, Samuel J. Sharpless et al., Trustees under the will of Townsend Sharpless of LYDIA J. HUNN.
" 17, Samuel J. Sharpless et al., Trustees under the will of Townsend Sharpless of ANNA R. SHARPLESS AND HER CHILDREN.
" 17, Hester S. Reeves, Executrix of JAMES S. REEVES, dec'd.
" 17, Joshua H. Morris, Executor of CHAS. L. DESAQUE, dec'd.
" 17, Albert D. Fell et. al., Executors of PENROSE FELL, dec'd.
" 18, Catharine Miller, Administratrix of JAMES MILLER, dec'd.
" 18, The Provident Life and Trust Company, Guardians of BERTHA ROSENSTEIN, dec'd.
" 18, William Moyn, Administrator of WM. HIDDIMAN, dec'd.
" 18, Sarah T. Woodcock, Administrator of WILLIAM WOODCOCK, dec'd.
" 18, Harriet Barrett et al., Executors of NATHAN BARRETT, dec'd.
Mar. 21, Rudolph P. McCall, Administrator of JOSEPH W. BURTON, dec'd.
" 21, Catharine Harkins (Doyle), Administratrix of JOHN DOYLE, dec'd.
" 21, James K. Neulis, Guardian of GEO. NEULIS, a minor.
" 21, Mary A. Garber, Administratrix of SARAH GEHMAN, dec'd.
" 21, Meyer Gans, Guardian of JULIA GANS.
" 22, Peter Leeten, Administrator of SUSANNAH WADE, dec'd.
" 22, Frederick Narr et al., Administrator of WILLIAM G. VOGEL, dec'd.
" 22, Kate L. Moffett, Administratrix of THOMAS MOFFETT, dec'd.
" 22, Ann Jane McWhinney, Administratrix of ARTHUR McWHINNEY, deceased.
" 22, James Larkens, Executor of JAMES GALLAGHER, dec'd.
" 22, Samuel G. Flood, Executor of MARY H. CROZIER, dec'd.
" 24, Helen McCutcheon, Guardian of McCUTCHEON minors.
" 24, Athalin E. Edwards et al., Executors of IGNATIUS EDWARDS, dec'd.
" 24, William Harris, Jr., Administrator of SAMUEL Y. ADDIS, dec'd.
" 24, Eliza A. Mart, in Administratrix of JOHN MARTIN, dec'd.
" 24, Mary Rockhill et al., Executors of THOMAS C. ROCKHILL, dec'd.
" 25, Charles H. Gross, Surviving Executor of CHARLES HEEBNER, dec'd.
" 25, Margaret Story (late Burnet), Administratrix of JOHN BURNET, Jr., dec'd.
" 25, James Noble, Executor of JEREMIAH DUNBAR, dec'd.
" 25, Ellwood Davis, Executor of BENJAMIN DAVIS, dec'd.
" 25, Antone Schraudt, Executor of WM. STEFFEN, dec'd.
" 25, Cornelius K. Gibson Administratrix of CHARLES M. GIBSON, dec'd.
" 26, Ellen M. Treanor, Executrix of MICHAEL TREANOR, dec'd.
" 26, Philip S. P. Conner, Administrator of SAML. EMLEN RANDOLPH, deceased.
" 26, Cecelia Miller, Administratrix of JNO. H. MILLER, dec'd.
" 26, John Levering, Jr., Administrator, &c., of JOHN N. SHUGARD, dec'd.
" 26, James Peoples, Executor of ELLEN LACEY, dec'd.
" 26, Joshua Lukey, Administrator of CHARITY KELSEY, dec'd.
" 27, Caroline F. Byrnes (late Allen), Administratrix of AND. M. ALLEN, deceased.
" 27, Wm. J. Shaw, Administrator of SARAH SHAW, dec'd.
" 27, David E. Hance, Administrator of ABRAHAM JORDAN, dec'd.
" 27, D. S. Cadwallader et al., Administrators, &c., of SARAH B. CADWALLADER, dec'd.
" 27, William H. Mills, Administrator of JOHN MILLS, dec'd.
" 27, Mary Jane Moore, Administratrix of JANE TAYLOR, dec'd.
" 27, Joseph R. Lyndall et al., Executors of WILLIAM BALLENGER, dec'd.
" 27, Sarah A. Albright et al., Executors of WILLIAM L. ALBRIGHT, dec'd.
" 27, John L. Shoemaker et al., Executors of ASHTON ROBERTS, dec'd.
" 27, Rachael L. Wise, Administratrix of SUSANNA DUYLASS, dec'd.
" 27, Elizabeth Gorgas et al., Administrators of CHARLES GORGAS, dec'd.
" 27, Joseph Bacon, Administrator of MARGARET E. BACON, dec'd.
" 25, Jane E. Rogers, Administratrix of WILLIAM ROGERS, dec'd.
" 27, John Wistar Evans et al., Surviving Residuary Trustees under the will of THOMAS EVANS, dec'd.
" 27, Michael Keyney et al., Executors of DENNIS KANE, dec'd.
" 27, Joseph Bacon et al., Surviving Executors and Trustees under the will of DAVID BACON, dec'd.

WILLIAM M. BUNN,
mar 28-4t Register.

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Supreme Court United States.

THE PHILADELPHIA AND READING RAILROAD COMPANY, Plaintiffs in Error, v. THE COMMONWEALTH OF PENNSYLVANIA.

1. A State may tax the franchises of its carrying companies, and the tax may be proportioned either to the value of the franchises granted, or to the extent of their exercise.
2. The gross receipts of a company may be taken as a measure of the value of its franchises, or of their enjoyment, and a tax may be laid thereon.
3. The act of the Legislature of Pennsylvania of February 28th, 1866, imposing a tax on the gross receipts of certain companies incorporated under its laws, is constitutional.

In error to the Supreme Court of the commonwealth of Pennsylvania.

Mr. Justice STRONG delivered the opinion of the court, March 10th, 1873.

By an act of the Legislature of Pennsylvania, passed on the 23d day of February, 1866, entitled "An act to amend the revenue laws of the commonwealth," a tax was imposed upon the gross receipts of certain companies. The second section is as follows: "In addition to the taxes now provided by law, every railroad, canal, and transportation company incorporated under the laws of this commonwealth, and not liable to the tax upon income under existing laws, shall pay to the commonwealth a tax of three-fourths of one per centum upon the gross receipts of said company; the said tax shall be paid semi-annually upon the first days of July and January, commencing on the first day of July, 1866; and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer, or other proper officer of said company, to transmit to the auditor-general a statement, under oath or affirmation, of the amount of gross receipts of the said company during the preceding six months; and if such company shall refuse, or fail, for a period of thirty days after such tax becomes due, to make said return, or to pay the same, the amount thereof, with an addition of ten per centum thereto, shall be collected for the use of the commonwealth, as other taxes are recoverable by law from said companies."

Under this act a tax was levied upon the plaintiffs in error of three-quarters of one per cent. of the gross receipts of the company during the six months ending December 31st, 1867, and the question now is whether the act imposing it is in conflict with the third clause of the eighth section, article first, of the Constitution of the United States, which confers upon Congress power to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes;" or whether it is in conflict with the second clause of the 10th section of the same article, which prohibits the States, without the consent of Congress, from laying any imposts, or duties on imports, or exports, except what may be absolutely necessary for executing the inspection laws." It was claimed in the State courts that the act is unconstitutional so far as it taxes that portion of the gross receipts of companies which are derived from transportation from the State to another State, or into the State from another, and the Supreme Court of the State having decided adversely to the claim, the case has been brought here for review.

We have recently decided in another case between these parties that freight transported from State to State is not subject to State taxation, because thus transported. Such a burden we regard as an invasion of the domain of Federal power, a regulation of inter-state commerce, which Congress only can make. If then a tax upon the gross receipts of a railroad, or a canal company, derived in part from the carriage of goods from one State to another, is to be regarded as a tax upon inter-state transportation, the question before us is already decided. The answer which must be given to it depends upon the prior question, whether a tax upon gross receipts of a transportation company is a tax upon commerce, so far as that commerce consists in moving goods or passengers across State lines. No doubt every tax upon personal property, or upon occupations, business, or franchises affects more or less the subjects and the operations of commerce. Yet it is not every thing that affects commerce that amounts to a regulation of it, within the meaning of the Constitution. We think it may safely be asserted that the States have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property when belonging to natural persons, and to the same extent. We think also that such taxation may be laid upon a valuation, or may be an excise, and that in exacting an excise tax from their corporations, the States are not obliged to impose a fixed sum upon the franchises or upon the value of them, but they may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise. No mode of effecting this, and no forms of expression which have not a meaning beyond this, can be regarded as violating the Constitution. A power to tax to this extent may be essential to the healthy existence of the State governments, and the Federal Constitution ought not to be so construed as to impair, much less destroy, anything that is necessary to their efficient existence. But, on the other hand, the rightful powers of the national government must be defended against invasion from any quarter, and if it be, as we have seen, that a tax on goods and commodities transported into a State, or out of it, or a tax upon the owner of such goods for the right thus to transport them, is a regulation of inter-state commerce, such as is exclusively within the province of Congress, it is, as we have shown in the former case, inhibited by the Constitution.

Is, then, the tax imposed by the act of February 23d, 1866, a tax upon freight transported into or out of the State, or upon the owner of freight, for the right of thus transporting it? Certainly it is not directly. Very manifestly it is a tax upon the railroad company measured in amount by the extent of its business, or the degree to which its franchise is exercised. That its ultimate effect may be to increase the cost of transportation must be admitted. So it must be admitted that a tax upon any article of personal property, that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon the instrument, such as a stage coach, a railroad car, or a canal, or steamboat, its tendency is to increase the cost of transportation. Still it is not a tax upon transportation, or upon commerce, and it has never been seriously doubted that such a tax may be laid. A tax upon landlords as such affects rents, and generally increases them, but it would be a misnomer to call it a tax upon tenants. A tax upon the occupation of a physician or an attorney, measured by the income of his profession, or upon a banker, graduated according to the amount of his discounts or deposits, will hardly be claimed to be a tax on his patients, clients, or customers, though the burden ultimately falls upon them. It is not their money which is taken by the government. The law exacts nothing from them. But when, as in the other case between these parties, a company is made an instrument by the laws to collect the tax from transporters, when the statute plainly contemplates that the contribution is to come from them, it may properly be said they are the persons charged. Such is not this case. The tax is laid upon the gross receipts of the company; laid upon a fund which has become the property of the company, mingled with its other property, and possibly expended in improvements or put out at interest. The statute does not look beyond the corporation to those who may have contributed to its treasury. The tax is not levied, and indeed such a tax cannot be, until the expiration of each half year, and until the money received for freights, and from other sources of income, has actually come into the company's hands. Then it has lost its distinctive character as freight earned, by having become incorporated into the general mass of the company's property. While it must be conceded that a tax upon inter-state transportation is invalid, there seems to be no stronger reason for denying the power of a State to tax the fruits of such transportation after they have become intermingled with the general property of the carrier, than there is for denying her power to tax goods which have been imported, after their original packages have been broken, and after they have been mixed with the mass of personal property in the country. That such a tax is not unwarranted is plain. Thus, in Brown v. Maryland, 12 Wheaton, 419–441, where it was ruled that a State tax cannot be levied by the requisition of a license upon importers of foreign goods by the bale or package, or upon other persons selling the same by bale or package, Chief Justice Marshall, considering the dividing line between the prohibition upon the States against taxing imports and their general power to tax persons and property within their limits, said that "when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State. This distinction in the liabilities of property in its different stages has ever since been recognized. (Waring v. The Mayor, 8 Wallace, 122; Perviar v. The Commonwealth, 5 Wallace, 479). It is most important to the States that it should be. And yet if the States may tax at pleasure imported goods, so soon as the importer has broken the original packages, and made the first sale, it is obvious the tax will obstruct importation quite as much as would an equal impost upon the unbroken packages, before they have gone into the markets. And this is so, though no discrimination be made.

There certainly is a line which separates the power of the Federal government to regulate commerce among the States, which is exclusive from the authority of the States to tax persons, property, business, or occupations within their limits. This line is sometimes difficult to define with distinctness. It is so in the present case, but we think it may safely be laid down that the gross receipts of railroad or canal companies, after they have reached the treasury of the carriers, though they may have been derived in part from transportation of freight between States, have become subject to legitimate taxation. It is not denied that net earnings of such corporations are taxable by State authority without any inquiry after their sources,

and it is difficult to state any well founded distinction between the lawfulness of a tax upon them and that of a tax upon gross receipts, or between the effects they work upon commerce, except perhaps in degree. They may both come from charges made for transporting freight or passengers between the States, or out of exactions from the freight itself. Net earnings are a part of the gross receipts.

There is another view of this case to which brief reference may be made. It is not to be questioned that the States may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of proximate value, or if not, at least of the extent of enjoyment. If the tax be in fact laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come, than would an equal tax laid upon a direct valuation of the franchise. In both cases the necessity of higher charges to meet the exaction is the same.

Influenced by these considerations, we hold that the act of the Legislature of the State imposing a tax upon the plaintiffs in error, equal to three-quarters of one per cent. of their gross receipts, is not invalid, because in conflict with the power of Congress to regulate commerce among the States. And under the decision made in Woodruff v. Parham, 8 Wall. 123, it is not invalid, because it lays an import or duty on imports or exports.

The judgment of the Supreme Court is therefore affirmed.

MILLER, FIELD and HUNT, JJ., dissenting.

D. W. MIDDLETON,
C. S. C. U. S.

Supreme Court of Pennsylv'a.

WM. McLOON'S ADMR. v. HENRY K. CUMMINGS.

1. When a ship disabled by the perils of the sea puts into an intermediate port to repair, is there condemned and sold, and the voyage broken up, the expenses so incurred are the subject of general average.
2. When the cargo of a disabled vessel is sent to the port of destination, the parties are bound by an adjustment fairly made by a despacheur at such port, according to the rules and usages there established.
3. Where the parties continue to exercise control over the cargo, the rate of contribution is to be adjusted upon the basis of the value of the cargo at the port of destination.
4. Though there be no express coin contract, yet in an action on a liability incurred in a foreign country, upon a gold standard, the verdict should be for gold.

Certificate from Nisi Prius.

Opinion of the court by AGNEW, J. Delivered March 17th, 1873.

On the trial at Nisi Prius, three points were reserved. The first was: "Whether when a ship had been disabled by the perils of the sea, puts into an intermediate port to repair, and the vessel is there condemned and sold, and the voyage broken up, the expenses so incurred are the subject of general average?

Henry K. Cummings chartered the ship "Juliette Tumdy," of the owner, Wm. McLoon, for a cargo of coal from Baltimore, Maryland, to San Francisco, California. Storms and stress of weather injured the vessel, caused her to leak badly, and drove her for safety into the port of Rio de Janeiro, where, after the proper protests and necessary surveys, she was condemned as unseaworthy and sold, and the cargo was forwarded by her captain to San Francisco, in the "Shatemuc," under a charter party. It is evident that the vessel was disabled by the perils of the sea, and her voyage broken up; and the deviation into a port of distress was voluntary, in order to save the vessel and cargo, as far as possible, and the lives of those on board. The expenses which followed, were necessarily incurred to ascertain the ability of the vessel to proceed in her voyage, and to save the cargo from loss, and the cargo as thus saved, was forwarded to the port of destination. The expenses incurred at Rio de Janeiro were *extraordinary*, and were necessarily incurred by the captain, as the common agent for all interested, and therefore included the shipper.

General average has been defined to be: "a contribution by all the parties in a sea adventure, to make good the loss sustained by one of their number, on account of *sacrifice* voluntarily made of part of the ship or cargo to save the residue, and the lives of those on board from an impending peril; or for *extraordinary* expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise." Star of Hope, 9 Wallace, 228; McAndrews v. Thacher, 3 Wallace, 365; Nelson v. Belmont, 21 New York, 38. The right to general average extends to the loss of the ship, when the cargo is saved in whole or in part, as well as to the loss of the cargo, when the ship is saved. Gray v. Waln, 2 S. & R. 229; Cage v. Richards, 1bid, 237; Barnard v. Adams, 10 Howard, 270; 3 Wallace, 365–6; 9 Wallace, 204. We see no reason to doubt, therefore, that the cargo in this case would be subject to general average, if it had any value left when it arrived at San Francisco, and the cargo was sold for the charges.

The third point reserved was: "When the cargo is so sent to the port of destination, whether the parties are bound by an adjustment fairly made by a despacheur at such port, according to the rules and usages there established?"

We are inclined to affirm this as a general principle of maritime law. There are many reasons for this rule, some of which arise in the fact that this port is that of the intended market, upon which the calculation of the shipper is founded, and is also the end of the ship's voyage as contemplated by the owners. Besides, the want of uniformity in the customs and rules of ports in different countries, render it essential that a certain port should be adopted as the place of adjustment, and the only practicable rule which can be followed in the midst of variety, is to take that port for which the cargo is destined, and where the voyage is terminated. The circumstances and customs of this port, it is to be presumed, were in the minds of the parties, in entering into the charter party, while the market for the cargo there, is to be presumed to be the best. Yet conceding this to be a general rule, we must except the cases of fraud or gross mistake, and of a voyage broken up and ended; where from the facts in the case, or the mutual acts of the parties or their agents, a final separation between the vessel and cargo has taken place, and the relations of the parties have actually terminated. In the last case the port of disaster would, generally speaking, become the place of adjustment. Such, we think, is the result of the authorities referred to.

This leaves us to consider the second reserved point, which becomes the hinge of the case, viz.: "Whether the rate of contribution is to be adjusted upon the basis of the value of the cargo at the place of repairs, or at the port of destination, if the cargo is sent on by another vessel, at a rate of freight exceeding that stipulated to be paid under the original contract of affreightment."

It is contended on behalf of the plaintiff, that the voyage was broken up at Rio de Janeiro, the vessel and cargo actually separated, and that the relations of the parties finally terminated there.

Is this so? McLoon, the owner of the vessel, and plaintiff, seems not to have thought so in the first instance. He had the first adjustment made at Boston, February 1st, 1868, and the second at San Francisco, September 17th, 1868. None seems to have been made, or thought of, according to the rules of the port of Rio de Janeiro. We must, therefore, examine the facts to determine whether in the contemplation of the parties, their relations finally terminated at Rio de Janeiro, and the separation of the cargo became so complete, that the port of destination ceases to be a common point for the adjustment under the charter party, and that of distress became the end of their adventure.

First, it may be noticed that the charter party contains no covenant or proviso enabling the owner of the vessel to terminate his voyage at Rio, or any intermediate port. It does not contain even the common exception of the perils of the sea. He must stand, therefore, only upon the law as it would arise upon the facts of his deviation into the port of Rio. But conceding the deviation to be justified, it is a well settled principle of maritime law, that in the case of a disaster by a peril of the sea, rendering the vessel unable to proceed upon her voyage, the master or captain becomes the common agent of all the parties in interest. The subjects of these interests are the vessel, the cargo, and the freight. It is therefore the duty of the master, if the vessel cannot proceed, to re-ship the cargo, if he can, to the port of destination, so as to protect all interests. For this purpose he must exercise a large discretion, according to the circumstances. In the absence of owner and shipper, and alone, as he usually is in a distant port, he must do what he fairly and conscientiously believes is for the interest of all. These are general principles, borne out by the authorities. 3 Kent Com. 210, 212; 2 Parsons on Ship. 234; Lamont v. Lord, 52 Maine, 388, *et seq.*; Thwing v. Wash. Ins. Co., 10 Gray, 457 to 460; Winter v. Del. Ins. Co., 6 Casey, 334. In forwarding the cargo to the port of destination, the master may act for both owner and shipper. If he can save part of the freight to the owner, he will be considered as his agent, as well as the agent of the shipper. But if he can save nothing for the owner of the vessel, he will not be the agent of the owner, but of the shipper alone.

The foundation of this exception is, that an authority arising from implication only, will not be presumed, where the act of the master is clearly injurious to the interests of the owner of the vessel. These being governing principles, a separation of the relation between the owner and the shipper would be deemed to have taken place in this instance, if the only facts to be considered were the condemnation and sale of the vessel at Rio, and the proceeding of the cargo by the captain at a greater rate of freight from Rio to San Francisco, than the freight agreed upon in the charter party from Baltimore to San Francisco. The stress of the argument for the plaintiff rests upon this view of the case. But these are not the only facts, while upon the whole evidence, its weight carries the adjustment to the port of San Francisco. In addition to the fact already stated, that the charter party is without a saving covenant, leaving the question of deviation into Rio open to a controversy, which the owner of the vessel or the captain, as his agent, might prefer to avoid; the following elements are to be found in the evidence. Captain Perry, the master of the Juliette Tumdy, entered into a charter party with Captain Foule, master of the "Shatemuc," without disclosing a principal, the vessel was to be consigned to the *charterers'* agent at the port of discharge, and freight to be paid on unloading and right delivery of the cargo in cash. The bill of lading by the Shatemuc was signed by Wright & Co., as agents for Captain Perry, cargo to be delivered at San Francisco "unto order or to assignees," he or they paying freight as per charter party. Wright & Co., for Captain Perry, endorsed this bill to the order of John S. Wright, Esq., agent of New York; and it was transmitted to New York, where John S. Wright, agent, endorsed it, deliverable to Wm. B. Cummings & Co. Captain Perry testifies, that the bill of lading, charter party for the "Shatemuc," and all the papers were forwarded to the *plaintiff*, McLoon; and in answer to a question why the bill of lading was not forwarded to San Francisco to meet the arrival of the "Shatemuc" there, said he was told by Mr. Wright, that the adjustment would be made in Boston, and the average would be forwarded to San Francisco. He also testifies, that in all he did, he acted upon his own judgment for what he thought to be the best interest of *all* concerned. Now in all this it is clear he so acted as to preserve to McLoon the power to control the cargo at the port of destination, so far as to protect any interest he deemed himself to possess there. In this his acts were met by McLoon and ratified. On the arrival of the "Shatemuc" at San Francisco, Wm. B. Cummings & Co., to whom Wright, of New York, finally endorsed the bill of lading, had no authority to receive the cargo. On the 14th March, Captain Foule, after the arrival of the "Shatemuc," notified Wm. B. Cummings & Co. of his readiness to deliver the coal on payment of the freight, delivery of the bill of lading, and *bond for payment of the general average incurred* for charges at Rio. Captain Foule on the 19th March, telegraphed to McLoon, "Where are the Shatemuc's bill of ladings to Tumdy's cargo?" McLoon replied by telegraph March 21st, "De-

liver your cargo to Wm. B. Cummings & Co., upon their giving *bond to pay general average.* Bill of lading on the way." Wm. B. Cummings having telegraphed to Henry K. Cummings, the arrival of the "Shatemuc" without papers or bills of lading, the latter on the 19th March, wrote to McLoon. McLoon replied March 24th, saying he had received a dispatch from Captain Foule, and telegraphed him to deliver cargo to Wm. B. Cummings, *upon his giving general average bond*, also that he supposed H. K. Cummings would have paid the general average on cargo *here* (Boston), but if not should have to *send the paper to San Francisco.* These facts show plainly that none of the parties recognized the port of Rio de Janeiro as the place of final separation of interests, that Captain Perry considered himself as still acting for McLoon, to enable him to control the cargo, and that McLoon ratified his act by assuming to control the delivery of the cargo on his own terms, and himself adopted San Francisco as the place of adjustment, failing to secure it at Boston. Under these circumstances, the separation of interests was not complete at Rio de Janeiro, but they continued together until the arrival of the cargo at San Francisco, and its sale there to pay the freight for charges from Rio to San Francisco. The reasons of McLoon for retaining control are not very apparent, but they may have arisen from a belief that San Francisco would be the best market for the cargo. It is certain, however, that he so acted as to control the cargo after it left Rio, and on its arrival at the port of destination. Having done so, the value of the coal at that port, is the true criterion in the adjustment, and the evidence as clearly shows that its entire value was consumed by the freight and charges.

The proof is satisfactory that the adjustment at San Francisco was made "in accordance with the usage and customs of that port," and that the principle adopted there is "that what is *saved* shall pay, and nothing remains where charges consume the whole value." The custom at San Francisco is to deduct at San Francisco, from the value of the cargo at that place, the freight, special charges, and commission of five per cent." In this state of the case, the entire cargo being lost to the shipper, there was nothing upon which general average could be charged. The judge at Nisi Prius was therefore right in confining the recovery to the special charges on the coal.

The remaining question is, whether the plaintiff was entitled to a verdict for the difference between gold and the national currency in legal tender notes. The judge directed the verdict to be rendered for the sum recovered in gold. We think this was right in view of the nature of the transaction and the contract to be implied from it. It is argued that there was no express coin contract, and, therefore, the judgment should have been for currency, adding the premium paid for gold, as the actual expenditure of the plaintiff. But the expenses were incurred in a foreign country upon a gold standard, and the draft drawn by the master of the "Juliette Tumdy," at Rio de Janerio, on the plaintiff, as her owner, was for gold. Gold, therefore, was the basis of the transaction, and of the adjustment. The liability of the parties should be measured by that standard, gold coin also being one of the legal standards of money in the United States, and, therefore, directly applicable as a measure. The expenditure being founded on a gold basis, and being a foreign transaction, the contract to be implied from it must follow the same nature, especially in view of there being a legal national currency, whereby it can be measured. The settlement of such a foreign transaction on a uniform and proper basis, must result in due proportion of contribution among all interests. It is only in the payment in this country in a currency of less value, the alleged loss arises, and that arises between the two species of legal currency, the result of local causes, and not attributable in any way to the adjustment upon the foreign gold basis. The right of the party paying the draft seems to be that of receiving the proportions which others pay, and which he has advanced upon the basis of the transaction, which was gold and not legal tenders. The fluctuations between the two species of lawful money in the interval between adjustment and payment, ought not to be permitted to prejudice the judgment which is founded on the gold basis itself, a uniform and unchanging standard. If gold were now at twice the premium paid by the plaintiff, he would be entitled to his judgment payable in gold, and the loss would then fall on the defendant. Gold being the measure of the debt, it seems to us should be the measure of the payment also. When all interests are measured by a common legal standard, no injustice is done to any one. The payment therefore should follow the nature of the liability.

Judgment affirmed.

CITY OF PHILADELPHIA v. LOCKHARDT, to use of Pyle and Hansell.

1. A contract may be assigned so as to vest in the assignee the equitable right to the proceeds, although the money may not have been due or earned at the time of the assignment. Nor does the fact that the debtor is a municipal corporation, change the right to assign money not yet earned.
2. Notice of the assignment of a school building contract with the city of Philadelphia, was served upon the city controllers of public schools, and not upon the city controller or city treasurer. *Held:* to be sufficient.

Error to the District Court of Philadelphia.

Opinion by MERCUR, J. Delivered March 19th, 1873.

The admission in evidence of the written contract under which the school house was built, is assigned as error.

The objection to its admission is predicated upon the fact that the instrument in its commencement purports to be an agreement between "the controllers of public schools of the first district of Pennsylvania," of the first part. It is, however, signed and attested, on the part of the first part, by the mayor of the city, and duly sealed with its corporate seal. A short time after its execution, the contract was duly approved by ordinance of councils. The sureties given by Lockhardt for his performance of the contract, were at the same time and in like manner, approved. From time to time during the progress of the work, the city paid the instalments as they severally became due, according to the terms of the contract. After its completion, the city took possession of the house, and have continued in the possession and enjoyment thereof. After all these recognitions and ratifications of the contract on the part of the city, it is too late for her to successfully deny that she was a party to the contract.

The fifth, sixth, seventh, and eighth assignments are based upon the act of 28th May, 1715, which provides for the assignment of bonds, specialties, and notes in writing. The form of the suit in this case, however, does not admit of the application of that act. That act provides a mode of assignment by which a suit may be brought in the name of the assignee only. This action is brought in the name of the original party to the contract, for the use of the assignee. This assignment is not made according to the act of 1715. This suit is not brought under it. The plaintiff is unaffected by its provisions. The claim to recover is not put upon an alleged agreement made with the equitable plaintiff, but upon the one made with Lockhardt, from whom they have an equitable assignment.

The remaining alleged errors that were pressed, relate to the assignment made by Lockhardt to Pyle and Hansell, and notice thereof to the city.

It is contended by the plaintiff in error, that when Lockhardt made said assignment, he had no interest to assign. That it was made four days only after the execution of the contract, and before he had done anything under it. We think this position is not sound. It is well settled that a contract may be assigned so as to vest in the assignee the equitable right to the proceeds, although the money may not have been due or earned at the time of the assignment. It is often done by builders and other contractors to enable them to procure the materials necessary to fulfil their contracts. This was the case in Lott v. Morris, 4 Simons, 607, in which the assignment was held good. Nor does it make any difference if instead of a debt now due, the assignment is of money which is expected to become due at a future day, to the assignor. Crocker et ux. v. Whitney, 10 Mass. 316.

In Patton v. Wilson, 10 Casey, 299, it was held that an equitable assignment of unliquidated damages arising from a tort, and for the recovery of which an action was pending, was binding between the parties. Nor does the fact that the debtor is a municipal corporation, change the right to assign money not yet earned. Brackett v. Blake, 7 Metc. 335; Field v. The Mayor of New York, 6 N. Y. 179.

The only remaining question is that of notice to the city. Did she have such notice of the assignment and letter of attorney from Lockhardt to Pyle & Hansell, and their claim under it, as to prevent the subsequent payment by the city to Lockhardt, from being interposed against a recovery in this action.

No objection is taken to the form of the notice given, but to the official upon whom it was served. It was urged upon the argument that the assignees should have given notice to the city controller or to the city treasurer. There is much force in the suggestion, that if the assignees had given written notice of their rights to the city controller, he would have retained the warrant, subject to the order of the assignees. It would be well if the law designated that officer as the person to whom notice should be given in such cases. In the absence, however, of any such law, we think notice to other officials equally valid. The jury found that notice had been given to the board of controllers of public schools, and to the councils and to the city solicitor. This the learned judge held upon the point reserved, was notice to the city.

By the act of March 3d, 1818, § 6, 7th Smith's Laws, 55, it is made the duty of the controllers to examine all accounts of moneys disbursed in erecting, establishing, and maintaining the several schools within the district. The act of 15th February, 1832, § 1, P. L. 80, makes five members of the controllers a quorum for the making of orders for the payment of money, and the transaction of business generally. There would then seem to be great propriety in giving notice to this board, which was most directly interested in looking after the subject matter for which the money was to be paid. In Danville Bridge Company v. Pomeroy et al., 3 Harris, 151, it was held, that notice to the engineer of a company appointed to supervise and direct the work of an alteration in the structure by the builder, was notice to his principals. In Trenton Bank v. Canal Co., 4 Paige, 127, it was ruled that notice to the agent, when it is the duty of the agent to act upon such notice, or communicate it to his principal, in the proper discharge of his duty as agent, is notice to the principal, and applies to the agents of corporations as well as of others. In this case, these official branches of the city having been notified, we must hold the notice sufficient to charge the city therewith. The court committed no error in entering judgment in favor of the plaintiff below upon the point reserved.

Judgment affirmed.

Recent Acts of Congress.

An act to revise, consolidate, and amend the laws relating to pensions. Approved March 3d, 1873.

This act enlarges and liberalizes the former acts, re-enacting nearly all former provisions as well as extending many of them. Among the new provisions are the following: All persons who have lost a leg above the knee, and are so disabled thereby that they cannot use an artificial limb, shall be rated in the second class, and receive $24 per month. All persons who have lost the hearing of both ears receive $13 per month. Section 5 provides that the rate of $18 per month, may be proportionately divided for any degree of disabilities established, for which the section 2 makes no provision. The old law provided for no rate between $8 and $18. In the organization of the pension bureau, important changes are made. The new law provides for the appointment by the President of a deputy commissioner of pensions, with a salary of $2,500 per annum The efficiency of the bureau is also increased by a provision for the appointment of a duly qualified surgeon, as medical referee, who shall have charge of the revision of reports of examining surgeons.

LEGAL GAZETTE.

Friday, April 11, 1873.

JOHN H. CAMPBELL,
EDITOR.
THEODORE F. JENKINS,
ASSOCIATE EDITOR.

Last week the Legislature of Illinois, by a vote in the House of 101 to 30, and in the Senate of 29 to 6, passed an act, providing "that any woman, married or single, of the age of twenty-one years and upwards, and possessing the qualifications prescribed for men, shall be eligible to any office under the general or special school laws of this State." Mrs. Bradwell, the editor of the *Chicago Legal News*, is consequently jubilant, and thanks, "in the name of the women of Illinois," the senators and representatives who voted for the bill. As the bill has been approved by the governor, the holding of office by women in Illinois, will soon be *un fait accompli*. The Constitutional Convention of this State, has passed to a second reading, a provision similar to the law just mentioned, and will probably incorporate it in the new constitution. We hope so at any rate!

In New York city, on Monday last, a novel and interesting case was decided by Judge C. F. Daly, in the Court of Common Pleas. The suit was commenced by Rannuld, Francois & Co., of that city, who are the sole agents in this country for the importation and sale of the sparkling champagne, so well known to lovers of good wine, as Piper Heidsick, against one Baron Davis, as defendant, for the purpose of obtaining a perpetual injunction, restraining the defendant from selling spurious wine with a counterfeit label, or trade mark, intended to represent the label or trade mark upon the genuine Piper Heidsick. The defendant interposed a demurrer to the complaint, on the ground that the plaintiffs had not complied with the United States law, as to trade marks. This demurrer was overruled, with leave to answer, on payment of costs. The time to answer having expired, judgment was yesterday entered for the plaintiffs, for the costs, and perpetually enjoining the defendant from keeping or selling any wine with the counterfeited label. The plaintiffs brought their action as a test case, and will now proceed vigorously against persons selling wine with counterfeited labels, as well as against persons found printing or using counterfeited labels.

In New York city they have been having an argument this week, before U. S. Circuit Judge Woodruff, upon the writ of habeas corpus sued out on behalf of George McDonnell, accused of complicity in the recent frauds upon the Bank of England. We notice the names of Messrs. Brooke and Dos Passos, mentioned as counsel for the prisoner. These gentlemen, we believe, were both formerly connected with the Philadelphia Bar.

The Constitutional Convention re-assembles in this city upon next Tuesday, 15th inst. The Judiciary Report will come up for consideration at an early day.

PUBLICATIONS RECEIVED.

OUR STUDENTS' RECORD, vol. 1, No. 1.—Published monthly by the Reynolds Grammar Schools, Philadelphia, May, 1873.

To judge from the first number now before us, the Record will be a sprightly, first-class paper, and in every way worthy of the support of our city school children and their parents. Its purpose is excellent, its contents enjoyable, and its editorial management evidently "tip-top." We wish it long life, and trust it may certainly develop that "feminine" Benjamin Franklin, which it already half promises.

ADDRESS OF T. BRADFORD DWIGHT, ESQ., before the Law Academy of Philadelphia, December 5th, 1872. 8vo., pp. 49. Philadelphia, Kay & Bro., 1873. Subject of the address, "Important modifications of English Law in Pennsylvania."

THE CODE OF CIVIL PROCEDURE OF THE STATE OF CALIFORNIA.—Adopted March 11th, 1873, to take effect January 1st, 1873, with references to Decisions of the Supreme Court, and Notes showing the changes made in the different Statutes consolidated in the Code, since their original adoption. Compiled by Warren Olney, of the San Francisco Bar. SECOND EDITION, 12mo., pp. 752. San Francisco, Sumner, Whitney & Co., 613 Clay street, 1873. Received from the Publishers. Price, $4.00 and $5.00, according to style of binding.

This work is a real little gem, gotten up in a neat and convenient form for the practitioner, and commending itself at first glance to the good wishes of the purchaser, by the excellent taste and good judgment displayed in its typographical and mechanical execution. The copy sent us is bound in dark flexible Turkey morocco, and looks handsome enough for a prayer book, instead of a lawyer's companion. The work must be of great service to the Pacific Bar, since it has already reached a second edition. As the California Code contains all the "modern improvements," the work is also useful to legislators and lawyers of this section of the country.

Court of Common Pleas of Philadelphia.

COMMONWEALTH v. HAWKINS.

The defendant, a notary public, was elected a member of councils of Philadelphia. The act of incorporation of that city, prohibited any person holding office from or under the State, from being a member of councils. An act of Assembly was passed February 18th, 1873, declaring the meaning of the act of incorporation to be, that the holding of the offices of notary public and member of councils at the same time, was not incompatible, and prohibiting any member from being removed from office by reason of his being a notary public. *The court held:*

1. A notary public is a person holding office or employment from or under the State.
2. The act of 1873 was a retroactive expository act, and is, therefore, unconstitutional. It is clearly a usurpation by the Legislature of the functions of the court.

Quo warranto.

Opinion by FINLETTER, J. Delivered April 5th, 1873.

The complaint was filed December 2d, 1872, and charges that the defendant on December 10th, 1870, was duly commissioned by the governor of the commonwealth to the office of notary public, and from that time to the present, holds and exercises that office. That on the second Tuesday of October, 1871, he was returned as a member of common council by the qualified voters of the Fourteenth ward, and is now acting in that capacity. That by the consolidation act, it was provided that the legislative powers of the city of Philadelphia, shall be vested in two bodies, to be called the select and common councils * * * * *Provided*, That no member of the State Legislature, nor any one holding office or employment, from or under the State at the time of said election, shall be eligible as a member of said councils.

On the 18th day of February, 1873, the defendant pleaded as follows: "For a plea in this behalf, the said Henry C. Hawkins, saith, that by an act of the General Assembly of the commonwealth of Pennsylvania, approved the 29th day of January, A. D. 1873, entitled an act relating to the office of notary public in the city of Philadelphia, it was enacted and declared:

"That the true intent and meaning of the act of Assembly, entitled an act to incorporate the city of Philadelphia, approved the 2d day of February, A. D. 1854, is not to prevent any member of the select and common councils of the city of Philadelphia, from holding at the same time the office of notary public."

SECT 2. That the holding of the office of notary public shall not be incompatible with holding at the same time, the office of member of either branch of the councils of the city of Philadelphia; and no member of the present councils of the city of Philadelphia shall be held to be disqualified, on account of the holding of the office of notary public; nor shall he be removed from the office of member of councils, by reason of any such disqualification.

To this plea the plaintiffs demur: "First. That the alleged act of the General Assembly of this commonwealth, set forth in said plea, cannot remove the disqualification of the defendant. Second. That the said alleged act of the Legislature is unconstitutional, and therefore void, because it is an assumption of the judicial power of the commonwealth."

The act of 1873, in terms, declares the holding of the office of notary public, under the law theretofore, to be a disqualification to hold "the office of select or common council." Its undisguised purpose is to cure the alleged defect in the title of defendant to a seat in councils. Notwithstanding this, it is still our duty to consider all the questions involved.

By the act of consolidation, it will be seen that no one holding office or employment from or under the State, when elected, shall be eligible as a member of councils.

Notaries public are of great antiquity. The Stat. 41 Geo., 3 c. 79, was passed to regulate them. It required that they should serve seven years' apprenticeship, and be duly admitted to act. Here they are commissioned by the governor "as notaries public for the commonwealth." Before entering upon their duties, they must "take and subscribe an oath or affirmation that they will support the constitution of the State," and give bond with two sureties. They are required to attest their acts by a "public notarial seal, upon which shall be engraved the arms of the commonwealth;" "to keep fair registers of all official acts by them done in virtue of their office." Their attestations are received as evidence of the facts therein certified. The act of 1840 speaks of "the office of notary public, and makes it subject to the provisions of the act "taxing certain officers." Even the act of 1873, describes it as "the office of notary public." In Commonwealth v. Pile, 6 Harris, 521, it is recognized as "the office of notary public."

In every aspect, therefore, we are compelled to regard a notary public as "holding office or employment from or under the State," and by the act of consolidation ineligible as a member of councils.

The act of 1873 defines the intent and meaning of the act of 1854. It declares that the holding of the office of notary public shall not be incompatible with holding at the same time the office of member of councils. It declares, also, that no notary public shall be removed from the office of member of councils by reason of any such disqualification. Undoubtedly, if this act be constitutional, it removes the disability of the defendant.

The Supreme Court has settled decisively all the questions which can arise in this inquiry, in 2 Watts & Serg, 271; 4 Watts & Serg, 227; 1 Jones, 494; 3 Harris, 18; 4 Harris, 256; and 7 Wr. 515. It speaks in no doubtful language and gives no uncertain sign. It will be seen, therein, how steadily and firmly every encroachment upon the judiciary has been resisted.

From these cases it is clear that the Legislature has no authority to pass retroactive expository acts. Nor can it command the decision of a court in a particular way, or forbid the legitimate consequences of a judgment.

The act of 1873 strides far beyond all others of like character. It not only interprets the act of 1854, and commands us to decide a particular case in a particular manner, but it also forbids the operation of our decree in a particular cause.

Without doubt, we desire to treat with great respect the action of the Legislature. We may not question, that within its proper province it is omnipotent. We can, however, only see in the act under consideration, a needless assumption of authority. In order that a particular individual may exercise the offices of notary public and member of councils at the same time, the Legislature has undertaken to say that the act of 1854 did not mean what, in express and fitting language, was declared to be its intent and meaning, and what has been acquiesced in by every one for nineteen years. It has also said that the judgment of the court in a matter within its jurisdiction, shall not be enforced. In other words, it has usurped the prerogatives of a preceding Legislature, and the functions of this court. It may be possible that the object to be attained might extenuate the inconsiderate exercise of such power. It cannot justify it.

Apparently the act of 1873 has no other purpose than to anticipate and annul the decision of the court in a case pending. When such legislation exists without necessity or excuse, the Legislature not only overrides the judiciary, but becomes a terror and a dread to the whole community.

Demurrer sustained. Judgment for the relators.

John J. Ridgway, Jr., and *Wm. H. Rawle, Esqs.*, for commonwealth.

Wm. B. Mann, Esq., for defendant.

Supreme Court of Pennsylv'a.

IN EQUITY.

GEO. KEEFER, Trustee, &c., German Reformed Congregation, v. JOSEPH EMERICK, Trustee &c., Evangelical Lutheran Congregation.

1. This court will so deal with its equity powers as to make them serve all the purposes of justice to which they can be made applicable.
2. A dispute between two unincorporated church organizations, as to the use of the church edifice, is within the equity powers of the courts.
3. A church congregation, limited in the use of a building to the holding of divine service, was restrained from holding a Sabbath school there.

Appeal from Common Pleas of Northumberland county.

Opinion of the court by AGNEW, J. Delivered March 17th, 1873.

This bill, on behalf of a German Reformed congregation, was to enjoin an Evangelical Lutheran congregation from holding Sunday schools in the church building. These congregations built a church for common use, and on the 8th April, 1848, adopted a "canon law," as they called it, for the government of its use by the two bodies. By the first article of this canon, the church was to be and remain a German Reformed and Evangelical Lutheran Church, under the name of "Emanuel's Church." The third and fourth articles provide for funerals and burials in the burial ground, from which it appears a graveyard was to be used in connection with the church. The thirteenth declares, that each congregation shall have equal right to the church property, and each pastor shall so arrange his *divine service*, as not to interfere with the pastor of the other denomination. The fifteenth article provides that it shall be allowed to hold *divine service* in two languages, in English and German.

The master finds, that *divine service* only was to be held in the church, and that by common understanding of both congregations, no meetings other than those for divine service could be held in it, and that, for a period of over twenty years, no other than meetings for public worship or preaching the Gospel were held there; that a union Sunday school, organized and kept up by the congregations, was held for many years in a school house close by the church. A short time ago, the Lutheran congregation withdrew from the union Sunday school, and established one of their own, in the audience room of the church, in opposition to, and without the consent of the German Reformed congregation.

This bill is to prevent this unauthorized and continued use of the audience room for the Sunday school. The master finds, that Sunday schools were not in existence, or thought of in this neighborhood at the time of the union of these congregations, and adoption of their rules; that both congregations understood, and rigidly adhered to the understanding, that a "preaching service" only was to be maintained in the church, and that singing schools, prayer meetings, and the like, were forbidden to be held there. He concludes by saying, he is satisfied from the articles of association, and the testimony in the cause, the preaching of the Gospel only was understood by the members of both congregations to be the "divine service" mentioned in the articles. In the court below, the controversy was not upon the facts reported, but upon the meaning of the terms "divine service;" the defendants holding that they embraced Sabbath schools. The witnesses agree, that the German word *Gottesdienst*, used in the articles of union, means, in English, *divine service;* and the court below decided that this included Sunday school service. That prayer and praise, and, indeed, oral as well as written instruction in religious matters, by laymen, are used in Sunday school service, is true, and in a general sense it may be said to be divine service. Indeed, the Reverend Samuel J. Milliken did say in his testimony, that the more extensive use of the term divine service, includes the performance of any duty arising out of our obligations to God; but in the more restricted sense, it is used to signify acts of religious worship. This would give two significations to these words. Like words of art, the sense in which they have been used by the parties, must, therefore, be sought for. It is the duty of courts to interpret the language of written instruments; but in doing this, they always follow the meaning attributed to the terms by those whose custom it is to use them. Therefore, when a contract is capable of two different interpretations, that which the parties themselves have always put upon it, and acted upon, especially as here for a long series of years, a court will follow, because it is the true intent and meaning of the parties which are to be sought for in the language they use. However right it may be to view, as the court did, the Sunday school as a most useful institution in instructing youth in the knowledge and worship of God, and their duties to mankind, this praiseworthy view cannot change a written contract. We cannot engraft on a contract for one thing, an agreement for a different thing, though the fruit of the scion be even better than that of the natural stock.

These congregations never so understood or acted upon their agreement of union. They built their church for divine worship, by prayer, praise and the preaching of God's word. Its use was to be *congregational worship*, not *school instruction*. Their worship was to be led by *pastors*, who should regulate their appointments in due regard to mutual harmony, and was not to be the instruction of youth, even though part of it were in divine things, led by *individual laymen*. There are reasons, also, why a chamber or audience room, dedicated to public congregational worship, should not be thrown open to thoughtless, giddy, sometimes vicious youths, to deface and soil it. We think the court erred in deciding the case according to the general meaning of the words "divine service," as testified to by some of the witnesses, instead of confining their signification to the sense in which the congregations understood it when they entered into the agreement, and afterwards practiced upon it.

A doubt has been suggested, as to the jurisdiction of the court below in such a case, but, we think, without a solid ground. As unincorporated associations, the parties fall directly within the fifth equity head of the act of 16th June, 1836, conferring on the Supreme and Common Pleas courts jurisdiction in the supervision and control of unincorporated societies or associations and partnerships. Foley v. Toney, 4 P. F. Smith, 190, is in point, opinion by the present chief justice. The number and relations of these parties, and the subject and nature of the injury, also, make the case as one for the peculiar jurisdiction of equity. The number of the members of each congregation, and the uncertainty in their identity and connection with the congregation, make a remedy at law neither convenient nor certain. There would be some difficulty in moulding a common law action to remedy the perverted use. The subject of the use is also peculiar. Such congregations are not governed by the ordinary rules of tenancy in common. It has been decided, there can be no partition of a church or a graveyard held by two congregations precisely as these two hold their property. Brown v. Lutheran Church, 11 Harris, 495. The language of Woodward, J., is forcible and just, in which he shows the sacrilegious character of a proceeding that would sell the altar and the graves; that a church cannot be divided; and that the policy of the State has always been to protect the resting-places of the dead. A sale is the only mode of partition in such a case; and what, he asks, would these graves, of inestimable value to surviving relatives, fetch in the market? This case, therefore, does not on this ground fall within the principle of North Pennsylvania Coal Company v. Snowden, 6 Wright, 488.

The nature of the injury, too, is to be noticed. It is not an act of wrong or injury to the property itself, nor is it an ouster from possession, or wrongful withholding of the possession by one congregation from the other, but a mere perversion of its use; and here again it differs from the North Pennsylvania Coal Company v. Snowden, and from Tillmes v. Marsh, 17 P. F. Smith, 507. In those cases, the bills were what is termed an ejectment bill—a bill to obtain possession and enforce rights under a legal title. Here the injury consists in a perversion of the right of the congregation, a misuse of its privileges under the articles of union, and it is continuing in its nature. It involves a series of injurious acts of misuse, and therefore can have no adequate remedy at law, if an action for damages could be conveniently sustained. This brings the case directly within the letter and spirit of the fifth head of equity, in the second branch of powers contained in the act of 1836, to wit: The prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community, or the rights of individuals." The congregation defendant, is not only an unincorporated association, and thus within the control of the court, but the congregation plaintiff is composed of individuals, whose rights are prejudiced by the defendants, and therefore entitled to the exercise of the restraining power of the court. In either way jurisdiction attaches. The right of the plaintiffs is not disputed, which takes the case out of the rule that the court will not enjoin upon a disputed title till it is settled at law. It is only the illegal acts of the defendants that are the subject of dispute, and they are clearly contrary to law, as we interpret the agreement of union. The disposition of this court has been not to deal with these equity powers in a narrow spirit, but to make them serve all the purposes of justice to which they can be made applicable. In Wesley Church v. Moore, 10 Burr, 280, Chief Justice Gibson remarked, that "The equitable jurisdiction conferred by these statutes is a valuable, indeed, indispensable one, and ought to be extended by every interpretation of which the words are susceptible." The same opinion has found utterance in subsequent cases. Kirkpatrick v. McDonald, 1 Jones, 393; Yard v. Patton, 1 Harris, 282. The actual exercise of this valuable power of restraint has been sustained in numerous and analogous cases, which may be briefly noticed, presuming that in the same clause is found the supervision and control of partnerships, following directly after the supervision and control of unincorporated societies and associations, subjects analogous in the unincorporated membership and the close and confidential relations of the members of each class. Thus in Stockdale v. Ulery, 1 Wright, 486, a partner was restrained from pawning or pledging the notes of the firm for his own debts. So a partner may be restrained from doing acts prejudicial to the estate of a deceased partner. Holden's Adm'r v. McMackin, 1 Parsons, 284. And a person may be restrained from doing business contrary to a lawful agreement not to do so. Palmer v. Graham, 1 Parsons, 476. So to restrain the use of a party wall before payment of a moiety of the cost. Sutcliff v. Jones, 1 Parsons, 494. To prevent the holder of a legal title from conveying it away contrary to equity O'Neil v. Hamilton, 8 Wright, 18. To restrain associates from denying the right of one chosen by a publishing company as the editor of a paper, and preventing his publication of it. Peacock v. Chambers, 10 Wright, 434. To prevent a usurpation of power by a portion of a body which should be a unit, as the Common Council of Philadelphia. Kerr v. Trego, 11 Wright, 292. To restrain an unlawful sale under execution of the property of the wife for the debt of the husband. Lyon's Appeal, 11 P. F. Smith, 15. Without further citation, Kerns' Appeal, 12 P. F. Smith, 428, may be instanced as a case in point. There a deed was made of a church property to trustees, for the use of two congregations, with a provision for division in a certain manner, if conducive to the interests of the parties. One congregation took exclusive possession. Held to be a dispute between members of an unincorporated society in relation to their rights and privileges, and not merely as tenants in common of real estate, and equity had jurisdiction to restore the excluded party to their rights. Sutter v. Trustees of First Reformed Dutch Church, 6 Wright, 503, is also an authority on this point. The decree of the court below, dismissing the bill, is, therefore, reversed, and the bill restored, and report of the master confirmed; and it is hereby ordered and decreed, that the defendants named in the bill of the plaintiffs, be enjoined and restrained perpetually from using the said church described in the bill, for the purpose of holding Sunday or Sabbath schools therein, and that the defendants pay the costs.

I concur in the construction given to the articles or canons in this case, but I

dissent from the decree on the ground that the evidence does not show that any such injury has arisen, or is likely to arise from the act complained of, as warrants the interposition of a court of equity to restrain it by injunction.

HENRY W. WILLIAMS.

McHOSE v. FULMER.

Where a vendor fails to comply with his contract, by reason of not being able to procure an article of the same quality as called for, and by reason of the limited production of the article, its market price cannot be ascertained, the measure of damages is the actual loss which the vendee sustains in his own manufacture, by having to use an inferior article, or by not receiving the advances on his contract price upon any contracts, which he had himself made, in reliance upon the fulfilment of the contract.

Error to the Court of Common Pleas of Lehigh county.

Opinion by SHARSWOOD, J. Delivered March 24th, 1873.

When a vendor fails to comply with his contract, the general rule for the measure of damages, undoubtedly is, the difference between the contract and market price of the article at the time of the breach. This is for the evident reason, that the vendee can go into the market and obtain the article contracted for at that price. But when the circumstances of the case are such that the vendee cannot thus supply himself, the rule does not apply, for the reason that it ceases. Bank of Montgomery v. Reese, 2 Casey, 143. "It is manifest," says Mr. Chief Justice Lewis, "that this (the ordinary measure), would not remunerate him when the article could not be obtained elswhere." If an article of the same quality cannot be procured in the market, its market price cannot be ascertained, and we are without the necessary *data* for the application of the general rule. This is a contingency which must be considered to have been within the contemplation of the parties, for they must be presumed to know whether such articles are of limited production or not. In such a case, the true measure is the actual loss which the vendee sustains in his own manufacture, by having to use an inferior article, or by not receiving the advances on his contract price upon any contracts which he had himself made, in reliance upon the fulfilment of the contract by the vendor. We do not mean to say, that if he undertakes to fill his own contract with an inferior article, and in consequence, such article is returned on his hands, he can recover of his vendor, besides the loss sustained on his contract, all the extraordinary loss incurred by his attempting what was clearly an unwarrantable experiment. This legitimate loss is the difference between the contract price he was to pay his vendor, and the price he was to receive from his vendees. This is a loss which springs directly from the non-fulfilment of the contract. The affidavits of defence are not as full and precise upon this point as they might and ought to have been; but they state that the defendants below had entered into such contracts, and that they were unable to get the same quality of iron, which the plaintiffs had agreed to deliver, and this, we think, was enough to have carried the case to a jury.

Judgment reversed, and *procedendo* awarded.

Recent Acts of Congress.

The following is a brief statement in addition to that already published in this journal, of the several acts passed at the recent session of Congress, which are of general interest to the profession:

An act to fix the time for holding the annual session of the Supreme Court of the United States, and for other purposes. Approved January 24th, 1873.

This act designates the second Monday of October as the day for commencing the annual session of the United States Supreme Court, in future.

An act to amend an act entitled An act to establish a uniform system of bankruptcy throughout the United States, approved March 2d, 1867. Approved February 13th, 1873.

This act declares that whenever a corporation created by the laws of any State, whose business is carried on wholly within the State creating the same, and also any insurance company so created, whether all its business shall be carried on in such State or not, has had proceedings duly commenced against such corporation or company before the courts of such State, for the purpose of winding up the affairs of such corporation or company, and dividing its assets ratably among its creditors, and lawfully among those entitled thereto, prior to proceedings having been commenced against such corporation or company under the bankrupt laws of the United States, any order made, or that shall be made by such court, agreeably to the State law, for the ratable distribution or payment of any dividends of assets to the creditors of such corporation or company, while such State court shall remain actually or constructively in possession or control of the assets of such corporation or company, shall be deemed valid, notwithstanding proceedings in bankruptcy may have been commenced and be pending against such corporation or company.

An act to declare the true intent and meaning of the act approved June 8th, 1872, amendatory of the general bankrupt law. Approved March 3d, 1873.

This act declares that it was the true intent and meaning of the act of June 8th, 1872, that the exemptions allowed the bankrupt by the said amendatory act shall be the amount allowed by the constitution and laws of each State, respectively, as existing in the year 1871, and that such exemptions be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court; any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding.

An act to regulate the taking of testimony in certain cases. Approved March 3d, 1873.

This act provides that no witness shall be compelled to testify under letters rogatory, issued or to be issued from any court in any foreign country, in any suit or proceeding in which the government of such foreign country shall be a party of record or in interest, except for the purpose of answering specific written interrogatories, issued with and accompanying such letters rogatory, and addressed to such witness: *Provided*, that when counsel for all the parties attend the examination, they may consent that questions in addition to those accompanying the letters rogatory may be put to the witness, unless the letters rogatory exclude such additional interrogatories, and that no witness shall be required on examination under letters rogatory, to make any disclosure or discovery which shall tend to criminate him.

Recent Decisions.

NEW YORK.

COURT OF COMMON PLEAS OF NEW YORK CITY. General Term. Before Judges C. F. Daly, Robinson, Larremore, and Loew. April 7th, 1873.

The steamer St. Louis, running between New York and New Orleans, was spoken off Sandy Hook, when coming into this port, by John W. Murray, a pilot licensed under the State law. The vessel refused to take him on board, and he brought suit before Judge Quinn, in the First District Court, to recover his pilotage fees. Mr. John E. Parsons, for the defendants, argued that the St. Louis was "a coastwise steam vessel," within the meaning of the act of Congress of 1871, providing that "all vessels propelled in whole or in part by steam, when navigated within the jurisdiction of the United States, shall be subject to the rules and regulations established by the United States, for the government of steam vessels, and that every coastwise sea-going steam vessel; subject to such rules and regulations, and to the navigation laws of the United States, not sailing under register, shall, when under way, except upon the high seas, be under the control and direction of pilots licensed by the United States Inspectors of Steamboats," and therefore was not required to take a pilot under the State law. The United States statute provides that in the case of the vessels indicated, no charges by State or municipal action shall be levied, but it expressly excepts "coastwise steam vessels," from the operation of this saving clause. Judge Quinn gave judgment for the plaintiff, and defendants appealed to this court, where the judgment was affirmed. Chief Justice Daly, in rendering the decision, says that where this statute refers to a "coastwise sea-going vessel not sailing under register," it must mean one that is enrolled and licensed for the coasting trade, and a vessel sailing from one part of the coast of the United States to another, or which is employed in the whale or coast fisheries, and does not refer to a registered vessel, that may trade or sail to any port of the world, as it was expressly declared "not sailing under register." That the State pilot law of 1867, in no way conflicts with the provision of the United States act, the obligation of taking a pilot licensed by the State board, being only imposed upon masters of foreign vessels, vessels coming from a foreign port, and vessels sailing under register. A coastwise vessel is one sailing by the way of or along the coast. In a certain sense the St. Louis was a vessel of this description, but was not necessarily limited to running by way of or to and from ports upon our coast. She was a registered vessel, and, being so, was privileged to go to or stop at foreign ports, and on the voyage in question, had stopped at Havana. That she was under control and direction of her master, who was a United States pilot, did not effect the question.

[Head notes of decisions reported in 14th Wallace soon to appear.]

Supreme Court, United States.

PRACTICE.

See Answer; Bankrupt Act, 7; Bill of Review; Parties, Supersedeas.

1. In the Supreme Court.

(*a*) In cases generally,

1. The refusal of the court below to admit further proof of a fact already well established, and which this court can see from the record was not disputed at the trial, is not ground for reversing the judgment, though the evidence offered might have been competent; because the party was not injured by the ruling of the court. Gregg v. Moss, 564.

2. The incorporation of all the testimony given to a jury, and the consequent attempt of counsel to reargue here, matters of fact decided by the jury, reprehended again, as it has been before. Id.

3. The granting or refusal by the highest court of a State of a motion for the rehearing of an equity suit, is not a subject for review by the Supreme Court of the United States; in fact not being within its jurisdiction. Steines v. Franklin County, 15.

4. When a Supreme Court of a State is composed of a chief justice and several associates, writs of error to the court under the 25th section of the judiciary act, must be signed by the chief justice. Bartemeyer v. Iowa, 26.

5. A notice by one of three defendants to his co-defendants of his intention to prosecute a writ of error, and a refusal by them to co-operate, is equivalent to the old proceeding of summons and severance and the one defendant can take his writ accordingly. O'Dowd v. Russell, 402.

6. The Supreme Court will not reverse a decree because a deposition showing the amount of damages has been improperly received; there being other evidence that the damages were as great as this court finally awarded. The Steamer Webb, 406.

7. Cannot pass on the weight of evidence on error to the circuit courts, when acting under the act of March 3d, 1865, as a jury. Dirst v. Morris, 484.

8. A failure of the Court of Claims to find a fact as a party alleges it to be, will not justify the bringing of all the evidence on the subject to the Supreme Court; though on a refusal of the Court of Claims to make any finding on the subject, the Supreme Court may remand the case for such finding. Mahan v. United States, 109.

9. Though error may have been committed by a court below on the then state of statutory law, yet where a statute has been passed since that court gave their judgment, changing the then existing law, so that if the judgment were reversed and the case sent back, the court would now and in virtue of the new statute, have to rightly give the same judgment that they gave before erroneously, this court will affirm. Pugh v. McCormick, 361.

(*b*) In admiralty

10. Although the general rule is that a party who does not appeal cannot be heard in opposition to the decree, still where it appeared—the suit below being a libel for collision against a tug and her tow — that an appeal from the District Court to the Circuit Court had been taken from the entire decree, by the owners of the tow,

who had ordered the tug, and who had undertaken her defence as well as their own, and thus represented the entire interest of the losing party in the suit, an appeal by the tug from the Circuit Court to this court was entertained here, though the tug had not in form appealed from the decree of the District Court. The Mabey and Cooper, 204.

11. A decree in admiralty in the District and Circuit Courts for a greater amount than the sum for which the sureties were bound on their bond to release the vessel, reformed by the Supreme Court so as not to exceed that sum. The Steamer Webb, 406.

12. Where exceptions of form are taken on a libel in admiralty in the District Court, but are not found in the record of an appeal to the Circuit Court, or from the Circuit Court to the Supreme Court, and do not appear to have been brought to the attention of the Circuit Court, or acted on in any manner by it, they must be held in the Supreme Court to have been waived. The Vaughan and Telegraph, 258.

II. In Circuit and District Courts.

13. Where a mortgagor has filed a bill of revivor against the personal representatives, and not including the heirs of a mortgagee, who had bought the mortgaged property under a proceeding supposed to be a valid sale of foreclosure, but which was, in fact, a proceeding wholly void, and has had the bill dismissed and a decree that he is himself still owner, and that he pay the balance unpaid of the mortgage money, though the fact that the decree did not order the heirs of the mortgagee purchaser to convey, cannot be taken advantage of on error, yet the execution of the decree for payment may be stayed until the outstanding title have been brought back Bigler v. Waller, 297.

14. Where a charge is merely ambiguous, a party dissatisfied with it ought, before the jury leave the bar, to ask the court to make it clear. He should not take his chance with a jury, and then, after the verdict is against him, claim the benefit of the ambiguity on error. Improvement Company v. Munson, 442.

III. In district courts.

15. Decrees in admiralty *in rem* should not exceed the amount for which the sureties were bound on stipulations for a discharge of the vessel from the marshal's custody. The Steamer Webb, 406.

SHERIFF'S SALES.

The following are the prices obtained for the properties sold at Sheriff's sale on Monday last.

Hiram and Jane A. Krieder. No. 1, $3,200. No. 2, 3,200
Eli H. Ashton. No. 1, $5,000. No. 2, 4,000. No. 3, 4,200 No. 4, 1,900. No. 5, 2,000. No. 6, 1,850. No. 7, 2,000. No. 8, 2,000.
Edward Meredith & Co. 2000
Wm. Sweeney. 2,350
Wm. R. Milligan. 6,250
Jacob Frame. 2,500
Authony C. Walters. 2,400
Josiah Ashenfelder, Saml. Ware and Jacob Heller, Sr. 40
Adam H. Dietrich. 2,500
Agnes McKenna. 300
Wm. R. Ambler. 30,90
Wm. S. Dodd. $50
Julius Holzer. 1,000
Bertles-Shee. 1,200
Job Kirby. 1,600
Jacob L. Senneff. 1,200
Isaac Heister. 525
Franklin Dyer. 9,550
Isaac Heister. 900
Chas. W. Hepburn. No. 1, $5,000. No. 2, 1,200. No. 3, 1,100. No. 4, 1,100. No. 5, 750. No. 6, 700. No. 7, 700. No. 8, 700. No. 9, 500. No. 10, 900. No. 11, 1,250
Jas. McKenna and Jas. C. Larkins. No. 3, $250. No. 4, 250
Geo. P. Steinmetz & Wife. 700
G. A. Wernrich. 40
Martin Knitzbach. 1,300
Edwin Rafsnyder. $250
John M. Boland. 600
Geo. W. Campbell. No. 1, 5,400. No. 2, 5,400. No. 3, 4,100
Wm. Donaghy, with notice, &c. No. 1, $300. No. 2, 250
John Lamplue. 5,000
Edward Shields. 2,000
Edward Shields. 2,000
McDevitt & Young. 110
Louis Bloomberg. 4,500
Michael Carlin 1,000
Rose and Margaret McCann. 1,550
Jas. J. Mullin. 150
Patrick Conlin. 2,675
Geo. W. Merritt, Jr. 50
James Fraley and Wife. 1,200
Jos. J. Ray and Wife. 2,000
Geo. O. Evans and Wife. No. 1, $12,500. No. 2, 1,500
Jacob Frame. 2,200
Edward Weiss. 2,500
Margaret Farren. 80
Jeffrey Lowery, owner, Nicholas F. English, registered owner. 200
Septimus Ambler, owner, Cornelius O'Hara, registered owner. 300
Mrs. Key and John Kilpatrick. 350
Freeman Scott. 210
Freeman Scott. 2,600
Freeman Scott. 600
Mrs. Reilly, owner, and Margaret Reilly, present owner. 500
R. Yerkes, owner, Alfred Moore, adm'r 1,800
Edward Martin. 200
Mary W. Neff. 500
Mary W. Neff. 150
Mary W. Neff. 225
Mary W. Neff. 150
Freeman Scott, owner, Mary Scott, registered owner. 160
Freeman Scott, owner, Mary Scott, registered owner. 200
Freeman Scott, owner, Mary Scott, registered owner. 250
James, Elizabeth J., and David Floyd. 160
Hibernia Hose Co. 1,000
Lewis Wirth. 1,000
Unknown. 3,200
Joseph Battin, Geo. W. Carson, registered owner. 50
John A. McSorley, Chas. McDevitt, and Thos. Graham. 500
John O'Reilly. 6,000
Robert Mac Gregor. 25
Marion M. Steel. 825
N. Quering. 3,500
Porter Thompson and Wm. H. Brecklinbridge, contractors, G. M. Fried, owner. No. 1, 3,300. No. 2, 3,300
John Carson. 2,000
Martin Matchisky. 100
George Schickling. 50
Samuel T. Billmeyer. 50
Joseph Rutland. 50
Henry Kahley. 50
Edward D. Johnson. No. 1, $100. No. 2, 100
August Beckman. No. 1, $75. No. 2, 125
Michael Butler. 50
Jas. D. Shaw. 150
Susanna Ripple. 50
Peter Schopf. 50
Andrew McFarland. 1,700
Andrew McFarland. 1,600
Unknown, owner, F. Kearnan, registered owner. 100
Patrick Carroll. 50
Casper Vetter. 350
John S. Lash and Wife. 4,500
John Graef. 4,350
Friend J. Streeton. $700
Ann Coulter. No. 2, $1,600. No. 3, 1,500. No. 4, 1,100. No. 5, 1,000. No. 6, 900. No. 7, 900. No. 8, 900. No. 9, 900. No. 10, 925. No. 11, 1,025. No. 12, 1,300. No. 13, 1,475. No. 14, 1,525. No. 15, 1,200. No. 16, 875. No. 17, 350. No. 18, 350. No. 19, 350. No. 20. 500. No. 21, 825. No. 22, 825. No. 23, 800. No. 24, 800. No. 25, 825. No. 26, 800. No. 27, 1,010. No. 28, 1,175. No. 29, 1,175. No. 30, 1,100. No. 31, 1,100. No. 32, 1,100. No. 33, 1,100. No. 34, 1,150. No. 45, 1,125. No. 46, 1,375. No. 47, 1,475. No. 58, 2,100. No. 59, 1,975. No. 60, 2,000. No. 61, 2,000. No. 62, 2,000. No. 63, 2,500. No. 64, 2,000. No. 65, 1,500
Edw. Hughes. 10,000
Fonrose Millett. No. 1, $20. No. 2, 50. No. 3, 50. No. 4, 50. No. 5, 40. No. 6, 80. No. 7, 100. No. 8, 100. No. 9, 90. No. 10, 50. No. 11, 50. No. 12, 90. No. 13, 90. No. 14, 90. No. 15, 90. No. 16, 90. No. 17, 50. No. 18, 70. No. 19, 70. No. 20, 90. No. 21, 70. No. 22, 110. No. 23, 110. No. 24, 50. No. 25, 70. No. 26, 80. No. 27, 50. No. 28, 70
John Schaffer, No. 1, $500. No. 2, 500. No. 3, 500. No. 4, 500. No. 5, 500
Fourose Millett. No. 1, $50. No. 2, 50. No. 3, 50
Geo. A. Eno. No. 1, $1,100. No. 2, 1,100
Wm. Crawford. 25
Wm. Crawford and Wm. J. Bell. 1,200
Wm. Crawford. 325
Wm. J. Bell. No. 1, $35. No. 2, 25
Wm. J. Bell. 25
Edward DeMott. Nos. 1 to 38 inclusive, $15.
Sam'l H. Martyn, owner, Thos. Morphy, contractor. 1,850
Matthias Smith. 1,250
Jacob Frame. Nos. 1 to 4 inclusive, $2,200 each.
Jas. C. McCurdy. 100
Geo. V. Baird. 900
Henry G. Riley. 1,500
Hartman Grau. 8,500
Thos. Clark. 175
Dr. J. W. Robbins. 20
Exchange Mutual Ins. Co. 50
August H. Wirz. 2,000
John, Thomas and David J. Griffiths. 650
Wm. N. King. 50
Robert Harbison. 25
Geo. L. Francis. 2,200
Catharine McCloud. No. 1, $10. No. 2, 10
Oliver Benner, dec'd. No. 1, $50. No. 2, 50. No. 3, 50
Thomas Clark. 50
Chas. F. Swilkey. 2,300
Robert C. Bulmer. 75
Patrick Reenan. 1,200
Jacob S. Frederick. No. 1, $700. No. 2, 800
Geo. Engle and Robt. Henderson. 50
John Ashburner, No. 1, 840
Francis A. McClellan, dec'd. No. 1, 2,000
F. Frank and N. Lentz. 2,100
B. Rowland Croasdale. 500
Michael Gibbons. No. 1, $75. No. 2, 50. No. 3, 75. No. 4, 75. No. 5, 75. No. 6, 75. No. 7, 125. No. 8, 75. No. 9, 100. No. 10, 25. No. 11, 25. No. 12, 25. No. 13, 10
Wm. J. Bell. No. 10, 20
John Noble. 300
Everett Plummer and Wife. $1,450
Henry Fricke. 10
Felix Donnelly. 1,000
John Gardner. 4,150
Mary E. Helmbold. 2,400
Albert S. Ashmead, and Edw. S. Bodine, owners, Albert S. Ashmead, contractor. 25

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in April, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

Feb. 28, Isaac H. Macdonald, Administrator of NANCY TOLAND, dec'd.
" 28, Francis Lucas, Executor of FRANCIS R. LUCAS, dec'd.
" 26, John G. Kuhnle, Executor of CATHARINE ELLIS, dec'd.
Mar. 1, Emma Harvey, Administratrix of LOUIS C. L. HARVEY, dec'd.
" 3, Maria B. Hunsworth et al., Executors and Trustees of JOHN HUNSWORTH, dec'd.
" 3, Adam Schmunck et al., Executors of VALENTINE STEITZ, dec'd.
" 3, Eugene Linnard, Guardian of MARY DUNHAM.
" 4, Mary J. Heller, Administratrix of SCARBOROUGH TATHAM, dec'd.
" 4, George Erety, deceased, Executor of ANN ELY, deceased, as filed by William Erety and Horace B. Shoemaker.
" 5, Charles M. Lukens, Administrator of GEORGE M. SNYDER, dec'd.
" 6, John Ashbridge, Administrator of JACOB HARRIS, dec'd.
" 6, Nettie E. Schoneman, Executrix of JACOB NATHAN, dec'd.
" 7, Clara H. Thomas, Administratrix of EDWIN L. THOMAS, dec'd.
" 8, I. Wistar Evans et al., Executors of CATHARINE EVANS, dec'd.
" 8, Emily M. Whartenby, Executrix of HARRIET S. WHARTENBY, deceased.
" 8, Stephen R. Snyder, Guardian of FREDERICK GETZ, late minor.
" 8, George Wood, Executor of GILBERT GAW, dec'd.
" 8, Charles H. Meyer, Administrator of ADOLPH H. PICKERT, dec'd.
" 10, James L. Hulligan et al., Executors of BRIDGET FITZGERALD, dec'd.
" 11, Charles J. Piggott, Administrator of JOHN T. PIGGOTT, dec'd.
" 12, Eliza Bready, Guardian of WILLIAM C. O. ELY, dec'd.
" 13, William J. Gibb et al., Executors of JOHN GIBB, dec'd.
" 13, Michael Jennings, Administrator of EDWARD LYNCH, dec'd.
" 14, Robt. C. Bennett, Surviving Executor of JOHN DAVISON, dec'd.
" 15, Catharine Nepley et al., Executors of JOHN N. NEPLEY, dec'd.
" 15, Charles Este, Administrator of FRANCIS A. ROSS, dec'd.
" 15, Alexander Black, Administrator of WILLIAM K. ROBINSON, dec'd.
" 17, Samuel J. Sharpless et al., Trustees under the will of Townsend Sharpless of ALICE M. BROWN.
" 17, Samuel J. Sharpless et al., Trustees under the will of Townsend Sharpless of LYDIA J. HUNN.
" 17, Samuel J. Sharpless et al., Trustees under the will of Townsend Sharpless of ANNA R. SHARPLESS AND HER CHILDREN.
" 17, Hester S. Reeves, Executrix of JAMES S. REEVES, dec'd.
" 17, Joshua H. Morris, Executor of CHAS. L. DESAQUE, dec'd.
" 17, Albert D. Fell et. al., Executors of PENROSE FELL, dec'd.
" 18, Catharine Miller, Administratrix of JAMES MILLER, dec'd.
" 18, The Provident Life and Trust Company, Guardians of BERTHA ROSENSTEIN, dec'd.
" 18, William Moyn, Administrator of WM. HIDDIMAN, dec'd.
" 18, Sarah T. Woodcock, Administrator of WILLIAM WOODCOCK, dec'd.
" 18, Harriet Barrett et al., Executors of NATHAN BARRETT, dec'd.
Mar. 21, Rudolph P. McCall, Administrator of JOSEPH W. BURTON, dec'd.
" 21, Catharine Harkins (Doyle), Administratrix of JOHN DOYLE, dec'd.
" 21, James K. Neulis, Guardian of GEO. NEULIS, a minor.
" 21, Mary A. Garber, Administratrix of SARAH GEHMAN, dec'd.
" 21, Meyer Gans, Guardian of JULIA GANS.
" 22, Peter Leeten, Administrator of SUSANNAH WADE, dec'd.
" 22, Frederick Narr et al., Administrator of WILLIAM G. VOGEL, dec'd.
" 22, Kate L. Moffett, Administratrix of THOMAS MOFFETT, dec'd.
" 22, Ann Jane McWhinney, Administratrix of ARTHUR McWHINNEY, deceased.
" 22, James Larkens, Executor of JAMES GALLAGHER, dec'd.
" 22, Samuel G. Flood, Executor of MARY H. CROZIER, dec'd.
" 24, Helen McCutcheon, Guardian of McCUTCHEON minors.
" 24, Athalin E. Edwards et al., Executors of IGNATIUS EDWARDS, dec'd.
" 24, William Harris, Jr., Administrator of SAMUEL Y. ADDIS, dec'd.
" 24, Eliza A. Mart, in Administratrix of JOHN MARTIN, dec'd.
" 24, Mary Rockhill et al., Executors of THOMAS C. ROCKHILL, dec'd.
" 25, Charles H. Gross, Surviving Executor of CHARLES HEEBNER, dec'd.
" 25, Margaret Story (late Burnet), Administratrix of JOHN BURNET, Jr., dec'd.
" 25, James Noble, Executor of JEREMIAH DUNBAR, dec'd.
" 25, Ellwood Davis, Executor of BENJAMIN DAVIS, dec'd.
" 25, Antone Schraudt, Executor of WM. STEFFEN, dec'd.
" 25, Cornelius K. Gibson Administratrix of CHARLES M. GIBSON, dec'd.
" 26, Ellen M. Treanor, Executrix of MICHAEL TREANOR, dec'd.
" 26, Philip S. P. Conner, Administrator of SAML. EMLEN RANDOLPH, deceased.
" 26, Cecelia Miller, Administratrix of JNO. H. MILLER, dec'd.
" 26, John Levering, Jr., Administrator, &c., of JOHN N. SHUGARD, dec'd.
" 26, James Peeples, Executor of ELLEN LACEY, dec'd.
" 26, Joshua Pusey, Administrator of CHARITY KELSEY, dec'd.
" 27, Caroline F. Byrnes (late Allen), Administratrix of AND. M. ALLEN, deceased.
" 27, Wm. J. Shaw, Administrator of SARAH SHAW, dec'd.
" 27, David E. Hance, Administrator of ABRAHAM JORDAN, dec'd.
" 27, D. S. Cadwallader et al., Administrators, &c., of SARAH B. CADWALLADER, dec'd.
" 27, William H. Mills, Administrator of JOHN MILLS, dec'd.
" 27, Mary Jane Moore, Administratrix of JANE TAYLOR, dec'd.
" 27, Joseph R. Lyndall et al., Executors of WILLIAM BALLENGER, dec'd.
" 27, Sarah A. Albright et al., Executors of WILLIAM E. ALBRIGHT, dec'd.
" 27, John L. Shoemaker et al., Executors of ASHTON ROBERTS, dec'd.
" 27, Rachael L. Wise, Administratrix of SUSANNA DUYLASS, dec'd.
" 27, Elizabeth Gorgas et al., Administrators of CHARLES GORGAS, dec'd.
" 27, Joseph Bacon, Administrator of MARGARET E. BACON, dec'd.
" 25, Jane E. Rogers, Administratrix of WILLIAM ROGERS, dec'd.
" 27, John Wistar Evans et al., Surviving Residuary Trustees under the will of THOMAS EVANS, dec'd.
" 27, Michael Keyney et al., Executors of DENNIS KANE, dec'd.
" 27, Joseph Bacon et al., Surviving Executors and Trustees under the will of DAVID BACON, dec'd.

WILLIAM M. BUNN,
mar 28-4t. Register.

Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, APRIL 18, 1873. No. 16.

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Court of Common Pleas, Philadelphia.

IN EQUITY.

ABRAHAM C. BROWN et al. v. THE FAIRMOUNT GOLD AND SILVER MINING CO.

1. A supplement to a charter of incorporation, will not be binding until accepted by the body which composes the corporation.
2. An acceptance by the board of directors, unless they be specially empowered thereto, is not sufficient.
3. A supplement to a charter increasing the price of stock subscribed for, would impair the obligation of a contract, and is, therefore, unconstitutional.

Motion for an injunction.

Opinion of the court by ALLISON, P. J. Delivered April 5th, 1873.

The corporation defendant was created by an act of the Legislature of Pennsylvania, approved May 1st, 1866, and by the same authority, a supplement to the charter was passed the 5th of February, 1873.

This supplement declares that the board of directors, at any stated or other meeting called for the purpose, shall have authority to assess from time to time, at their discretion, on the stock then issued, or thereafter to be issued, such sum or sums of money as they may think necessary to pay existing liabilities of the company, and to carry on its business; notice of such assessment is required to be given in two daily newspapers published in Philadelphia, once a week, for three weeks.

It states further, that the board shall have power to sell such shares at public sale, for non-payment of assessment, after ten days' notice, and notice of the sale is to be published once in two papers, at least five days previous to the time fixed for the sale.

The supplement has never been submitted to the stockholders for acceptance or rejection, but was, according to paragraph 10 of the answer, accepted by the board of directors for the company. Under the charter, defendants claim to possess this power.

This presents one of the vital questions which are raised by the bill and answer. The case of the Commonwealth v. Cullen, 1 Harris, 133, seems to settle the law in our State conclusively against this position, on which the defendants justify their action. The principle is broadly affirmed, that substantive alterations of a charter, without request or assent of a corporation, are unauthorized interferences with the franchises, and that such assent must be given by the body who compose the corporation, and where this body is the stockholders, the directors or trustees have no power to accept or reject such alterations.

It therefore, follows, that to make valid as the act of the corporation, an act altering a charter, it should be passed at a meeting of the corporators, duly convened for that purpose, after notice to all the members. The most ample opportunity should be afforded for deliberation upon the proposed alteration; nor can a minority be deprived of this right by the arbitrary will of a majority.

This fundamental right of the stockholders was totally ignored by the directors; the amendment was procured without previous notice to or consultation with the body of the corporators, and it is charged in the bill, and is not denied in the answer, that the supplement was obtained without the consent, or even the knowledge of the large majority of the stockholders. The statement in the answer upon this point, is not responsive to the charge, it is not pretended that that previous approval was had, but only that it is acceptable, now acceptable to and desired by a large majority of the holders of shares, and to the holders of a majority of the shares. How this has been ascertained, is not stated, nor is there proof of its correctness. But though it be true, what becomes of the right of consultation, of the assembled body after notice, and time and opportunity for deliberation. The answer in this case is that the board of directors have chosen to wholly ignore it, and to assume to themselves the exercise of this important prerogative, without the color of law even to sustain them. The charter will be explored in vain for evidence of any such power. Article 3, in all of its six sections, contains nothing from which it may be inferred, and certainly there can be found no express grant of the kind. The duties and powers are those of ordinary management and control, nothing more.

The charter makes provision for the annual meetings of the stockholders. Special meetings are to be called by the board, of their own motion, or on written request of stockholders representing one-third of the capital stock of the company. The entire charter shows that the power to pass on important questions is reserved to the corporators, and it is declared that the business of the company shall be conducted and managed by a board of seven directors. But the acceptance of a material alteration of the charter, can in no proper sense be covered by the power to conduct and manage the business of the corporation. Yet such is the claim set up in the answer, which has not even a shadow of right on which to plant itself, and in no case could its exercise be justified, except where there was a clear power given by the charter, or where, as in the case of St. Mary's Church, 6 S. & R. 517, a select few representing all those interested in the objects of the association, are erected into and vested with all the powers of a corporation. In such case, they constitute of themselves the corporate body, and, therefore, wield the whole corporate authority, and are of necessity competent to apply for and accept changes in their organic law.

It was also claimed, that although the charter contains no grant of power such as has been sought to be exercised in this case by the directors, yet, having exercised it for the benefit of the company, it is binding on those for whom they have acted. But before such a principle can be successfully invoked, it must be shown that there has been acquiescence or assent by those who are to be effected. This cannot be claimed to be the case here, for as soon as the plaintiffs obtained knowledge of the existence of the supplement to the charter, and the attempt to levy assessments under it, they at once filed their bill praying an injunction to restrain the directors from exercising any authority by virtue of its supposed grant of power.

Upon the general doctrine of acceptance of a charter, whether it be as to an original grant, or as addition thereto, the decisions are clear, that there must be an acceptance of the chartered rights and obligations, before they can bind the members of the body. When granted to persons who have not solicited it, it is said to be in *fieri*, until after acceptance, and acceptance cannot be thrust on the members, nor will it ever be presumed, unless it be from open and plain recognition of the grant, or from a continual exercise of the corporate power.

This doctrine is broadly stated in Commonwealth v. Cullen, and also in the case of Shorts v. Unangst, 4 W. & S. 45. Nor will the carrying a charter round among the members privately, procuring their signatures without meeting or notice, constitute the assent of the society, nor bind any who are not parties to it. Swedes Church, Kingsessing, King, P. J., 1847; Bright. Sup. 1849, 125. Upon this point, are also Angell & Ames, 52, and Dartmouth College v. Woodward, 4 Wheaton. There is not a pretence in this case, that the essential formalities have been complied with, nor is there any fact from which it can be inferred that they have been waived by the plaintiffs, or that the supplement, either directly or indirectly, has been accepted by them, which makes their right to the injunction for which they pray, clear.

But the bill charges that the supplement is in violation of the constitution of the State, in that it is a law impairing the obligation of contracts. This is denied by the answer, and we are requested by the parties to pass on this question.

The charter fixes the number of the shares at 20,000, and the value of each share at $10. Only 8,200 of the shares have been sold, the balance remaining under the control of the board, for which certificates have not been issued.

The plaintiffs do not aver in what way they became owners of their stock, whether as original subscribers, or by purchase from stockholders, but they aver that it is all paid up, and that defendants received the full par value for each and every share that was issued.

This, they contend, is a full compliance with their agreement with the company regarding the subscriptions for stock in the nature of a contract with the corporation. They hold it to be beyond the power of the Legislature to change the terms of the agreement by which, after a full compliance with the obligations under which they placed themselves, they can now be compelled to pay another price for their stock, and that price, by the terms of the supplement, is without limit, the directors having authority to assess it with such sums of money as they may think proper and necessary to pay liabilities, and to carry on the business of the company. In the case of the Commonwealth v. Cullen, Judge Bell says: Substantive alterations of the charter of an insurance company, are not to be taken as parcel of a private charter without the previous concurrence of the corporators, manifested in some way recognized by law. Unless so sanctioned, they are esteemed as unauthorized interferences with a solemn compact between the public and the individuals composing the corporations, and therefore obnoxious to the constitutional prohibition touching the obligation of contracts. This is the broad doctrine of the Dartmouth College case, in 4 Wheaton. In Brown v. Hummell, the trustees elected under the provisions of a will, and an act of incorporation, had vested rights under the act, and that a subsequent act, divesting them of their privileges and franchises, was unconstitutional and void, because it impaired the solemn contract of the State as contained in their original charter. Judge Coulter says: "Being a contract on the part of the State, it was beyond the reach and control of subsequent Legislatures. If this principle applies to a purely religious and eleemosynary corporation, how much more clear is it, that it governs chartered contracts, where the purpose is pecuniary merely, and where there is an undoubted agreement for the payment of money for a specified consideration.

A subscription for stock in a joint stock incorporated company is a contract, and the interest thereby acquired is a good consideration to support an action for the amount subscribed against the subscriber, Wordsworth on Joint Stock Companies,

317. Balt. T. Co. v. Barnes, 6 Har. & Johns. 57; Man. Co. v. Davis, 14 Johns. (N. Y.) 238, and in our State, are the cases of Ogle v. Somerset, 13 S. & R. 256; and Commonwealth v. Gill, 3 Whart. 228.

So strictly is a subscriber for stock held to his contract with the corporation, that he will not be permitted to withdraw and abandon his shares without the consent of the corporation, unless expressly empowered to do so by the act of incorporation. Twin. Co. v. Imlay, 1 Southard, 285; and U. Society v. Bank, 7 Conn. 456.

In the original charter of this company, there is no power of assessment of shares of stock, or of sale after forfeiture, and the principle is well settled, that the extent of the liability of a party to pay assessments, is to be measured by the extent of his engagements. Angell & Ames, 493. It is a corollary of this proposition, that where there is no engagement, there is no obligation to pay assessments. At page 489 of Angell & Ames, the doctrine is thus stated: "A corporation has no power to assess the shares of a member, unless such power has been conferred by the charter, or unless the members have obligated themselves by some act or promise on their part, to pay assessments."

Without spending more time on this part of this case, we think the objection taken to the right of the Legislature to alter the terms of the contract between the members and the corporation, is well taken; that it is an attempt to make a new contract as to the price, which the plaintiffs who object, agreed to pay for their stock, and that it so impairs the obligation of the contract, that it falls within the constitutional prohibition.

The injunction as prayed for, is granted.

Thos. J. Ashton, Esq., for plaintiffs.

J. Hanson and *E. Hunn Hanson, Esqs.*, for defendants.

Supreme Court United States.

THE PHILADELPHIA AND READING R. R. CO. Plaintiffs in Error, v. THE COMMONWEALTH OF PENNSYLVANIA.

A State tax upon the gross receipts of a carrying company, transporting goods from one State to another, is unconstitutional.

Dissenting opinion by Mr. Justice MILLER. Delivered March 10th, 1873.

The principles announced in the case of the tax on the ton of freight, and the argument by which those principles are supported, meet my full approval. They lie at the foundation of our present Federal Constitution. The burdens which States possessed of safe and commodious harbors, imposed by way of taxes called imposts upon the transit of merchandise through those ports to their destination for consumption in other States, were the cause as much as any one class of grievances of the formation of that Constitution; and the reluctance of the little State of Rhode Island to give up the tax which she thus levied on the commerce of her sister States through the harbor of Newport, then the largest importing place in the Union, was the reason that she refused for nearly two years to ratify that instrument.

The clauses of the Constitution which forbid the States to levy duties on imposts, and which gave to Congress the right to regulate commerce, were designed to remedy that evil, and have always been supposed to be sufficient for that purpose. The one is the complement of the other, and something more. The first forbids the States to levy the tax on goods imported from abroad. The second places the entire control of commerce, with the exception of such as may be begun and completed within a single State, under the control of Congress. That commerce which is carried on with foreigners, or with the Indian tribes, or between citizens of different States, is under the jurisdiction of the general government.

The opinion which affirms the tax of so much per ton on freight carried from one State to another to be a tax upon transportation, and therefore a regulation of the commerce among the several States forbidden by the Constitution, receives the approbation of all the members of this court except two. And it is there declared that any tax upon the freight so transported, or upon the carrier on account of such transportation, is within the prohibition.

Is the tax in the *present* case also within the evil intended to be remedied by the commerce clause of the Constitution?

It seems to me that to hold that the tax on freight is within it, and that on gross receipts arising from such transportation is not, is "to keep the word of promise to the ear and break it to the hope." If the State of Pennsylvania, availing herself of her central position across the great line of necessary commercial intercourse between the east and the west, and of the fact that all the ways of land and water carriage must go through her territory, is determined to support her government and pay off her debt by a tax on this commerce, it is of small moment that we say she cannot tax the goods so transported, but may tax every dollar paid for such transportation. Her tax by the ton being declared void, she has only to effect her purpose by increasing correspondingly her tax on gross receipts. In either event the tax is one for the privilege of transportation within her borders; in either case the tax is one on transportation.

That the tax on gross receipts comes not only ultimately, and in some remote way, but directly out of the freight transported, it is hardly worth while to argue. The railroad company makes precisely the same calculation in making its business profitable in relation to the cost and expenses of transportation, and the price to be demanded for it, in regard to this tax, that it does in reference to the tax on the ton of freight, and it imposes this additional burden for the benefit of the State in fixing the price of transportation.

The tax does not depend on the profits of the companies. It is the same whether the profits or the losses preponderate in a given year. A road may do a large carrying trade at a loss, but the State says, nevertheless, "for every dollar that you receive for transportation I claim one cent or half a cent."

It is conceded that railroads may be taxed as other corporations are taxed on their capital stock, on their property, real and personal, and in any other way that does not impose necessarily a burden on transportation between one State and another. But a railroad or canal company differs from corporations for banking, insurance, or manufacturing purposes in this, that while their business is only remotely, or incidentally, connected with commerce, *the business of roads and canals, namely, transportation of persons and property, is itself commerce.* So much of said commerce as is exclusively within the State is subject to its regulations by taxation or otherwise, but that which carries goods from or to another State is exempted by the Constitution from its control.

I lay down the broad proposition that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay to it a tax, contribution, or toll, for the privilege of having their goods transported through that State by the ordinary channels of commerce. And that this was the purpose of the framers of our Constitution I have no doubt; and I have just as little doubt that the full recognition of this principle is essential to the harmonious future of this country now, as it was then. The internal commerce of that day was of small importance, and the foreign was considered as of great consequence. But both were placed beyond the power of the States to control. The inter-state commerce to-day far exceeds in value that which is foreign, and it is of immense importance that it should not be shackled by restrictions imposed by any State in order to place on others the burden of supporting its own government, as was done in the days of the helpless Confederation.

I think the tax on gross receipts is a violation of the Federal Constitution, and, therefore, void.

I am authorized to say that Justices Field and Hunt concur in this dissent.

D. W. MIDDLETON,
C. S. C. U. S.

R. A. Lamberton and *John W. Simonton, Esqs.*, of Harrisburg, *James E. Gowen, Esq.*, of Philadelphia, and *William W. McFarland, Esq.*, of New York, for the companies, plaintiffs in error.

James W. M. Newlin, Lewis Waln Smith, and *F. Carrol Brewster, Esqs.*, of Philadelphia, and *Wayne McVeagh, Esq.*, of Harrisburg, for the State of Pennsylvania, defendant in error.

[Head notes of decisions reported in 14th Wallace soon to appear.]

Supreme Court, United States.

RECEIPT IN FULL.

Not necessary to satisfaction of a disputed claim of a contractor with the government, referred to a commission when any sum found by the commission as due has been accepted. United States v. Justice, 535.

RENT CHARGE.

Is cut off by a sale for taxes under the act of February 6th, 1863, and the act of June 7th, for the collection of taxes in insurrectionary districts. Turner v. Smith, 553.

RENTS AND PROFITS.

An actual pernancy of, necessary to charge one who claims only through a proceeding supposed to be a valid foreclosure, but which in fact is wholly void, and therefore no sale at all. Bigler v. Waller, 297.

SALVAGE.

A vessel undertaking in good faith to perform the office of salver to a derelict vessel, held not responsible for the latter having been wholly lost in the effort to save her. The Laura, 336

STAMPS.

1. Not required to an endorsement of a promissory note. Pugh v. McCormick, 361.

2. Nor to a waiver in writing, by an endorser, of demand and notice of dishonor. Ib.

STRANDING.

Under a charter to government agreeing "that the owners should bear marine risks and the government war risks," held to be a marine risk. Morgan v. United States, 531.

SUPERSEDEAS.

A writ of error cannot operate as a, when the record does not show that a copy of the writ was lodged within ten days in the clerk's office, nor that the bond was approved and filed within the same term. O'Dowd v. Russell, 402.

TENDER.

To redeem property which has been sold under a mortgage (as is alleged irregularly) the whole mortgage-money must be tendered, or, if suit be brought, be paid into court. Collins v. Riggs, 491.

TRUST.

The mere making of a deed to one as trustee does not vest the party with title as trustee, if he never in any form have accepted the trust. Armstrong v. Morrill, 120.

TRUSTEE.

1. As *ex gr.*, the cashier of a bank, when made consignee of goods under a bill of lading, may libel a vessel for their non-delivery. The Thames, 98.

2. A person is not constituted a, by the mere making a deed to him in trust; he not, in any way, accepting the trust. Armstrong v. Morrill, 120.

Recent Acts of Congress.

An act to prevent cruelty to animals while in transit by railroad or other means of transportation within the United States.

No railroad company whose road forms any part of a line of road over which animals shall be conveyed from one State to another, shall confine them for a longer period than twenty-eight consecutive hours, without unloading for rest, water and feeding for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement, the time during which the animals have been confined without such rest; on connecting roads, shall be included. Animals so unloaded shall be properly fed and watered during such rest, by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad company, or owners, or masters of boats or vessels transporting them; and they shall have a lien upon such animals for food, care, and custody furnished. A penalty of not less than one hundred, nor more than five hundred dollars, is imposed. When animals are carried in cars or vessels in which they have proper food, water, space, and opportunity for rest, they need not be unloaded.

SECT. 2. The penalty shall be recovered

by civil action in the name of the United States, in the Circuit or District Court of the United States, holden within the district where the violation was committed, or the person or corporation resides, or carries on business.

SECT. 3. Any person or corporation entitled to a lien under the act, may enforce the same, by a petition filed in the district where the food, care and custody shall have been furnished, or the owner or custodian of the property resides; and the court shall have power to issue all suitable process for the enforcement of such lien by sale or otherwise, and to compel the payment of all costs, penalties, charges, and expenses of proceedings under this act.

An act for the suppression of trade in, and circulation of obscene literature, and articles of immoral use. Approved March 3d, 1873.

Section 1 of this act contains stringent provisions, punishing by fine and imprisonment, all dealings in or advertisements of obscene publications, articles of immoral use, medicines to prevent conception or cause abortion, &c., committed within the District of Columbia, the Territories, or any other place within the exclusive jurisdiction of the United States.

Section 2 enlarges and extends the previous provisions of law relative to the transportation of any such articles through the mails; and

Section 3 prohibits their being imported through the custom houses.

Section 4 imposes a punishment upon any officer, agent, or employee of the United States, who aids or abets any violation of the preceding provisions.

Section 5 authorizes search for and destruction of any of the prohibited articles.

Supreme Court, United States.

LEARY v. UNITED STATES.

1. If by the terms of a charter-party the entire vessel is let to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But if the charter-party let only the use of the vessel, the owner at the same time retaining its command and possession, and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case the charter-party is a contract for the lease of the vessel; in the other it is a contract for a special service to be rendered by the owner of the vessel.
2. Stipulations in a charter-party that the general owners shall keep the vessel in good condition during the existence of the charter, and receive on board certain goods at the request of the government (the charterer), and refuse to receive other goods without its assent, *held*, to be conclusive evidence that the possession and control of the vessel had not passed to the charterer but had been retained by the general owner.
3. In a charter-party by which a vessel was hired by the government for the purposes of plying in the harbor of Port Royal, in South Carolina, or for such other services as the government might designate, it was stipulated that in case the vessel, while executing the orders of the government, should be destroyed or damaged, or by being compelled by the government to run any *extraordinary marine risk*, the owner should be indemnified. In complying with the orders of the harbor master in Port Royal, the vessel struck upon the fluke of a sunken anchor in the harbor, and was sunk. *Held*, that the risk which the vessel thus incurred was not an extraordinary marine risk within the meaning of the charter-party, but an ordinary risk which every vessel runs that enters a harbor, and which every marine policy covers.

Appeal from the Court of Claims.

On the 19th of November, 1862, one Leary, owner of the steamer Mattano, chartered her to the United States, for the purpose of plying in the harbor of Port Royal, South Carolina, or for any other service the government might designate.

By the terms of the charter-party Leary engaged that the vessel during the existence of the charter, should be kept tight, stanch, well fitted, tackled, and provided with every requisite, and with men and provisions necessary; that the whole of it (with the exception of room necessary for the accomodation of the crew and the storage of cables and provisions) should be at the sole use and disposal of the government during the existence of the charter, and that no goods or merchandise should be laden on board otherwise than from the government or its agent, on pain of forfeiture of the amount that may become due on the charter; that he, Leary, would receive on board the vessel, during the charter, all such goods and merchandise as the government might think proper to ship. The government on its part agreed to charter and hire the vessel at $250 a day, for each day that it might be retained under the charter, the government to supply the coal; and that in case the vessel, while executing the orders of the government, should be destroyed or damaged by a hostile force from any quarter, or by being compelled by the government *to run any extraordinary marine risk*, then Leary was to be indemnified; in case of loss, the value of the vessel being fixed at $26,000, "and in case of damage the amount to be assessed *by a board of survey*, to be convened on her, after her arrival at Port Royal, South Carolina, or other friendly port, at the expense of the government."

While under the charter, the vessel was lying at one of the wharves in the harbor of Port Royal. On the 12th of May, 1863, the military harbor master ordered her out to make room for another steamer. The captain of the Mattano objected to going out, as the tide was very low, and as he believed there was a considerable breeze from an unfavorable quarter. The harbor master ordered the Mattano peremptorily to back out, and her captain let go his lines and did so. In thus backing out she struck upon the fluke of a sunken anchor imbedded in the sand, and sunk in fifteen minutes.

This anchor, against whose fluke the vessel struck, was a mooring anchor, and had been placed where it was by the United States quartermaster, to moor big ocean steamers, prior to November, 1863, and had a buoy attached to it which showed its position, but about the 1st of January, 1863, the buoy had gone adrift in a gale of wind, and had never been replaced, and there was nothing at the time of the accident to warn vessels of the position of the sunken anchor. No one could have pointed out where the anchor was at that time. The captain of the Mattano knew of the existence of the anchor, but thought he was a long way outside of it. There was no unskilfulness in executing the order to back out.

The Mattano was removed from where she sank by a wrecking-boat sent there by the secretary of war, and under orders from the quartermaster, about July 4th, 1863, and the cost of this service was paid by the United States. A gale of wind, which came on after she sank, did damage to her by carrying off her upper works, wheel-house, and joiners' work clear to the hull. No board of survey was convened to assess the damage done to the vessel.

After the vessel had been raised by the United States, Leary took possession of her, carried her to New York, and there had her put in order in such a way as to leave her fit for a towing or carrying vessel, but not fitted for passengers. These repairs were completed on the 10th of December, 1863, and cost Leary for her restoration $18,265.25; and she was worth then $12,000 less than before the accident. From the time this occured, 12th of May, 1863, until the time the repairs were completed, December 10th, 1863, there were two hundred and fourteen days. The repairs were made as rapidly and as economically as possible. She was chartered again to the defendants in May, 1864, at $100 a day.

On this case the Court of Claims decided that the disaster was a usual marine disaster, such as was covered by ordinary marine policies of insurance, and not such extraordinary marine risk as was contemplated in the charter-party; and that as the owners neglected to protect themselves against such perils by insurance, they would have to bear the loss. The court accordingly dismissed the petition, and hence the appeal to this court.

Messrs. *Chipman*, *Hosmer*, and *Durant*, for the appellants, argued in substance:

1st. That the United States were the owners of the injured vessel, by the terms of the charter-party, during the continuance of the service stipulated, and were consequently responsible for the damages sustained by the vessel whilst engaged in that service.

2d. That the damages to the vessel were occasioned by her running an extraordinary marine risk under compulsion from the United States, and for indemnity against such damages the charter-party stipulated, and they sought a reversal of the decree accordingly on those grounds.

Mr. *G. H Williams*, attorney general, and Mr. *C. H. Hill*, assistant attorney general, contra.

Mr. Justice FIELD delivered the opinion of the court.

There is no doubt that under some forms of a charter-party the charterer becomes the owner of the vessel chartered for the voyage or service stipulated, and consequently becomes subject to the duties and responsibilities of ownership. Whether in any particular case such result follows, must depend upon the terms of the charter-party considered in connection with the nature of the service rendered. The question as to the character in which the charterer is to be treated, is, in all cases, one of construction. If the charter-party let the entire vessel to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But on the other hand, if the charter-party let only the use of the vessel, the owner at the same time retaining its command and possession, and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case the charter-party is a contract for the lease of the vessel; in the other it is a contract for a special service to be rendered by the owner of the vessel.

In examining the adjudged cases on this subject, we find some differences of opinion, especially in the earlier cases, as to the effect to be given to certain technical terms used in the charter-party in determining whether the instrument parts with the entire possession and control of the vessel, but no difference as to the rule of law applicable when the construction is settled. All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such command, possession, and control is incompatible with the existence at the same time of such special ownership in the charterer. Christie v. Lewis, 2 Brod. & Bing., 410, 434; Marcardier v. The Chesapeake Insurance Co., 8 Cranch, 39, 49; The Schooner Volunteer and Cargo, 1 Sumner, 551, 556; Drinkwater v. Freight and Cargo of Brig Spartan, Ware, 149, 154; Donahoe v. Kettel, 1 Clifford, 135; Holt on Shipping, 461–471.

If now, in the light of these observations we look at the charter-party in this case, we shall find little difficulty in disposing of the first ground for reversal presented by the appellants. The vessel here was chartered for the purpose of plying in the harbor of Port Royal, in South Carolina, or for such other service as the government might designate, and the provisions which the charter-party contains on the part of the owners sound only in covenant. By it they engage that during the existence of the charter, the vessel shall be kept tight, stanch, well fitted, tackled, and provided with every requisite, and with the necessary men and provisions; and that the whole of the vessel, with the exception of the necessary room for the accommodation of the crew, and the storage for the cables and provisions, shall be at the sole use and disposal of the government; that no goods or merchandise shall be laden on board otherwise than from the government, or with the assent of its agent, on pain of forfeiture of the amount that may become due on the charter; and that the owners will receive on board all lawful goods and merchandise which the government may think proper to ship. In consideration of these stipulations, the United States agree that the owners shall receive the sum of $250 per day for each day the vessel is retained under the charter, and that they will supply the vessel with coal; and in case the vessel, whilst executing the orders of the government, shall be destroyed or damaged by a hostile force, or by being compelled to run any extraordinary marine risk, that the owners shall be indemnified.

The stipulations here designated on the part of the owners, imply the possession and command of the vessel by them, and would be inconsistent with such possession and command by the government.

Stipulations that the general owners shall keep the vessel in good condition during the existence of the charter, and receive on board certain goods at the request of the government, and refuse to receive other goods without its assent, would be out of place and inappropriate if the government were, at the same time, special owners of the vessel for the service stipulated, having the vessel in its entire possession and control. Great weight was given to similar clauses by the King's Bench, in Saville v. Campion, 2 Barnewall & Alderson, 511, and by the Supreme Court of New York, in Clarkson v. Edes, 4 Cowen, 477. In each of these cases they were held conclusive that the possession and control of the vessel had not pas ed to the charterer, but had been retained by the general owner.

The fact that the service stipulated in the present case was to be rendered for the government, cannot alter the natural import of the terms used in the charter-party, or change its construction, although in a doubtful case that fact might be entitled to much consideration.

2. The second ground presented by the appellants for a reversal of the decree is readily answered. The risk that the vessel incurred in complying with the orders of the harbor-master was not an extraordinary marine risk within the meaning of the charter-party. The term extraordinary is there used to distinguish an unusual risk which the vessel might be compelled to run by order of the government, from those risks which would be covered by an ordinary marine policy, and which might be expected to arise from the service in which the vessel was engaged. The contract of the government was not intended to apply to the usual risks attendant upon the performance of a service such as was here mentioned, but risks outside and beyond them.

The risk incurred was of a possible collision with a sunken anchor in the harbor. This was an extraordinary risk which every vessel must run that enters a harbor, and is one which every marine policy covers.

Decree affirmed.

LEGAL GAZETTE.

Friday, April 18, 1873.

JOHN H. CAMPBELL,
EDITOR.

THEODORE F. JENKINS,
ASSOCIATE EDITOR.

"TRUTH IS BITTER."

It is a notorious fact in the history of legislation of late years, in many of the large States, that our Legislatures contain a large percentage of unscrupulous and corrupt persons, whose only aim is to accumulate as much wealth as possible during their terms of office, without any regard to the justice or injustice of the laws which they help to pass. Most especially is this the case with the members of the lower branches of the Legislatures. The members from the large cities, particularly are, with but few exceptions, the most reckless and unscrupulous in those bodies. Our Pennsylvania Legislature is not an exception to the general rule in this respect, and we all know here in Philadelphia, that the representatives from this city, of both political parties, are as a general thing, recognized and regarded by their colleagues in the House, and by the outside public, as the head and front of nearly all the most iniquitous measures which are passed, either surreptitiously or otherwise, through the Legislature. Of course there are honorable exceptions to the rules, and fortunately, those exceptions are well known to their constituents; and it is a matter of great regret, that the misdoings of their less honorable fellow members should draw down the denunciations of the people upon the whole body, both good and bad, instead of upon the evil doers themselves.

We have been led into these reflections, in perusing the report of the legislative proceedings at Harrisburg, the evening before the adjournment, when the members of the lower House, following a disgraceful and undignified custom, indulged themselves in all sorts of strange antics, bidding defiance to all order and self-respect, and behaving like a parcel of lunatics or madmen. These amusements, as the telegraphic despatches inform us, "consisted of calling the most incompetent members to preside, and then overwhelming them with absurd questions and ridiculous motions. In one case, the member who assumed the chair, was driven out of it by repeated discharges of papers and documents from all parts of the House. As some of these missiles weighed half a pound each, and they were thrown with great force and velocity, the fun of dodging them was more exciting than pleasant."

Finally, as a sort of intellectual relief to the entertainment, "Mr. Brockway offered a resolution appointing a committee to invite Hon. A. K. McClure (Senator from Philadelphia), and the balance of the Liberal Republican party, to address the House on the corruption of all the political parties in existence. The resolution was agreed to. Messrs. Brockway, Josephs and Tittermary were appointed the committee, and proceeded in quest of Senator McClure. He was soon found and was escorted into the hall. As he entered, the members of the House rose and greeted him and the committee by whom he was escorted, with a volley of paper missiles, consisting of a general assortment of all the legislative documents of the session, in addition to cigar boxes, newspapers, and large printed files of bills."

After running the gauntlet the entire length of the hall, the Senator took his place upon the Speaker's stand, amid applause, which was half earnest and half jeering. He proceeded to deliver a short address, in which he concentrated the ablest, most bitter, and at the same time, most truthful estimate of the character of the men before him, that we have ever read. As a specimen of polished sarcasm, it is a master-piece; as an example of how to "Catch a Tartar," it is probably unequalled. His words were as follows:

"Mr. Speaker and Commoners of the State of Pennsylvania: I thank you for the distinction you have conferred upon me by your invitation to address you on the subject of reform. I know of no other body of men, either of the present or past, that needs instruction on the necessity of both public and private morality so much as the House of Representatives of this State, now before me (laughter), or that has so broadly and deeply experimented in the line of individual and official profligacy. (Laughter and applause.) I am not surprised, however, that it is so, when I consider that of the members serving in this House from my immediate locality, many were not even nominated, and few, if any, were ever elected. (Shouts of laughter.) I sent you reform bills, which cost me many days of anxious thought and labor to perfect, but you danced not when I piped to you, neither did you weep responsive to my mourning over the degeneracy of the body politic. I must admit, however, that you were prompt executioners, for every bill that looked toward reform was negatived with a yell as fast as rules would allow. But in political, as often in moral and religious cycles, the darkest hour is just before the dawn of day, and it is gratifying that, after you have consummated all the harm you can possibly inflict upon the State, you have by a unanimous resolution called for a confession. (Laughter.) It was well to pause thus, just for the sake of novelty or reference, so that when the tempest breaks, you can point to this becoming act of contrition for the wrongs done to your constituents, and to the Commonwealth. (Applause and sarcastic shouts.) Most of you, who have for three months been serving in the places to which other persons were elected by the people, have discounted the retributive wave of popular reprobation by creating offices by legislative enactments, to which you hope to retire; and those unprovided for, hope to be placed on the indefinite pay-roll of the pasters and folders of the House, in accordance with the prevalent custom here to pension decayed statesmen. (Shouts of laughter.) That you seek liberal counsels to have good seed sown in the chaos of virtue that surrounds you, is a hopeful sign of the times, and, if you do not cheat us more than 30,000 in Philadelphia next fall, the places that know you now, will know most of you no more forever. (Laughter.)

"But I turn to the faint silver lining on the deep cloud of your record. One act of this House gladdened the hearts of the whole people of the State, and reinspired hope throughout the length and breadth of the commonwealth. I refer to your vote, in the midst of disorder—that, at a Philadelphia fire, would be called a riot,—on Monday evening last, fixing an early day for your final adjournment. (Laughter and applause.) I have heard of no citizen of the State who did not heartily approve of that act. (Laughter.) I am happy to point to it as the oasis in the withered desert that you have made about you, and accord you credit for it. Hoping, gentlemen, if I may be pardoned the use of the term (laughter), that the length of your lives may correspond with the measure of your virtues, and that you will be succeeded by better men than yourselves, I bid you good night."

The Judiciary Report.

THE NORTHAMPTON BAR.

The following memorial was presented by Hon. Chas. Brodhead, in the Constitutional Convention upon Tuesday last:

To the Honorable the Delegates to the Convention to Revise and Amend the Constitution of the State of Pennsylvania.

The undersigned members of the bar of the county of Northampton, respectfully represent,

That feeling a deep interest in your action in reference to the judiciary system, you may report we have examined with much care the report of the majority and minority of your Committee on the Judiciary.

The plan of the majority, it appears to us, is too cumbersome, and would, if adopted, be productive of delay, trouble and expense in the administration of justice. The Circuit Court system proposed, would be found very inconvenient in practice. It is only required to sit once a year in each county, when exercising original jurisdiction. This would cause great delay in bringing cases to trial, or obtaining judgments in proper cases, which required expedition. The judges of the Circuit Court, in the exercise of appellate jurisdiction, are authorized to issue writs of *certiorari* to justices of the peace. Thus, a defendant in a $10 suit before a justice in this county, might take a *certiorari*, tie up the judgment for probably a year or more, and take the plaintiff near a hundred miles to Wilkesbarre, for its disposal, at a cost of $50 to $100. One of the judges of the Supreme Court would be occupied for much of his time, acting as chief justice of the Circuit Court in banc, and be thus necessarily prevented greatly from attending the sessions of the Supreme Court.

There are other numerous objections to this complicated project. The plan reported by the Hon. Daniel Kaine, from Fayette, from the minority of the committee, is, in our judgment, far better. By it the business would be confined, except as to appeals and writs of error to the Supreme Court, to convenient districts within easy reach of the members of the legal profession of each county. Three judges alternating as presiding judge in each county, would secure a more favorable feeling towards the bench than the continued presiding of one judge, as now. A judge holding court continuously, for a number of years in one district, necessarily comes in collision with practitioners by his decisions and rulings, and thus often an unpleasant state of antagonism is created between the bench and the bar. These three judges, sitting in banc, can compare notes, canvass questions which have arisen before each, discuss and examine the law applicable to every point tried before them, and their final decision would in most cases be accepted by the parties, and the Supreme Court be thus relieved of a very large amount of business.

The plan is simple, and its adoption, with some slight alterations, which we have suggested to the delegates from this district, would, we believe, prove useful and beneficial to parties, suitors, the bar and the courts.

We are also of opinion, that all the judges should be appointed by some non-partisan power, and not be elective, as now. Respectfully submitted,

H. D. Maxwell.

I concur fully, except as to election of judges. Edward T. Fox.

I concur in the above, and that all the judges should be elected by the people.

James W. Lynn.

We concur, with the exception that the judges of the Supreme Court should be elected, and all other judges appointed by the Supreme Court and the Governor, and confirmed by two-thirds of the Senate.

O. S. Meyers, W. W. Schuyler,
B. F. Fackenthall, J. C. Merrill,
Henry M. Scott, Elisha Allis.

We concur in the foregoing petition.

M. H. Tunis, Wm. Beidelman,
R. E. James, Reeder & Reeder,
S. V. B. Kachline, Wm. Mutchler,
James M. Porter, W. E. Doster,
U. Saudt, F. H. Lehr,
Henry F. Steckel, Val. Hilburn,
A. S. Knecht, G. V. Wallace,
Beates R. Swift, Lewis H. Stout,
W. S. Kirkpatrick, G. W. Stout,
L. C. Hepburn, Robt. I. Jones,
J. K. Dawes.

ALLEGHENY HEARD FROM.

At a meeting of the Allegheny county bar, held at Pittsburgh, on Friday, April 10th, 1873, the following resolution was unanimously adopted:

"*Resolved*, That our representatives in the Constitutional Convention, be requested to oppose the formation of a Circuit Court, as proposed by the Judiciary Committee, or of any intermediate court between the Court of Common Pleas and the Supreme Court."

Officers of the meeting: Hon. Moses Hampton, President; Hon. James P. Sterrett, Vice President; Wm. C. Moreland and J. G. MacConnell, Secretaries.

The Constitutional Convention re-assembled in this city upon Tuesday last. The judiciary article does not seem to meet with much favor; still another minority report, this time by Judge Woodward, being filed, and memorials from the Northampton and Allegheny county Bars being presented, urging the non-adoption of the article as reported. It is important to ascertain the wishes of the Pennsyl-

vania Bar in reference to the proposed changes in the Judiciary System. Let us hear from some of its members. Our columns are open for communications upon the subject from all parts of the State.

THE BAR AND THE CENTENNIAL.

In the Gazette of March 7th, last, we noticed the preparation by Elwood Wilson, Esq., of a handsome volume for bar subscriptions to the Centennial. The following is a list of the members of the Bar, who have so far subscribed their names in the memorial volume, for one share each of the Centennial Stock:

Horace Binney, Henry G. Freeman, Henry J. Williams, Eli K. Price, James Page, Isaac Norris, Joseph M. Pile, Edward Coles, Samuel Chew, Frank M. Etting, J. Sergeant Price, Joseph R. Rhoads, George M. Conarroe, Samuel H. Perkins, Samuel C. Perkins, Samuel Wetherill, George L. Ashmead, Benjamin H. Haines, William E. Whitman, Charles Chauncey, Isaac Myer, Jr., R. Rundle Smith, George D. Budd, C. Stuart Patterson, Edwin T. Chase, Joseph A. Clay, H. G. Clay, G. R. Jefferson, Elwood Wilson, Jr., William M. Meredith, Charles S. Pancoast, Wm. Rotch Wister, R. R. Montgomery, Pierce Archer, Jr., W. W. Montgomery, Cadwalader Biddle, Asa I. Fish, Chas. Hart, James H. Stevenson, R. L. Ashhurst, Edward H. Weil, Peter McCall, Henry M. Phillips, Thomas J. Diehl, Isaac Gerhart, George Bull, William F. Johnson, Walter J. Budd, David Webster, Charles Gilpin, Egbert K. Nichols, William S. Price, Theodore Cuyler, James R. Booth, John Fallon, Thompson Westcott, Henry T. Coleman, J. Warren Coulston, Theodore F. Jenkins, Gustavus Remak, William Henry Rawle, John C. Redheffer, Charles H. Downing, Charles S. Coxe, John Cadwalader, Jr., J. Hill Martin, J. Somers Smith, Charles Gibbons, P. Pemberton Morris, Morton P. Henry, J. Vaughan Darling, William M. Levick, Jerome Carty, William Henry Lex, George H. Earle, Richard P. White, William J. Binney, George Biddle, Chapman Biddle, John B. Gest, Joseph C. Ferguson, E. Cooper Shapley, Dan'l L. Leeds, E. Coppee Mitchell, John Goforth, Enoch Taylor, J. Eldon Salter, John Shallcross, Charles O'Neill, J. Dickerson Sergeant, Alex. Thackara, Paul M. Elsasser, Samuel G. Thompson, William McGeorge, Joseph I. Doran, John C. Bullitt, B. Franklin Fisher, William C. Hannis, David W. Sellers, Henry M. Dechert, Robert P. Dechert, John G. Johnson, Edward S. Harlan, J. Edward Carpenter.

The committee still have the volume in charge for personal presentation, and it will on Monday of each week, be at the office of Frank M. Etting, Esq., No. 506 Walnut street, where signatures and subscriptions will be received.

By order of the committee,
J. SERGEANT PRICE,
Secretary.

PUBLICATIONS RECEIVED.

THE LAW NEWS of St. Louis, comes to us this week changed from an eight page weekly, to a forty-eight page monthly. The publishers announce that they have made the change "after careful deliberation." The News has always had our good wishes, and we hope it may continue to prosper as it has done in the past. We think, however, the change from a weekly to a monthly, is not a good one, as in the present state of legal journalism, the profession desire to have information furnished to them as soon as possible, and do not as a general thing, care to wait a month for a correct copy of an important decision.

THE SOUTHERN LAW REVIEW for April, 1873, Nashville, Tenn.

This is quite a bulky number, containing, exclusive of its advertisements, 224 pages of legal essays, news, and digests of decisions; a continuation of the article on "English and French Law," by W. F. Cooper; an article on "Private International Law," by R. Hutchinson, of Memphis, Tenn.; one on "Rules of Evidence as Affected by Religious Belief," by Henry B. Tompkins, of Savannah, Ga.; one entitled "Presentment for Payment," by John W. Daniel, of Lynchburg, Va.; and one on "The Rebellion Viewed Through Legal Spectacles," by R. McPhail Smith, Nashville, Tenn., are among the contents of this number. The Review also has an extended Digest of English Law Reports; a selected Digest of State Reports, etc., etc.

A TREATISE ON THE LAW OF PERSONAL PROPERTY, by James Schouler, author of a Treatise on the Law of Domestic Relations. Boston, Little, Brown, & Co., 1873. 8vo.. pp. 776.

Law books in this day, get before the courts and bar in two different ways. The authors of some of them send copies to every eminent judge or lawyer whose name is known throughout the land, and to every newspaper which is likely to speak well of the book. Polite answers come, *of course*, to the letters, and the ordinary platitudes of eulogy figure in the newspapers. Both are then collected and sent through the post office to the bar of the whole United States. This is one way by which books become known, and for a while acquire reputation and sell. If they are really good books, they will keep on selling. But there is another way, which the modest author, who is still conscious of merit, adopts. He sends his book forth, and leaves it to speak simply for itself. It is advertised but not be-praised. It makes no noise. It is seen on the shelves of the Johnsons, the Kays, John Campbell, and other law booksellers. Lawyers look at it; some who are interested in the subject of it buy and read it. Of these certain ones cite it. The courts examine and refer to it, and by *degrees*, sometimes pretty slow ones, but for that reason the more sure, it comes to be recognized as a book of value; a standard book. It was thus that Sugden on Powers, Sugden on Vendors and Purchasers, Mitford on Pleading, and some other text books, have won their way to the universal confidence of courts and bar in two hemispheres. It is through the same way that Mr. Cooley's admirable book on Constitutional Limitations has become almost a book of judicial authority.

Mr. Schouler, whose name has now become a respected one in the courts, has seen good, we are happy to have observed, to follow the old fashioned and respectable plan. We forget how long ago it was that his book on the Domestic Relations first appeared, but it is now some time since. It made very little noise, and was, perhaps, received with something like disfavor; for most lawyers, who through the charming pages and praises of Chancellor Kent, had been made familiar with the writings of good old "Tapping Reeve" on the same subject, were rather, we suppose, disinclined to see the thing handled by a young performer. Mr. Schouler did not cause his book to be heralded or noticed. We fancy that he gave but few copies away to any one; certainly he sent none to us. But the book was there for any and all who were interested in the discussion of its subject. It was cited now and then; for a while, indeed, cited but seldom, afterwards more freely. The circle of readers has grown wider and wider, until at last without any outlays by any one, the book has come in a quiet way to be largely regarded as the best work on the subject; a carefully and intelligently prepared work on a topic of deep and constant interest.

We have now a new volume from Mr. Schouler. One, we predict, which will elevate him to the rank of one of the best known and most frequently quoted of our American text writers. He has in the the first place taken a good subject. His book fills a void. The growth of personal property has been immense in the United States, not only in the last twenty-five years, but in the last fifteen; indeed, since the war. His book is, therefore, on a subject of the most practical kind. Questions on its subject are arising daily and hourly in all our courts, Federal and State, throughout the land. Mr. Schouler's opening chapter, contains a philosophical chapter on Property and its Origin, in which the author—whose mind is obviously of a comprehensive cast, where the sociologic question finds kindred soil—dissenting from the views of Grotius and Blackstone, presents, in our judgment, a theory far more true and accordant with fact. He next considers the Nature and General Incidents of Personal Property; that sort of property in general; chattels, real and personal; heir-looms and emblements; fixtures; personal property in expectancy; joint and common owners; partners; members of limited partnerships and joint stock companies, and ship owners; members of corporations; interest and usury, and the conflict of law relating to personal property. This last chapter is particularly interesting. The author in entering on its subject, notes the gratifying fact, that "American jurists have done more thus far than those of England, to bring into harmony and blend together the jarring system of independent nations, by unfolding principles for universal recognition, as the ground-work of an international law, upon which a lasting superstructure may be made." In entering upon it himself, Mr. Schouler proceeds with great caution, heaving his lead and taking soundings the whole time. We are much struck with his careful manner. He pays a tribute of respect to the recent work of Dr. Wharton on the Conflict of Laws, and states fully his views in advocacy of the *lex rei sitæ*,—the views of Savigny and other writers, advocates of the civil law—"whose manifest tendency," says Mr. Schouler, "is to a repudiation of the doctrines that movables follow the person, and the substitution of a new principle that the *lex rei sitæ* controls the transfer of movables as well as immovables, whether the local law be founded on legislative enactment or a legal judgment." Mr. Schouler is careful how he commits himself as a partisan or a theorist in the matter. Speaking like a true lawyer, he says, "Writers of high repute would, indeed, gladly pilot us over to the *lex rei sitæ* as the true haven. But the courts still tarry. And it must be conceded, that while the *rei sitæ* doctrine furnishes a test the simplest possible, and the easiest of application, that test *is, nevertheless, the most prominative of international selfishness.*" It is a singular incident, that very soon after the lines quoted had been penned, and while Mr. Schouler's book was yet probably on its way through the press, his disinclination to follow "writers," even of high repute, "while the courts tarried," received a very positive approval from the highest court of our country in the case of the State Tax on Foreign Held Bonds, 15 Wallace, yet unreported, where the Supreme Court of the United States, overruling the decision of the Supreme Court of Pennsylvania, in Maltby v. Reading & Columbia Railroad, 52 Pennsylvania State, 140 (which declared a tax might be laid on the interest of corporation bonds issued within her borders, though held by persons resident out of them), asserted to the full extent the old maxim "*mobilia ossibus inhœrent;*" and largely on the ground presented by Mr. Schouler, that if any other doctrine were allowed the "international selfishness" of each State would lead it to support itself at the expense of the citizens of other States.

Our space does not allow us to speak more fully of Mr. Schouler's book. Recognizing the fact that the increase of every sort of personal property has become immense, even since the last good text books were written on the subject, he gives a chapter to almost all its "Leading Classes," these forming a third and final division of his volume. He takes especially ships and vessels; money; debts in general; debts secured by lien; debts secured by pledge; collateral security; debts secured by mortgage; chattel mortgages; bills and notes; miscellaneous negotiable and quasi negotiable instruments; shares of stock; patents and copyrights; fire and marine insurance policies; personal annuities and life insurance policies; legacies and distributive shares.

A careful reference to the best authorities, characterizes the volume in every part, and while the author is obviously one who thinks for himself, he not less obviously remembers that he is writing a treatise on a practical branch of the law, and that all speculation and theorizing must be rigidly subjected to the decisions of the courts of the country. Mr. Schouler observes, that a second volume devoted to the subject of the "Title to Personal Property," and covering especially the important topics of gift and sale, is necessary to complete the present work according to his original plan; but intimates that he will leave its preparation to others. We trust that, contrary to his anticipation, he will himself give the work to the profession.

Supreme Court, New York.

AT CHAMBERS—NEW YORK CITY.

In re GOODWIN.

The relator was expelled from an incorporated society, for alleged violation of its by-laws, in the use of improper language at one of its meetings. Upon application, the court granted a mandamus to restore him, on the ground that the words alleged to be in violation of the by-laws, were not reduced to writing, or acted upon by the meeting at which they were spoken, as required by the rules in Cushing's Manual, which were declared by the same by-laws, to govern the debates of the society.

Mandamus.

Opinion by FANCHER, J. Delivered April 8th, 1873.

The respondents were incorporated by an act of the Legislature of the State of New York, passed May 2d, 1829, and are owners of real and personal estate of large value. The relator was, on the 12th of November, 1846, elected a life member of the corporation, and continued to hold such relation to the corporation until June 6th, 1872, when he was expelled for an alleged violation of the by-laws of the corporation. The relator alleges that his expulsion was without proper cause, but the respondents assert that the cause of expulsion was sufficient, and that the proceedings of the corporation which involved the expulsion were authorized by their charter and by-laws, and they further contend that their proceedings are not open to revision on mandamus. By virtue of his membership, an interest in the property of the corporation was vested in the relator, and he cannot be deprived of it without his consent or due process of law.

When he became a member of the corporation, he assented to the by-laws adopted for its government, and he has no right to complain if there has been a fair and proper administration of the by-laws in his case; but if the by-laws have not been observed, he has been improperly expelled, and this court has the power, and should exercise it, to reinstate by mandamus. The People ex rel., Price v. American Institute, 2 Leg. Obs. 170. The People v. Medical Society of Erie, 24 Barb. 577. It is alleged that at a meeting of the Institute, held on the 5th of October, 1871, a resolution was adopted, authorizing the trustees to purchase or lease the premises known as the Empire City Skating Rink, on the Third avenue. The relator, with others, opposed the resolution at that meeting prior to its adoption; and he also at the subsequent meeting, held on the 2d of November, made an unsuccessful motion for an amendment of the minutes of the October meeting, relating to the action of the institute as to the rink. At the meeting of November 2d, 1871, a committee was appointed to investigate certain charges against the relator, presented at that meeting. From an examination of the charges, it appears that he was accused of using language at the meeting in October, "calculated to excite confusion and dissension among the members, in violation of by-laws, article 22, section 16," also, that at said meeting "he did not, in speaking upon a certain question under debate, confine himself to the question, but wandered therefrom into indecorous language;" also, that he "imputed improper motives" in that debate to certain members, and accused members of being improperly influenced in the matter of the resolution as to the rink.

The investigating committee reported that it found the charges sustained. At a subsequent meeting, a special committee was appointed under the by-laws to try the charges, and the relator was summoned to appear for trial. The trial was had, and the trial committee in May, 1872, reported in favor of expelling the relator from membership in the institute. The resolution was laid over to the meeting held on the 6th of June, 1872, when it was resolved to vote by white and black balls on the proposed resolution of expulsion. The vote was accordingly taken in that manner, when sixty-four voted in favor of and fifteen opposed the resolution, and it was declared adopted. The question is whether or not these proceedings were in accordance with the by-laws of the corporation. Article 24, section 20, of the by-laws reads as follows: "The rules in 'Cushing's Manual' shall govern all debates, except in cases herein specially provided for." "Cushing's Manual" points out the procedure when action of a deliberative body is taken for disorderly words. The member is called to order, and his words reduced to writing by the clerk. The assembly then determine whether the member has been guilty of any offence, and whether further proceedings to punish him shall be had. The following paragraph follows: "232. If offensive words are not taken notice of at the time they are spoken, but the member is allowed to finish his speech, and then any other person speaks, or any other matter of business intervenes, before notice is taken of the words which gave offence, the words are not to be written down, nor the member using them censured. The rule is established for the common security of all the members, and to prevent the mistakes which must necessarily happen if words complained of are not immediately reduced to writing." This rule was not observed in the proceedings against the relator. It does not appear that his supposed violation of the rules of debate were noticed by any action at the October meeting, where the offensive words were spoken. The first action was at the meeting in November following. As the meeting at which the words were spoken did not take any action concerning them, it was not competent for a subsequent meeting to take action in regard to them. There was no by-law of the corporation to authorize any action in the matter at such subsequent meeting. The rule quoted from "Cushing's Manual" applies to the case, and section 20 of article 24, contains the law applicable to the offensive words of the relator. Section 6 of the same article contains a provision under which the relator might have been called to order at the time the words were spoken; the penalty for which would have been that the relator should take his seat, provided the presiding officer declared him to be out of order. The same section contains further provisions as to the course of proceeding in case a member thus pronounced out of order should refuse to take his seat. But the return of the respondents does not set up that the relator was called to order, and refused to take his seat after being declared out of order, and it shows that the proceedings touching the relator were not of that character, and are not protected by the 6th section of article 24. It is clear that the proceedings against the relator leading to his trial and expulsion, and which began in the November meeting, were unauthorized by the by-laws of the corporation, and his expulsion was, therefore, improper. The motion for a mandamus must be granted.

Recent Decisions.

NEW HAMPSHIRE.

[Our thanks are due to John M. Shirley, Esq., State Reporter, for advance sheets of vol. 51, New Hampshire Reports, from which we extract the following head notes.]

SUPREME COURT OF NEW HAMPSHIRE.—S. obtained goods of the plaintiffs by means of a fraudulent sale, and under such circumstances that they were entitled as against him to treat the transaction as wholly void. Directly after getting the goods into his posession, S. made an assignment of all his property to the defendant, under the provisions of ch. 126, Gen. Stats., who thereupon took possession of the same, including the goods in question. *Held*, that the plaintiffs might recover the goods in an action of replevin against the assignee.—Farley et al. v. Lincoln.

Satisfaction of the judgment recovered in an action of trespass for the conversion of chattels, passes property in such chattels to the defendant; and the defendant's title thus acquired, takes effect by relation from the time of the conversion.—Smith v. Smith.

TENNESSEE.

The SUPREME COURT OF TENNESSEE have decided (2 So. Law Rev. 414), in Fritz v. The State, that lager beer is not a spirituous or vinous liquor, within the meaning of the State liquor law, which prohibits the sale of spirituous and vinous liquors on Sunday, and it follows that an indictment will not lie for the sale of fermented liquors on Sunday.

Also, in Wisner et al., Executors, v. Maupin et ux., that there may be a trial of an issue *devisavit vel non* on a *copy* of the original will, the correctness of the copy not being in dispute.

ALABAMA.

[Our thanks are due to John W. Watts, Esq., State Reporter, for head notes of decisions of the Supreme Court of Alabama, rendered at January Term, 1873. We make the following selections from them.]

PETERS, J.—An agent, who receives the funds of his principal to purchase lands for him, cannot repudiate his trust and purchase the land for himself with his own and his principal's funds, and then set up the statute of frauds in his defence, because his agency did not rest upon written authority.—Firestone v. Firestone.

SAFFOLD, J.—A will revoked by tearing off the names of the testator and some of the witnesses, cannot be republished, except by a resigning and attestation in writing.

The existence of a subsequent will, without proof of its contents, is sufficient to revoke a former one.—Barker v. Ball.

PETERS, J.—A guardian should not be charged compound interest, unless he is guilty of fraud, or gross neglect, which amounts to fraud.—Childress v. Childress.

PECK, C. J.—1. One who undertakes to contract as an agent, and either has no authority, or so contracts as to impose no legal obligation on his principals, is himself personally liable.

2. The honest belief of such a person that he has authority, and acts in good faith, yet, if in fact he has no authority, does not thereby relieve him from responsibility.—Belisle v. Clarke, Hart & Co.

SEVENTH JUDICIAL DISTRICT.

Court of Common Pleas, Montgomery County.

STREEPER'S EXECUTORS v. ZIMMERMAN.

1. To determine the validity of a gift, its subject matter must be considered. If capable of manucaption, it must be either actually or constructively delivered. If it be not, then it is still executory, and being without consideration, is void, either as a gift *inter vivos*, or a *donatio causa mortis*. A chose in action may, however, pass by assignment, for the debt itself cannot be delivered, and the only delivery that can be had must be of this character.
2. A gift must be executed, for, if it remains executory and there be no consideration, it is void.
3. If the donor has perfected his gift in the way in which he intended, so that there is nothing left for him to do, and nothing which he has authority to countermand, the donee's right is enforced as a trust, and the consideration is immaterial.
4. Nothing can take effect as an assignment which does not manifest an intention to relinquish the right of dominion on the one hand, and create it on the other.
5. An agreement, under seal, to make a gift, imports a consideration, and may therefore be enforced.
6. The natural love and affection of a grandparent for his grandchild, when that grandchild had been affectionate and attentive to him and his wife in their declining years, is not a sufficient consideration to support an executory gift *inter vivos*. Kindness and filial devotion are not the subjects of a *quantum meruit*.
7. A moral obligation is not a vague or undefined claim, arising from nearness of relationship, but it is an imperative duty, which could be enforced by law or in equity, were it not for some positive rule, which, with a view to some general benefit, exempts the party in that peculiar instance from legal liability.

Sur case stated.

Opinion of the court by Ross, P. J. Delivered February 1st, 1873.

The defendants in the case stated, on the first day of April, 1864, executed and delivered to the plaintiff's testator, a bond conditioned for the payment of $500 one year after date, with interest at five per cent. George Streeper, the testator, died September 10th, 1864, leaving a last will dated August 3d, 1864, of which will the plaintiffs were constituted the executors. After the testator's death, this bond was found among his papers, it having remained in his possession since its execution and delivery. Payment was not demanded until 1871, when it was refused, and this action was instituted.

The ground of defence consists principally of an endorsement made upon the bond by the testator in his lifetime, which is in these words: "July 22d, 1864, I request my executors to give this bond to Anna *Meriah* Zimmerman, for her *grate* kindness that she shown to me and her grandmother."

"GEORGE STREEPER," [L. S.]

"GEORGE STREEPER."

"This is not to interfere with what I will to her. This she is to have beside that."

GEORGE STREEPER.

Anna *Meriah* Zimmerman, named in this endorsement, was the granddaughter of the testator, whose proper name was Anna Maria, and who was intermarried with the defendant. The testator bequeathed to her a legacy of $400 in his will. It is admitted by the case stated, that the bond was never delivered to her in pursuance of the endorsement, but that it remained in the possession of George Streeper until his death.

Under these facts can a recovery be had upon the bond?

It must be remembered that the endorsement is not intended to release the defendant, the obligor, from his liability upon the bond. If it has any effect whatever, it is to make a gift of the bond to Mrs.

Zimmerman. This fact must not be overlooked or disregarded, for it underlies the case, and governs the facts presented for our determination.

To constitute a valid gift *inter vivos*, certain essentials are requisite, and the first inquiry which presents itself is, whether the endorsement upon the bond, undelivered to Mrs. Zimmerman, constituted a valid gift.

To determine the validity of a gift, its subject matter must be considered. If capable of manucaption, it must be actually or constructively delivered. If it be not, then it is still executory, and being without consideration is bad, either as a gift *inter vivos*, or a *donatio causa mortis*. Yard v. Patton, 1 Harr. 278; Kennedy v. Ware, 1 Barr, 445; Whitehill v. Wilson, 3 Pa. Rep. 405; Jones v. Drake, 6 Philada. Rep. 416; In Painter's Estate, 6 Wr. 156; Cressman's Appeal, 6 Id. 147. A chose in action may, however, pass by assignment, for the debt itself cannot be delivered, and the only delivery that can be had must be of this character.

A gift must be executed, for if it remains executory, and there be no consideration, it is void. Kennedy v. Ware, *supra*. In order to execute a gift of a chose in action, there must be a delivery of the evidence of the debt, or an assignment of it.

"A gift," says C. J. Gibson, In re Campbell's Estate, 7 Barr, 101, "is a contract executed, and as the act of execution is the delivery of possession, it is of the essence of the title. It is the consummation of the contract, without which it would be no more than a contract to give, and without efficacy for want of consideration. If made on a sufficient consideration, it would be a binding agreement, but then the nature of the contract would be changed, and there still would be no gift. The gift of a bond, note, or any other chattel, therefore, cannot be made by words in futuro, or by words in presenti unaccompanied by such delivery of possession as makes the disposal of the thing irrevocable. "This doctrine is cited and approved in Painter's Estate, *supra*."

So strictly is the validity of a gift made dependent upon its execution, that it was ruled in Pennington v. Gitting, 2 Gill & John. 209, that an intended gift by a parent to a child of certain bank stock, of which the certificate was handed to the contemplated donee, but no transfer of it was made on the books of the bank, which was the recognized mode of passing an interest in the shares, was executory, and could not be enforced. To the same purport are the cases of Deepfield v. Elwes, 1 Bligh Rep. 529; and Fortesque v. Barret, 3 Mylne & Keen, 36; Lonsdale v. Lonsdale, 5 C. 407; Adams' Eq. 234, note.

It is clear from these authorities, that unless there be a delivery, either of the chose in action, or the assignment of it to the donee, the gift is not executed, and the donee requires no rights under it.

But it is said that while the undelivered bond, with its endorsement, may not constitute a gift to the donee, yet it is in effect a declaration of trust, which converts the executors into trustees of this fund for her benefit. It is said that an equitable assignment of a chose in action is a declaration of trust, with an agreement to permit the assignee to sue in the assignor's name. Butler's Coke Litt. 232, and note 1.

But how can this undelivered endorsement be termed an assignment? It never passed out of the control of the testator; it never conferred a complete and present right upon the assignee. It would unquestionably have been competent for the testator, at any time after he made these endorsements, to have cancelled them. His power over the endorsements up to the hour of his death was complete and ample; and up to that hour, the donee had acquired no rights. Yet the converse of all this is essential to constitute an assignment. Vide 3 Lead. Eq. Cases, H. J. W.'s notes, 361, where it is said: "It is necessary, in order to constitute an assignment, either legal or equitable, that there should be such an actual or constructive appropriation of the subject matter assigned, as to confer a complete and present right in the assignee, even when the circumstances do not admit of its immediate exercise * * * * The characteristic of an assignment is the relinquishment of all legal or equitable interests by the assignor, and the creation of a new and independent right in the assignee." Rogers v. Hosack, 18 Wend. 319; Cowperthwaite v. Sheffield, 3 Comstock, 243. "If the donor has perfected his gift in the way in which he intended, so that there is nothing left for him to do, and nothing which he has authority to countermand, the donee's right is enforced as a trust, and the consideration is immaterial." Adams' Eq. 233. A delivery then of the bond, with the endorsement, was essential to vest rights in the donee. Until that was effected, the testator had done nothing to relinquish his legal or equitable interest. The whole matter was yet in his power, and subject to his control. He could have cancelled the endorsement without prejudice to any legal or equitable right of his intended beneficiary. It is well settled that nothing can take effect as an assignment which does not manifest an intention to relinquish the right of dominion on the one hand, and create it on the other. 3 Lead. Eq. Cas. 363; Dickinson v. Phillips, 1 B. 454; Rogers v. Hosack, *supra*; Hall v. Jackson, 20 Pick. 194.

This doctrine is thoroughly sustained by our own authorities. In Lonsdale v. Lonsdale, 5 C. 407, it was ruled that an assignment of choses in action, under seal, without valuable consideration, designed to take effect at the death of the assignor, where such choses in action were not delivered until after the assignor had become insane, passed no title to the assignee. This would seem to rule the point now under consideration. The same question was ruled by Judge Chapman in Jones v. Drake, 6 Philada. Rep. 417, in an able and elaborate opinion. Vide Grant v. Levan, 4 Barr, 424; Critchfield v. Critchfield, 12 Harr.; Plumstead's Appeal, 4 S. & R. 545.

If then, this endorsement was without consideration, not having been delivered, it passes no title to the donee. In order to avail herself of it, she must show it to have been made upon a sufficient consideration. The next inquiry, therefore, is, was the endorsement made upon a sufficient consideration?

It is said that the seal imports a consideration, and that from the sealing of the endorsement, the law presumes it to have been made upon sufficient consideration. "It is not now to be doubted," says Bell, J., in Yard v. Patton, 1 Harr. 285, "that though a parol unexecuted promise to make a gift *inter vivos*, without consideration, is void, an agreement, under seal, to do so, may be enforced as a legal obligation." Vide Campbell's Estate, 7 Barr, 100; Mack's App. 18 P. F. S. 233; Shenk v. Endless, 3 W. & S. 256; 1 Johns. Ch. Rep. 329. But in all these cases, it will be found that the sealed instrument was *delivered* to the donees. If delivery had been proved in this case, I should, in consequence of the endorsement being under seal, have no difficulty in concluding that the seal imported a consideration. But as there was no delivery, the fact that it was under seal, does not establish the existence of a consideration. This is squarely ruled in Lonsdale v. Lonsdale, and that authority renders further elaboration upon this point superfluous. But feeling the import of consideration derived from the attachment of the seal, how, or by what means do the facts in the case establish it? The endorsement by its own terms purports to be made "for her *grate* kindness that she shown to me and her grandmother." This expression excludes the idea that any valuable consideration was the moving cause for the endorsement. Kindness and filial devotion are not the subjects of a *quantum meruit*. The natural love and affection of a grandfather for his grandchild, when the grandchild has been attentive and affectionate to him and his wife, in their declining years, seem to have induced the testator to make the endorsement upon the bond. But there are not sufficient considerations upon which to enforce a gift *inter vivos*. For this, there is abundant authority. Yard v. Patton; Kennedy v. Ware; Mack's Appeal, *supra*; Shorb v. Shultz, 7 Wr. 207; Lyon v. Marclay, 1 Watts, 271; 18 Johns. 145; Whitehill v. Wilson, *supra*; Campbell's Estate, *supra*.

The only adjudicated case in Pennsylvania which intimated a contrary doctrine, is Wentz v. DeHaven, 1 S. & R. 312, and that was ruled on the authority of the dictum of Lord Mansfield. But upon this point it is distinctly overruled in Kennedy v. Ware, and Campbell's Estate, *supra*, and can be regarded as no authority.

But it is said there was a moral obligation which will support the endorsement, by affording a sufficient consideration. A moral obligation which will support a promise to pay, or to give, has a distinct legal character. A moral obligation is not a vague or undefined claim, arising from nearness of relationship, but it is an imperative duty, which could be enforced at law or in equity, were it not for some positive rule, which, with a view to a general benefit, exempts the party in that particular instance from legal liability. Kennedy v. Ware. Its nature is well illustrated by the case of a contract debt, barred by the statute of limitations, the collection of which cannot be enforced by legal remedies, but which will support a subsequent promise to pay the debt thus tolled by the statute. Where does the case stated show any imperative duty on the part of the testator to Mrs. Zimmerman? She must show, in order to enforce the endorsement, that there was a consideration, or its equivalent, in moral obligation. Nothing, however, is established by the case stated, except the executory gift. It is simply the case of an unexecuted intention to give at a future period, and is, therefore, under the authorities cited, void.

It was not seriously contended upon the argument, that the endorsements should be considered in the light of a testamentary disposition, nor could that view be maintained. A testator can execute but one will which can speak after his decease, and this testator made his will some time after the endorsement had been executed.

The fact that two of the executors are willing to surrender the bond, is not material. They cannot release assets of the estate as executors; after the fund comes into their hands as legatees, they may, in that character, act as they believe justice and equity require.

It is apparent from what has been said, that the plaintiffs can recover.

It may be questionable whether the defendant could have availed himself of the grounds of defence upon which the collection of the bond was resisted. It was never cancelled; nor is it pretended that the testator made a gift of it to him. She unquestionably owes the sum secured by it; and the question is not as to his liability to pay, but as to whom the payment is to be made. I have, however, decided the main question, in order that future litigation may be avoided.

The whole case is well summed up by C. J. Gibson, in Campbell's Estate: "All agree that the possession was not parted with; and it cannot be disputed that his intentions might be abandoned, and his directions countermanded. It was his property while he lived; and as the direction was a testamentary one, it became inoperative at his death. It was a mere authority, which expired with him."

And, now, February 1st, 1873, judgment is directed to be entered upon the case stated in favor of the plaintiffs, for the principal of the bond, with interest thereon at five per cent. from its date to the date of the institution of this action, and at six per cent. after that date.

B. N. Charn, Esq., pro plaintiffs.
Geo. N. Corson, Esq., pro defendant.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in April, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

Feb. 28, Isaac H. Macdonald, Administrator of NANCY TOLAND, dec'd.
" 28, Francis Lucas, Executor of FRANCIS R. LUCAS, dec'd.
" 28, John G. Kuhnle, Executor of CATHARINE ELLIS, dec'd.
Mar. 1, Emma Harvey, Administratrix of LOUIS C. L. HARVEY, dec'd.
" 3, Maria B. Hunsworth et al., Executors and Trustees of JOHN HUNSWORTH, dec'd.
" 3, Adam Schmunck et al., Executors of VALENTINE STEITZ, dec'd.
" 3, Eugene Linnard, Guardian of MARY DUNHAM.
" 4, Mary J. Heller, Administratrix of SCARBOROUGH TATHAM, dec'd.
" 4, George Erety, deceased, Executor of ANN ELY, deceased, as filed by William Erety and Horace B. Shoemaker.
" 5, Charles M. Lukens, Administrator of GEORGE M. SNYDER, dec'd.
" 6, John Ashbridge, Administrator of JACOB HARRIS, dec'd.
" 6, Nettie E. Schoneman, Executrix of JACOB NATHAN, dec'd.
" 7, Clara H. Thomas, Administratrix of EDWIN L THOMAS, dec'd.
" 8, I. Wistar Evans et al., Executors of CATHARINE EVANS, dec'd.
" 8, Emily M. Whartenby, Executrix of HARRIET S. WHARTENBY, deceased.
" 8, Stephen R. Snyder, Guardian of FREDERICK GETZ, late minor.
" 8, George Wood, Executor of GILBERT GAW, dec'd.
" 8, Charles H. Meyer, Administrator of ADOLPH H. PICKERT, dec'd.
" 10, James L. Halligan et al., Executors of BRIDGET FITZGERALD, dec'd.
" 11, Charles J. Piggott, Administrator of JOHN T. P. GOUTT, dec'd.
" 12, Eliza Bready, Guardian of WILLIAM C. O. ELY, dec'd.
" 13, William J. Gibb et al., Executors of JOHN GIBB, dec'd.
" 13, Michael Jennings, Administrator of EDWARD LYNCH, dec'd.
" 14, Robt. C. Bennett, Surviving Executor of JOHN DAVISON, dec'd.
" 15, Catharine Nepley et al., Executors of JOHN N. NEPLEY, dec'd.
" 15, Charles Este, Administrator of FRANCIS A. ROSS, dec'd.
" 15, Alexander Black, Administrator of WILLIAM K. ROBINSON, dec'd.
" 17, Samuel J. Sharpless et al., Trustees under the will of Townsend Sharpless of ALICE M. BROWN.
" 17, Samuel J. Sharpless et al., Trustees under the will of Townsend Sharpless of LYDIA J. HUNN.
" 17, Samuel J. Sharpless et al., Trustees under the will of Townsend Sharpless of ANNA R. SHARPLESS AND HER CHILDREN.
" 17, Hester S. Reeves, Executrix of JAMES S. REEVES, dec'd.
" 17, Joshua H. Morris, Executor of CHAS. L. DESAQUE, dec'd.
" 17, Albert D. Fell et. al., Executors of PENROSE FELL, dec'd.
" 18, Catharine Miller, Administratrix of JAMES MILLER, dec'd.
" 18 The Provident Life and Trust Company, Guardians of BERTHA ROSENSTEIN, dec'd.
" 18, William Moyn, Administrator of WM. HIDDIMAN, dec'd.
" 18, Sarah T. Woodcock, Administrator of WILLIAM WOODCOCK, dec'd.
" 18, Harriet Barrett et al., Executors of NATHAN BARRETT, dec'd.
" 21, Rudolph P. McCall, Administrator of JOSEPH W. BURTON, dec'd.
" 21, Catharine Harkins (Doyle), Administratrix of JOHN DOYLE, dec'd.
" 21, James K. Neulis, Guardian of GEO. NEULIS, a minor.
" 21, Mary A. Garber, Administratrix of SARAH GEHMAN, dec'd.
" 21, Meyer Gans, Guardian of JULIA GANS.
" 22, Peter Leeten, Administrator of SUSANNAH WADE, dec'd.
Mar. 22, Frederick Narr et al., Administrator of WILLIAM G. VOGEL, dec'd.
" 22, Kate L. Moffett, Administratrix of THOMAS MOFFETT, dec'd.
" 22, Ann Jane McWhinney, Administratrix of ARTHUR McWHINNEY, deceased.
" 22, James Larkens, Executor of JAMES GALLAGHER, dec'd.
" 22, Samuel G. Flood, Executor of MARY H. CROZIER, dec'd.
" 24, Helen McCutcheon, Guardian of McCUTCHEON minors.
" 24, Athalin E. Edwards et al., Executors of IGNATIUS EDWARDS, dec'd.
" 24, William Harris, Jr., Administrator of SAMUEL Y. ADDIS, dec'd.
" 24, Eliza A. Mart, in Administratrix of JOHN MARTIN, dec'd.
" 24, Mary Rockhill et al., Executors of THOMAS C. ROCKHILL, dec'd.
" 25, Charles H. Gross, Surviving Executor of CHARLES HEEBNER, dec'd.
" 25, Margaret Story (late Burnet), Administratrix of JOHN BURNET, JR., dec'd.
" 25, James Noble, Executor of JEREMIAH DUNBAR, dec'd.
" 25, Ellwood Davis, Executor of BENJAMIN DAVIS, dec'd.
" 25, Antone Schraudt, Executor of WM. STEFFEN, dec'd.
" 25, Cornelius K. Gibson Administratrix of CHARLES M. GIBSON, dec'd.
" 26, Ellen M. Treanor, Executrix of MICHAEL TREANOR, dec'd.
" 26, Philip S. P. Conner, Administrator of S. EMLEN RANDOLPH, dec'd.
" 26, Cecelia Miller, Administratrix of JNO. H. MILLER, dec'd.
" 26, John Levering, Jr., Administrator, &c., of JOHN N. SHUGARD, dec'd.
" 26, James Peoples, Executor of ELLEN LACEY, dec'd.
" 26, Joshua Pusey, Administrator of CHARITY KERSEY, dec'd.
" 27, Caroline F. Byrnes (late Allen), Administratrix of AND. M. ALLEN, deceased.
" 27, Wm. I. Shaw, Administrator of SARAH SHAW, dec'd.
" 27, David E. Hance, Administrator of ABRAHAM JORDAN, dec'd.
" 27, D. S. Cadwallader et al., Administrators, &c., of SARAH B. CADWALLADER, dec'd.
" 27, William H. Mills, Administrator of JOHN MILLS, dec'd.
" 27, Mary Jane Moore, Administratrix of JANE TAYLOR, dec'd.
" 27, Joseph R. Lyndall et al., Executors of WILLIAM BALLENGER, dec'd.
" 27, Sarah A. Albright et al., Executors of WILLIAM E. ALBRIGHT, dec'd.
" 27, John L. Shoemaker et al., Executors of ASHTON ROBERTS, dec'd.
" 27, Rachael L. Wise, Administratrix of SUSANNA DUYLASS, dec'd.
" 27, Elizabeth Gorgas et al., Administrators of CHARLES GORGAS, dec'd.
" 27, Joseph Bacon, Administrator of MARGARET E. BACON, dec'd.
" 25, Jane E. Rogers, Administratrix of WILLIAM ROGERS, dec'd.
" 27, John Wistar Evans et al., Surviving Residuary Trustees under the will of THOMAS EVANS, dec'd.
" 27, Michael Keyney et al., Executors of DENNIS KANE, dec'd.
" 27, Joseph Bacon et al., Surviving Executors and Trustees under the will of DAVID BACON, dec'd.

WILLIAM M. BUNN,
mar 28-4t Register.

HENRY O'BRIEN,
BARRISTER AND ATTORNEY AT LAW,
SOLICITOR IN CHANCERY, NOTARY PUBLIC, ETC.,
No. 68 Church Street, Toronto, Canada.
Business from the United States promptlyse attended to. p 29-

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LAW OFFICES OF READ & PETTIT.
No. 518 Walnut Street, Second floor, Philadelphia.
JOHN R. READ. SILAS W. PETTIT.
sep 5-3mos

JAS. F. MILLIKEN,
ATTORNEY AT LAW,
Hollidaysburg, Pa.
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JOHN H. CAMPBELL,
ATTORNEY AT LAW,
738 SANSOM STREET, PHILADELPHIA.
Special attention paid to the Settlement of Estates, Probate of Wills, Obtaining Letters of Administration, Filing Accounts and Orphans Court practice generally. sep 8-tf

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M. THOMAS & SONS,
AUCTIONEERS.
Nos. 139 and 141, late 67 and 69 S. Fourth St.

REAL ESTATE SALE, APRIL 22.

Will include—

Thompson, (formerly Duke) West of Palmer—Three-story Brick Dwelling—Orphans' Court Peremptory Sale—Estate of Margaret Benner, dec'd.

Rowlandville road, 22d Ward—Large and Valuable Lot, 30 Acres, suitable for truck or fruit raising. Has a Stone House on it. See plan. Executors' Sale—Estate of Benjamin Rowland, dec'd.

Coates, No. 2007—Business Stand—Three-story Brick Store and Dwelling. Orphans' Court Peremptory Sale—Estate of Bayard Robinson, dec'd.

Gratz, Nos. 1703, 1705, 1707 and 1709—4 Three-story Brick Dwellings. Same Estate.

Uber, No. 1728—Three-story Brick Dwelling. Same Estate.

Fifteenth, (North,) No. 1317—Handsome Modern Three-story Brick Residence—2 fronts. Has all the modern conveniences.

Twelfth, (South,) No. 254—Modern Three-story Brick Residence. Has the modern conveniences.

Market, No. 316, Corner of Hudson—Very Valuable Business Stand—Five-story Iron and Brick Store.

Sebel, Nos. 234 and 635—2 Two story Brick Dwellings. Assignees' Peremptory Sale.

Norris, No. 263—Three-story Brick Store and Dwelling. Same Account.

Ormes, North of Somerset—2 Two-story Brick Dwellings. Same Account

Sydenham, No. 1628—Genteel Three-story Brick Dwelling. Same Account.

Fulton, No. 570, North of Tulip, 25th Ward—Three story Brick Dwelling.

Front, (South,) No. 37, extending through to Water street—Business Stand—Three-story Brick Store and Dwelling—Orphans' Court Sale—Estate of Francis Gurney Smith, dec'd.

Lombard, Nos. 226 and 228—2 Three-story Brick Dwellings. Same Estate.

Green, No. 2313—Handsome Modern Three-story Brick Residence, 25 feet front, 250 feet deep. Immediate possession.

Twentieth and Tioga, S. W. Corner, at Tioga Station on the Germantown Railroad—Business Stand—Three-story Brick Building, Store and Dwelling, Hall, &c. Immediate possession.

Thirty-fourth, (South,) No. 109—Modern Four-story Brick Residence. Has the modern conveniences. Immediate possession.

Fifth, (South,) Nos. 416, 418 and 420—Valuable Business Location—Three-story Brick Dwelling and One-story Brick Building—54 feet front.

Seventh, (North,) No. 459—Modern Three-story Brick Residence, with Side Yard. Has the modern conveniences. Immediate possession.

Twenty-second and Osborne, S. E. corner of, below Walnut—Elegant Three-story Gray Stone Residence. Has all the modern conveniences.

Race, No. 1219—Corner of Jacoby—Modern Three-story Brick Residence. Has the modern conveniences. Executors' Sale—Estate of Thos. Graham, dec'd.

Nineteenth, (North,) No. 1508—Modern Three-story Brick Residence.

Ground Rent, $72 a year.

Master, No. 1312—Modern Three-story Brick Residence.

Franklin, No. 1418—Modern Three-story Brick Residence.

3 Irredeemable Silver Ground Rents, each $37.50, $36, and $44 a year. Executor's Sale to close an Estate—Estate of Jeremiah Comfort, dec'd.

Christian, No. 2109—Modern Three-story Brick Dwelling.

Tenth, (North,) No. 1733—Business Stand—Three-story Brick Store and Dwelling.

Limekiln Turnpike, above Sixty-sixth avenue—Two-and-a-half-story Stone Mansion, Frame Carriage House, &c.

Sixty-sixth avenue, west of Limekiln Turnpike, adjoining the above—4 Two-and-a half-story Genteel Brick Dwellings.

For account of whom it may concern.

STOCKS, &c.

$13,500 Kent County Railroad Co., First Mortgage Coupons, 6 per cent., January and July, redeemable after January, 1880, due 1889; Nos. 1, 2 and 3 $500 each, and 20, 22, 23, 24, 25, 58, 82, 83, 84, 85, 86 and 87 $1,000 each.

REAL ESTATE SALE, APRIL 29.

Will include—

Bodine, Nos. 1630 and 1632—2 Three-story Brick Dwellings. Orphans' Court Sale—Estate of Wm. R. Paul, dec'd.

Hamilton, Nos. 1810, 1812 and 1814—3 Modern Three-story Brick Dwellings—Same Estate.

Ridge avenue, Nos. 1347 and 1349—Valuable Business Stand—Stores and Society Room. Have the modern conveniences. Now occupied as a Furniture Store, and doing an excellent business.

Twenty-third and Master, N. W. Corner—Large and Valuable Lot, 200 feet front, 90 feet deep.

Naudain, No. 1869—Four story Brick Dwelling, with 6 Four story Brick Dwellings in the rear, forming a court. Sale by Order of Heirs—Estate of Robert Patterson, dec'd.

Auburn, East of Ninth—Two-story Brick and Frame Building. Orphans' Court Sale—Estate of John Bockius, dec'd.

3 Three-story Brick Dwellings, on a court north of Catharine street, between Eighth and Ninth. Same Estate.

Sixteenth, (North,) No. 1237—Genteel Three-story Brick Dwelling. Orphans' Court Sale—Estate of Fredericka Loew, dec'd.

Haverford, No. 3509—Two-story Stone Cottage. Trustees' Sale.

Tasker, Nos. 811 and 819—2 Two-story Brick Cottages. Executors' Sale—Estate of Phillip S. White, dec'd.

Spruce, No. 2405—Modern Three story Brick Residence. Has the modern conveniences. Immediate possession.

Torresdale, Pa.—Very Desirable Residence, with Stable and Coach House, 1 Acre. Immediate possession.

Annapolis, Nos. 616 and 618—2 Brick and Frame Dwellings. Sale by Order of Heirs—Estate of Michael Quinn, dec'd.

Front, below Morris—Lot. Same Estate.

Water, (North,) Nos. 49, 51 and 53, and Nos. 50, 52 and 54 Delaware avenue—6 Stores and Large Lot. Executors' Sale—Estate of Elizabeth Hopkins, dec'd.

Lombard, No. 438—Business Stand—Three-story Brick Store and Dwelling—Same Estate.

JAMES A. FREEMAN, & CO.
AUCTIONEERS.
No. 422 WALNUT STREET.

REAL ESTATE SALE AT THE EXCHANGE
APRIL 30, 1873.
On Wednesday, at 12 o'clock, noon.

Orphans' Court Absolute Sale.—39th street, above Chestnut. Handsome Modern Brown Stone Residence with Side Yard. Has back building and all the conveniences. Lot 50 x 100 feet, corner of Ludlow street. $8,000 may remain. Immediate possession. Estate of Oliver Fales, dec'd.

Orphans' Court Absolute Sale.—Lancaster avenue.—Desirable Building Lot near 48th street, 20 x 223 feet to Merion avenue. Estate of Allen, minors.

Orphans' Court Sale.—1019 Milton street. Three-story Brick Dwelling, and Three-story Brick House on Oliver street, 2d Ward. Lot 15 x 58 feet. Estate of Michael Mills, dec'd.

Orphans' Court Absolute Sale.—Broad street. Genteel Three-story Brick Dwelling, above Susquehanna avenue, 28th Ward. Lot 17 x 117 10-12 feet. Estate of Hannah Miley, dec'd.

Orphans' Court Absolute Sale.—Pacific street. Two-story Brick House, on the rear of the above. Lot 17 x 60 feet. Same Estate.

Orphans' Court Absolute Sale.—2222 Pacific street. Neat Three-story Brick Dwelling, above Broad and Susquehanna avenue. Lot 17 x 89 feet. Same Estate.

Orphans' Court Absolute Sale.—415 Richmond street. Genteel Three-story Brick Dwelling, above Columbia avenue, 18th Ward. Lot 17 x 80 feet to Keyser street. Same Estate.

Orphans' Court Absolute Sale.—1215 Ogden street. Neat Three-story Brick Dwelling and Lot 16 x 77 feet, 14th Ward. Same Estate.

Orphans' Court Sale.—1325 Moyamensing avenue. Three story Brick Dwelling, below Wharton street. Lot 18 x 100 feet. Estate of Mary Ann Cope, dec'd.

Executors' Absolute Sale.—425 Wildey street. Three-story Frame Dwelling, above Hanover street, 18th Ward. Lot 13 x 70 feet. Estate of George J. Weaver, dec'd.

Executors' Absolute Sale.—Ireland street. Nos. 438 and 440—2 Frame Houses above Hanover street, 18th Ward. Lot 18 x 78 feet. Same Estate.

Positive Sale.—8th street. Desirable Building Lot, below Dauphin, opposite the 4th and 8th streets Prssenger R. R. Depot, 20 x 69 feet. Half cash.

Positive Sale.—Franklin street. Desirable Building Lot, in the rear of the above, below Dauphin street, 28th Ward, 20 x 69 feet. Half cash.

1810 Bainbridge street.—Neat Three-story Brick Dwelling and Lot 15½ x 71 feet. Immediate possession.

321 South Seventh street. Genteel Three-story Brick Dwelling, corner of Barclay street. Lot 16 x 61 feet. In good order throughout. Immediate possession. Half cash.

323 South Seventh street.—Genteel Three-story Brick Dwelling, below Spruce street, Lot 16 x 60 feet. Has the conveniences. In good order. Immediate possession. Half cash.

Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, APRIL 25, 1873. No. 17.

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ONE COPY FOR ONE YEAR, THREE DOLLARS.

Supreme Court, United States.

DUNCAN et al. v. MARY T. B. JAUDON, and THE NATIONAL CITY BANK, Appellant, v. MARY T. B. JOUDAN.

1. If a *cestui que trust* waive a breach of trust on the part of her trustee, it will not, therefore, be presumed that a subsequent breach is made with her consent.
2. Though a trustee under a will, in making investments, depart from the rule prescribed by the testator, yet, if it be acquiesced in by the party in interest, and there is no interference by the court having charge of the trust, the right of action to the *cestui que trust* for an illegal disposition of the property thus substituted, is not effected by reason of this departure.
3. A person with whom a trustee pledges stock, which by its face is held in trust, is bound to take notice of the trust, and on a sale of the stock by him, or on his account, will be liable to the *cestui que trust* for the proceeds thereof.

Appeals from the Circuit Court of the United States, for the Southern District of New York.

Opinion of the court by Mr. Justice DAVIS.

The object of these suits is to reach the proceeds of certain trust property, which it is charged was disposed of by Samuel Jaudon, the trustee, in violation of his trust, to the advantage and gain of the plaintiffs in error. The trust in question has its foundation in the will of Commodore Bainbridge, who died in Philadelphia, in 1833. Among other things, the testator directed certain trustees, whom he named, to invest a portion of his estate in trust for his daughter, the complainant below; to pay the interest on the investment to her during her natural life, and at her death to divide the property equally between her children. These trustees, at their own request, in 1835, were discharged from the duties of their appointment by the Court of Common Pleas of Philadelphia, and Samuel Jaudon appointed in their stead. The trustee thus substituted received, at the time of his appointment, with other effects of the estate, certain State bonds, which he sold, and invested the proceeds in the stock of the Delaware and Raritan Canal Company. One hundred and seventeen shares of this stock were appropriated to the use of this appellee, and stood upon the books of the company in the name of Samuel Jaudon, as her trustee, and certificates for said shares, showing on their face that this was so, were issued and delivered to him, and the dividends for a long period of time were regularly paid by him to the *cestui que trust*.

At different times during the years 1865-66-67, these shares of stock were pledged as security for loans obtained by Samuel Jaudon from the appellants in these cases, on his own private account, and were afterwards sold by them to extinguish this private indebtedness. The legality of these respective transactions form the subject matter of these suits.

It is too plain for controversy that Samuel Jaudon committed a gross breach of trust in allowing these shares of stock to be disposed of and applied in the manner they were; but as he is insolvent, and the specific property cannot be reclaimed, the inquiry arises whether the appellants, with whom the shares were pledged and for whose benefit they were sold, or the *cestui que trust*, shall bear the loss occasioned by his misconduct.

It is argued that the appellants bear a different relation to this stock from what would be the case if the investment in it had been authorized by the terms of the will. It is true the will directed investments to be made in government or State stocks, and on this account the conversion by Jaudon of the State stocks on hand into canal stock, was a wrongful act and a breach of trust. But the *cestui que trust* was at liberty to approve or reject this unauthorized proceeding, and her decision on the subject concerned no one not interested in the trust estate. She elected to approve it after she learned of the occurrence, and by doing this adopted the new investment, and waived the breach of trust. But her waiver on that occasion did not bind her to observe the same line of conduct in case of further violation of duty. It would be absurd to suppose because she ratified this transaction, she intended to assent to future breaches of trust. Indeed, it is quite clear from the evidence, that she acquiesced in the arrangement, because her relatives who had charge of the estate advised it. In the nature of the case, she could not have had that sort of information on such a subject on which to base a correct judgment, and, therefore, necessarily relied for the security of her rights on the counsel of older and more experienced persons in whom she placed confidence. It is due to the trustee to say that the change of investment was a family arrangement, in order to obtain a greater income, and that the stock selected for this purpose was one of the best of its kind that the market afforded.

Although it is wrong in any case for trustees under a will, in making investments, to depart from the rule prescribed by the testator, yet if it is done, and acquiesced in by the party in interest, and there is no interference by the court having charge of the trust, the right of action to the *cestui que trust* for an illegal disposition of the property thus substituted, is not effected by reason of this departure. It is still an estate held in trust for the beneficiary under the will, and to be protected equally with an investment made strictly in accordance with the terms of the will. It follows, then, that the relation of those having dealings with the trustee, based on shares of stock held in this way, is not changed by reason that the original purchase was not in accordance with the directions of the testator.

This brings us to a consideration of the particular transactions on which the claim for relief in these cases is founded. The dealings of Jaudon with the City Bank, based on the stock in question, commenced in 1865, and extended through a period of two years. During this time ten separate loans were made to him on the pledge of forty-seven shares of the canal stock. The securities were returned to Jaudon whenever he paid up the amount of a loan, and re-delivered to the bank each time a new loan was effected. In December, 1867, when the last loan matured, the bank, being unwilling to renew it, and Jaudon unable to pay it, sold the stock by the direction of Jaudon, and applied the proceeds of the sale to the liquidation of his indebtedness.

The dealing with Duncan, Sherman & Co. was confined to a single transaction. This was a loan in July, 1867, at ninety days, on the pledge of seventy shares of similar stock. This stock, on account of Jaudon's inability to meet his engagement at the expiration of the time limited for payment, shared the same fate as the stock pledged to the bank. In both cases the certificates, which were the evidence of the hypothecated stock, recited that "S. Jaudon, trustee for Mrs. Mary T. B. Jaudon," was entitled to a certain number of shares in the capital stock of the company, transferable on the books of the company by him or his legal representative, on the surrender of the certificate. Each certificate, when the stock was pledged, was accompanied by a blank power of attorney, on a separate piece of paper, signed by "S. Jaudon, trustee of Mary T. B. Jaudon." In the case of the bank, the negotiations were conducted with the cashier, who, although uninformed of the purpose for which the funds were wanted, knew that the certificates taken in pledge disclosed the fact that Jaudon held the stock, not in his own right, but as trustee.

William B. Duncan acted for his firm in making the loan. Jaudon told him he had good securities to offer for the money he desired. Duncan, wishing to oblige him, being satisfied of their sufficiency, without inspecting them, turned the business over to his cashier, who completed it. The evidence leaves no room for doubt that each and all of these loans were to Jaudon in his personal character and for his individual use, and that the money obtained was applied to discharge liabilities incurred in the purchase, or carrying "of Broad Top coal stock," a speculative stock of no established reputation, in which he was at the time dealing on his own account.

It is true, when he borrowed the money, he had no expectation of resorting to the trust funds to repay it, but his good intentions in this respect furnishes no excuse for his conduct. It was wrong for him, under any state of circumstance, to pledge the stock in order to obtain money for his personal wants. He held a fiduciary relation to it, and yet used it as if it were his own, and bargained for the consequences which followed, although the necessity for the ultimate sale of it was not anticipated by him at the time he pledged it. If the law allowed the property of the *cestui que trust* to be treated in this manner, there would be little encouragement to vest an estate in trustees for the benefit of others. It is argued that the several transactions of Jaudon with the bank and Duncan, Sherman & Co. were really on his part for the purpose of reinvesting the trust funds. How can this be, when he had not a thought at the time he got the money, of failure to pay it? His speculations, then, were on his own account, and, like all sanguine men who deal in stocks, he had full faith that the venture in which he was engaged would prove remunerative. The idea of reinvestment was an afterthought, occurring at the time he found himself unable to pay, and obliged, as he supposed, to part with the property of his *cestui que trust*. And even then it did not assume the shape of a settled purpose, but only an intention to offer the injured party Broad Top security, in which he was operating for the canal stock, which he was about to appropriate to his own necessities. It is natural that a trustee who makes use of trust property to pay his own debts, without a deliberate design to defraud, should intend, at some future time, to put the party wronged by him, in as good a position as before; but can such an intention be treated as a purpose to reinvest the trust funds in the securities in which the trustee is privately speculating? If it can, personal property in the hands of trustees, be the declaration of trust ever so specific, is in a very unsafe condition. The stock was not sold because it was desirous to change the investment, but for the simple reason that

it had been pledged, and it was pledged for the sole object of enabling Jaudon to obtain money to advance his personal ends. If, therefore, there had been occasion for making a reinvestment, and authority to do it, the transactions in question had no reference to any such object.

But why change the investment, when the canal stock, one of the most stable of its kind in the country, was paying on the average a semi-annual dividend of five per cent. If it were allowable under the will to invest in the stock of private corporations at all, few more desirable than this were accessible. Experience had shown that it was safe and yielded a large income, and no prudent trustee, having once invested in it, and had his conduct approved, looking alone to the interests of his *cestui que trust*, would take the hazard of selling it and purchasing another. But there was no authority to sell it, even were it desirable to do so, or to deal with it so that a sale might become necessary. If Jaudon thought so, there was no foundation for his belief, and he is compelled to admit, although his whole testimony is an effort to justify his conduct, that he never had any conversation with his *cestui que trust* on the subject of changing this stock.

It was treated by all concerned, during the long course of years in which it was held in trust, as a most desirable investment, and no thought of substituting other securities for it was ever entertained by any one, until the idea occurred to Jaudon as a means of escape from the embarrassment in which he was placed by the unlawful use he made of it. The *cestui que trust* not only never gave consent to pledge or sell it, but had no reason to suppose that the trustee would attempt anything of the kind; nor has she said or done anything, fairly interpreted, which tends even to relieve the trustee from the legal responsibility which pertains to the administration of the trust estate.

It follows, then, that the use of the stocks by Jaudon, in his transactions with the bank and Duncan, Sherman & Co., was, on his part, a flagrant breach of trust, without either justification or excuse. If so, are they blameless? They cannot be, if they had actual or constructive notice that the trustee was abusing his trust, and applying the proceeds of the loans to his own use. As we have seen, the loans were for no purpose connected with the trust, but for Jaudon's own benefit; and the face of the papers given as collateral security for the debts thus incurred, informed the parties dealing with him, that he held the stock as trustee for Mrs. Mary T. B. Jaudon, and inquiry would have revealed the fact, that the use to which the stock was put was unauthorized.

The duty of making such inquiry was imposed on these parties, for it is out of the common course of business to take corporate stock held in trust, as security for the trustee's own debt. The party taking such stock on pledge, deals with it at his peril, for there is no presumption of a right to sell it, as there is in the case of an executor. In the former case, the property is held for custody; in the latter, for administration.

It matters not, whether the stock is pledged for an antecedent debt of the trustee, or for money lent him at the time. It is unlawful to use it for either purpose.

In Lowry v. Commercial and Farmers' Bank of Maryland (Taney's Circuit Court Decisions), which was a case of misappropriation of corporate stock by an executor, Chief Justice Taney held, "that if a party dealing with an executor has, at the time, reasonable ground for believing that he intends to misapply the money, or is, in the very transaction, applying it to his own private use, the party so dealing is responsible to the persons insured." And the Supreme Court of Massachusetts, in a recent case (Shaw v. Spencer and others, 100 Massachusetts, 389), in its essential features like the case at bar, decides, that if a certificate of stock, expressed in the name of "A. B., trustee," is by him pledged to secure his own debt, the pledgee is, by the terms of the certificate, put on inquiry as to the character and limitations of the trust, and if he accepts the pledge without inquiry, does so at his peril. In that case, the *cestui que trust* was not named in the certificate, and the court remarked, that if it were so, the duty of inquiry would hardly be controverted.

If these propositions are sound, and we entertain no doubt on the point, the liability of the appellants for the conversion of the stock belonging to Mrs. Jaudon, cannot be an open question. They either knew, or ought to have known, that Jaudon was operating on his own account, and are chargeable with constructive notice of everything which, upon inquiry, they could have ascertained from the *cestui que trust*.

If this inquiry had been pursued, they could not have failed to discover the nature and foundation of the trust, and that the trustee had no right to pledge the stock for any purpose. The bank, in its dealings with Jaudon, was guilty of gross negligence, and, in consequence of this, inflicted serious injury upon an innocent person. It may be that the cashier never inquired of Jaudon, what he wanted with the money; but nine successive loans to him in one year, each time on the pledge of the same trust security, was evidence enough to satisfy any reasonable man, that the money was wanted for private uses, and not for any honest purpose connected with the administration of the trust.

Duncan, Sherman & Co., although intending no wrong, cannot escape their share of responsibility. Duncan loaned the money to Jaudon to oblige him, and, in the very nature of the transaction, he did it for Jaudon's private accommodation. On making the application, Jaudon told him he had securities to offer, naming them, and, naturally, he supposed they were Jaudon's own property. It is his misfortune that he turned them over to his cashier, with directions to accommodate Jaudon, without having personally examined them. If he had made this examination, we are persuaded the *cestui que trust* would have had no occasion to be dissatisfied with his conduct.

It is needless to argue, that Duncan is bound by the notice communicated to the cashier when he received the certificate and concluded the business with Jaudon.

Without pursuing the subject further, we are satisfied that the decrees below should be affirmed.

GARDNER v. THE GOODYEAR DENTAL VULCANITE CO. et al.

It cannot be admitted that one party to a suit can pay the fees of counsel on both sides, both in the court below and on appeal, without being held to have such control over both the preparation and argument of the cause, as to make the suit merely collusive in both courts.

Appeal from the Circuit Court of the United States for the District of Rhode Island. On motion.

Mr. Chief Justice CHASE delivered the opinion of the court, March 3d, 1873.

The original suit in equity was brought by the Goodyear Dental Vulcanite Company against Gardner, to enjoin him from the use of certain patented subjects belonging, as alleged, to the company, and for an account. The case was heard upon a bill, answer, and testimony, and there was a decree in favor of the company in the Circuit Court for the district of Rhode Island, in September, 1870. Upon appeal to this court, the decree below was affirmed on the 6th of May, 1872, but the opinion has not been read. The defence was conducted by counsel originally employed and paid by Newbrough, under whom Gardner was licensee. On the 1st of July, 1869, before the decree in the Circuit Court, Newbrough and the company compromised all matters of difference between them, with the understanding that this suit should go on to the final hearing and determination both in the Circuit Court and in this court on appeal, as if the compromise had not been made.

The company, however, paid the counsel employed for the defence, as well as for themselves in Circuit Court, and subsequently in this court. These facts appear from the record and from the admissions of the company, in the ninth article of their answer to the motion to dismiss the appeal. They are the only facts which we think it necessary to notice.

It may be that the company has not become the legal or equitable owners of the opposing interests involved in the suit. There may be, and doubtless are, large opposing interests, of which they are neither the legal nor equitable owners. But it cannot be admitted that one party to a suit can pay the fees of counsel on both sides, both in the court below and on appeal, without being held to have such control over both the preparation and argument of the cause, as to make the suit merely collusive in both courts. It can make no difference that the counsel fees were charged to the party apparently, though not really liable to pay them, and payment from the other party procured through him. This, indeed, is a circumstance against the party who pays the fees, rather than in his favor.

The motion to vacate the decree of affirmance, heretofore made, and to dismiss the appeal, must, therefore, be granted, and an order made to recall the mandate which has been issued to the Circuit Court. We take occasion, however, to say, that we see nothing in the conduct of the counsel who actually represented the company, which merits blame, or which ought to affect in any degree the high esteem in which they have been held. Neither of them appears to have had any knowledge of any arrangements made by their client with the opposing party.

Henry Baldwin, Jr., and *Hon. J. S. Black*, for motion.

THIRD JUDICIAL DISTRICT.

Court of Common Pleas of Lehigh County.

BALLIET et al. v. SCHOOL DISTRICT of THE CITY of ALLENTOWN.

1. **Upon the continuance of a cause, the party obtaining it must pay the costs of the term as a condition precedent, unless the primary cause of it be occasioned by his adversary.**
2. **Where a party materially changes his pleadings, so as to create good cause for surprise, and surprise is alleged, and a continuance is allowed, the costs of the term will fall upon him who has changed his pleadings.**

Sur rule to show cause why the plaintiffs shall not pay the costs.

Opinion of the court by LONGAKER, P. J.

The plaintiffs declared upon a written contract for the erection of a school house, and added a count for extra work, as well as the common counts in assumpsit. The defendant, after plea filed, ruled the plaintiffs (as provided by a rule of court) to file a bill of particulars. May 31st, 1872, a bill of particulars was filed, alleging that the entire work was done by the day, and enumerating the number of days worked, and the price of work per day. June 13th, 1872, the cause was called for trial; and, thereupon, the defendant demurred to the bill of particulars, upon the ground that it was in conflict with the narr., and that the plaintiffs have not specified what extra work was done, nor where, and when done. The demurrer was sustained. The plaintiffs were then allowed to amend the bill of particulars, as well as the pleadings, by alleging a rescission of the written contract, and declaring that the whole work was done for *quantum meruit*. On account of this amendment, the defendant alleged surprise. The court were of the opinion that there was good cause for surprise, and allowed a continuance, without making any disposition of the costs for the term. At a subsequent term the above rule was entered by the defendant.

It is a well settled practice, that upon the continuance of a cause, the court will usually require the party asking it, to pay the costs of the term; and these costs will not be refunded in case he shall ultimately prevail. Brightley on Costs, p. 92. It seems to be equally well established, that he who by reason of some cause, not produced by his adversary, is allowed a continuance, must pay the costs as a condition precedent. Ewing v. Byers, 2 Yates, 128. Such cause may be the absence of a material witness, who could not have been subpœnaed by using proper diligence, or the witness may have been subpœnaed, but does not attend on account of sickness, or from some other legal cause; or the ground of the continuance may be the sickness of the party litigant, or it may arise from some one of the other many causes which will afford good reason for a continuance. These causes frequently arise from circumstances entirely beyond the control of the party asking for, and to whom the continuance is allowed; and yet, while he obtains this indulgence, it is his misfortune to be compelled to pay the costs of the term.

An amendment of the pleadings in a material part is usually held to be good cause for surprise, and a party surprised is entitled to a continuance; and, although he who is surprised seeks a con-

tinuance, he seems to form an exception to the rule; that the party asking it must pay the costs of the term as a condition precedent. The reason for this exception is, that the primary cause for the continuance, from which the surprise originated, has been occasioned by the party who has amended the pleadings. If there had been no amendment, no surprise or cause for a continuance on such ground, would have arisen. This exception operates with no greater hardship, than where a continuance occurs, either from the sickness of a witness, or the sickness of a party. litigant; the reasons for the rule and the exception are *pari passu*.

An allegation of surprise, and a continuance therefor, is analogous to that stage in an action, where the plaintiff of course, or by reason of some mistake in the pleadings, suffers a non suit, or asks, or takes a discontinuance; or it may be likened to a proceeding in equity, where the complainant, by reason of some omission in his bill, seeks to remedy the defect by an amendment; and, in such cases, it has been held, that the plaintiff must pay the costs. In Porter v. English, District Court of Allegheny, 1 T. & H. Pr. 87, it is held: "In a bill in equity after answer, the plaintiff will be allowed to amend his bill, on paying the costs occasioned by such amendment." So after demurrer, general or special, it is usual to give the adverse party leave to amend, upon the payment of the costs. Archbold's Pr. 234; 1 Peters, 443; 1 T. & H. Pr. 426. So, also, a writ of execution may be amended, upon the payment of the costs. 3 T. R. 657; 1 T. & H. Pr. 577.

When the plaintiff finds he has misconceived his action, sued a wrong party, or for some defect in the pleadings, or for some other reason he will not be able to maintain it, he may, with some exceptions, enter a discontinuance on the payment of the costs; but no discontinuance will be allowed until the costs are paid: 1 T. & H. Pr. 412-415; Lacroix v. Macquait, 1 Miles, 156. A plaintiff has been allowed to discontinue, upon the payment of the costs, even after demurred, argued and allowed, where there was a mistake in the pleadings: Archbold's Pr. 234; 2 Lev. 124, 209; 1 Saunders, 23. The court now usually gives the party leave to amend upon the payment of the costs 2 Saunder's, 73.

The case at bar is to be received in this light: The defendant, being sustained in its demurrer to the bill of particulars, the plaintiffs conceived it to be necessary to amend their pleadings, in order to sustain their action; and the amendment was so radical as to require a very different line of defence from the cause of complaint first declared upon. By the amended pleadings, the written contract was alleged to have been rescinded, and the cause was to proceed upon the allegation, that the work was done for *quantum meruit*, and not specifically upon a written contract, as first declared upon, with a count claiming for extra work. If the plaintiffs, after the demurrer was sustained, had felt assured that they could not maintain their action, it became optional for them to discontinue, to suffer non suit, or to amend. Had either of the first two remedies been selected, their subjection to the payment of the costs would have followed. Their pleadings, however, are amendable, and because they availed themselves of the latter remedy, rather than either of the former remedies, there arises no good cause to relieve them from the payment of the costs for the term. The authorities cited abundantly warrant the opinion, that the costs of the term should be paid by the plaintiffs.

The rule, therefore, is made absolute.

Stiles & Erdman, for plaintiffs.

Runk & Harvey, for defendant.

Recent Decisions.

NEW HAMPSHIRE.

Head notes of decisions of the Supreme Court of New Hampshire, to appear in vol. 51, N. H. Reports. (Received from John M. Shirley, State Reporter.)

CROSS v. BROWN.

1. A negotiable note, payable on demand, was endorsed thirteen months after it was given, the consideration for the endorsement being an agreement to support the payee. In an action by the endorsee against the maker, it was *held*, that the maker might set off a debt due to him from the payee at the date of the endorsement.

2. The maker of a negotiable note, who has been appointed administrator of the estate of the payee, may defend against the suit of an endorsee by showing that the endorsement was invalid as against the creditors of the payee; that the avails of the note are needed to pay debts of the payee, and that he, as administrator, claims the note to apply it for that purpose.

3. One claiming property of a deceased person, under a transfer invalid as against creditors, is not affected by a decree of the Probate Court charging the administrator with the property.

4. The allowance by the Probate Court, after notice by publication, of the private claim of an administrator against the estate, is conclusive upon one claiming property under a transfer from the intestate which was fraudulent as against creditors.

BLAISDELL v. PORTSMOUTH, GREAT FALLS & CONWAY RAILROAD.

1. A license to do certain acts upon land does not convey any interest in the land; it amounts to nothing more than an excuse for acts which would otherwise be trespasses.

2. Any license pertaining to land may be revoked, so far as it is not executed; otherwise, a mere license might operate to convey an interest in land.

3. A license to build a railroad upon one's land would excuse any acts properly done under the license while the same was in force, but such license might be revoked at pleasure, as to everything in the future.

4. Possession held under a license cannot be adverse.

5. The decease of either party to such a license, or the conveyance by either of the rights affected by the license, operates as a revocation.

GAMMON v. PLAISTED et al.

The plaintiff sold to A. and B. his stock of goods, consisting in part of spirituous liquors, and took the note of A. for the price. A. afterwards sold his interest in the stock to B., and the plaintiff thereupon gave up A.'s note, and took the note of B. for the amount. This note was afterwards surrendered, and the note in suit, signed by B., with a surety, taken in its place. *Held*, that the surrender of A.'s note furnished no sufficient consideration for the note of B., and that the note sued must fail for want of consideration; also, that the plaintiff could not apply money paid generally upon the notes to extinguish that part resting upon an illegal consideration so as to leave the balance good

ALABAMA.

Head notes of decisions of the Supreme Court of Alabama, January Term, 1873. (Received from John W. Watts, Esq., State Reporter.)

GLOVER v. ROBBINS.

PETERS, J.—1. In an action against a surety on a promissory note, instituted by the payee, no recovery can be had on such a note, if it has been altered by the maker, who is the principal, and the payee, after its execution by the surety, without his consent or knowledge, to the prejudice of the surety.

2. The addition to such promissory note, of the words "with interest at four per cent.," is such an alteration as avoids the note as against the surety. 32 Ala. 480; 6 Wall. 80.

3. After such alteration, no recovery can be had on such note, upon a count describing without the alterations. 19 John. 391; 32 Ala. 432; 1 Greenleaf, c. 5, 565.

4. The judgment on a promissory note, payable "in specie," which bears date on the 10th day of October, 1864, should be for so many *dollars*, and not for so many *dollars in silver or gold coin*. 12 U. S. Stat. at Large, 345, 553, 709; 12 Wall, 457.

THOMPSON v. STATE OF ALABAMA.

PECK, C. J.—On the trial, under an indictment for the forgery of an order for the payment of money drawn on a banker, it is no defence that the alleged drawer had no funds in the hands of the banker at the time the order was drawn.

SCOTT v. GRIGGS.

PETERS, J.—A married woman may sell her separate estate in the manner allowed by law, and as an incident to the power to sell, she may rescind such sale, or she may re-purchase the property sold for her own protection.

GRAVES v. MCKISSACK.

PETERS, J.—M. being the owner of a mule, sold and delivered it to W. upon condition that the vendor was to be the owner of the mule until it was paid for, when applied to by G., who was in treaty with W. to buy the mule, told G. that he had no mortgage on the mule, and did not expect to have any, and did not claim the mule, nor disclose his title, is estopped from recovering the mule in a suit against G., who had purchased the mule and paid for it before he was notified of M.'s title, and after W. had run away from this State.

MOBILE AND MONTGOMERY RAILROAD v. ASHCROFT.

SAFFOLD, J.—1. In an action against a railroad company, for injuries to the person, it is competent to prove, that about two weeks before the accident complained of, the cars had run off the track twice during one trip.

2. When, in such an action, the absence of a bell rope from the passenger car, was alleged as contributing to the injury, evidence that very soon after the accident, the rope was permitted to be covered up with meal sacks, is admissible to prove carelessness, and also to verify the statement of the witness, that it was too short, by showing his attention was particularly called to its condition.

CARPENTER et al. v. MURPHREE & JONES.

SAFFOLD, J.—1. In a suit by transferees on a promissory note against two makers, a personal plea by one, that the other signed it after its execution, in pursuance of a verbal agreement, under which the payee released him and accepted the other, to whom he sold property, crediting him with the amount of the note, is good.

2. Such contract is not required to be in writing.—Judgment reversed.

THOMPSON v. PATTERTON, Administrator.

SAFFOLD, J.—A complaint in detinue, which describes the property sued for as "one chest or box of tools, containing one complete set of carpenters' tools, embracing all tools used in the carpenters' trade; one complete set of carving tools, embracing all tools used for scroll work or carving; two complete sets of drawing tools, used for drawing plans of buildings by architects; also, one set of turning tools, used by carpenters in turning lathes," &c., contains a sufficient description of the property.—Affirmed.

MASON et al. v. SMITH et al.

PETERS, J.—1. A codicil to a will is an addition to it, by which its dispositions are explained, added to, or changed. 4 Kent, 531; Marz. 1.

2. It is to be construed in connection with the body of the will.

3. An expression in the codicil, of a determination to alter the will in one particular, negatives an intention to alter it in any other particular. 9 Cush. R. 291.

4. In case of a revocation by a codicil, whether by implication or express words, the uniform rule is, not to disturb the dispositions in the body of the will further than is absolutely necessary to give effect to the codicil. 1 Jarm. Will. 160.

5. And if the codicil substitute another legacy for that in the body of the will, the substituted legacy is to be paid out of the same fund, and upon the same conditions as that prescribed in the body of the will, for the original legacy, if there are no especial instructions given in the codicil on these points. 2 Ves. Jr. 449.

6. S., in the body of his will, gave to J. B. & B. W. Mason, a considerable legacy, and then added in the same clause, these words, to wit: "And for and in consideration of the above, the said J. B. & B. W. Mason, will see that Sarah A. Manifee, my sister, will be amply provided for, should she ever be so unfortunate as to have any cause for such protection, and to Sallie A. Boyd, they, Jas. B. & B. W. Mason, will pay four thousand dollars, one-half at the settlement of my estate, and the other half twelve months thereafter." *Held*, That the legacy to Mrs. Boyd is a charge on the legacy to J. B. & B. W. Mason, and if they accept the legacy to them, they become personally liable to pay the legacy to Mrs. Boyd.

7. A codicil added to such a will (in which will the whole residue of the testator's estate is already disposed of), in these words, viz., "I hereby revoke *the donation* in the body of my will, to Sallie A. Boyd; and give her a proportionate share, with the rest of my nieces," only revokes the sum to be paid to Mrs. Boyd, and directs a different method to fix its amount, but it does not change the fund out of which it is to be paid, or the time and manner of its payment. It must be paid as the original legacy, for which it is substituted.—Decree affirmed.

LEGAL GAZETTE.

Friday, April 25, 1873.

JOHN H. CAMPBELL,
EDITOR.

THEODORE F. JENKINS,
ASSOCIATE EDITOR.

JUDGE WOODWARD'S PANACEA.

In this issue, we publish the minority report submitted by Judge Woodward, in the Constitutional Convention last week. The report presents for the consideration of the members of that body, a complete article on the judiciary. As Mr. Woodward occupied for fifteen years a seat in the Supreme Court of Pennsylvania (part of the time as chief justice), and is well known otherwise to the bar of the State, his panacea for the existing evils in the administration of justice in this State, will attract more than ordinary attention. We have ourselves carefully examined it, and have compared it with the voluminous report of the majority of the Judiciary Committee, and the many suggestions offered by minority members of the Committee, and by prominent lawyers and judges in the State.

We think, on the whole, it fails in providing a complete, rational judiciary system. Instead of simplifying the machinery of justice it retains the numerous courts at present, existing, and agrees with the majority of the committee in advocating a circuit court system in addition thereto (though as to that system we are willing to hear the argum nts of its advocates before deciding to oppose it). One great objection to the plan it proposes, is the provision requiring all the judges of the State "to be *appointed* by the governor, by and with the advice and consent of the Senate." This we are decidedly opposed to, believing as we do, that by the *election* of judges, we are just as likely, and more so, to get honest and competent ones, as if they were appointed. It strikes us as a little singular, that Judge Woodward, who himself owed his elevation to the bench to a vote of the people, should now advocate the appointment of judges, but he has, no doubt, just cause for his convictions upon the subject.

Another serious defect in the plan, is the want of a means of obtaining as many judges as the population of the State and its growing interests from time to time require. This can only be done by basing the number of judges in a district upon the population it contains, and until there is some such provision incorporated in our constitution, the evils of insufficient courts, and interminable delays in judicial proceedings, will never be fully remedied. Judge Woodward leaves everything in this regard to the Legislature, retaining the same serious evil of legislative tinkering and interference, of which the bar and public so bitterly complain.

The provision transferring the jurisdiction of registers of wills in large cities to Probate Courts, is an excellent one in idea, but we think the means suggested would not fully answer the purpose for which it was intended. The provisions prohibiting the Legislature from vesting in the judges the power of appointing certain municipal and civil officers, not judicial, and directing that all accounts filed in the courts should be audited by the judges, and not by auditors appointed by them, are very good, and we hope to see them, or something like them, adopted.

This is all we have time at present to say in reference to the plan, except that outside of the suggestion of a circuit court system, and a few probate courts, it leaves the present judiciary system, with many of its evils, still existing.

THE GRAND JURY SYSTEM.

The Berks County Bar.

The following petition was presented yesterday in the Constitutional Convention, by Judge Van Reed, of Berks county.

To the Honorable the Delegates of the Constitutional Convention of Pennsylvania.

The petition of the undersigned members of the Bar of Berks county, respectfully represents, that they firmly believe that the grand jury system has long since its establishment outlived its necessity or usefulness; that they believe it to be an impediment in the administration of justice, entailing an unnecessary amount of labor and expense upon the citizens, and no longer in any way necessary for their safety; they would therefore recommend its abolishment, to your honorable bodies.

C. H. Schaeffer,	Peter D. Wanner,
W. M. Rightmyer,	H. Maltzberger,
Cyrus G. Derr,	Aug. S. Sassaman,
A. K. Stauffer,	Wm. H. Livingood,
John Ralston,	Frank R. Schell,
F. M. Banks,	Horace A. Yundt,
Edwin Shalter,	T. H. Garrigues,
J. George Seltzer,	William P. Bard,
J. Warren Tryon,	Wm. L. Guinther,
Matthias Mengel,	J. H. Jacobs,
E. H. Shearer,	D. E. Schroeder,
Horace Roland,	E. White Moore,
Garret B. Stevens,	F. Leaf Smith,
M. L. Montgomery,	Wm. B. Schoener,
J. S. Livingood,	J. G. Hawley,
H. C. G. Reber,	Geo. F. Baer,
R. L. Jones,	Samuel L. Young,
Wharton Morris,	J. Lawrence Getz,
J. D. Schoener,	A. B. Wanner,
Henry Van Reed,	Wm. M. Goodman,
H. Willis Bland,	Louis Richards,
J. B. Wanner,	Geo. J. Eckert,
Henry Rhoads,	J. Ross Miller,
J. D. Davis,	Edgar M. Levan.

THE JUDICIARY.

The following is the minority report of Ex-chief Justice Geo. W. Woodward, a member of the Committee on the Judiciary of the Constitutional Convention:

Of the Judiciary.

Section 1. The judicial power of this commonwealth shall be vested in a supreme court, in circuit courts, in courts of common pleas and district courts, in courts of oyer and terminer and general jail delivery, in courts of quarter sessions of the peace, in orphans' courts, in justices of the peace, and in such other courts as the Legislature may from time to time establish.

Sect. 2. The judges of all the above named courts of record, and of such other courts of record as the Legislature may establish, shall be appointed by the governor, by and with the advice and consent of the Senate. They shall be men of good moral character, learned in the law, who have attained the age of thirty years, and who have had at least five years' practice in some of the courts of record of this commonwealth. The said judges shall appoint clerks for their respective courts, and exact adequate security for a faithful discharge of duties, and all necessary criers and tipstaves; but it shall not be competent for the Legislature to impose upon said judges the choice or election of any other officers, commissioners, inspectors, superintendents or other agents, whether civil, municipal, or corporate, nor to assign to said judges, or any of them, any extra judicial duties whatever; and said judges shall hold no other office, whether Federal, State, municipal or corporate; nor receive any fees, rewards, perquisites, emoluments, or travelling expenses, whilst holding and exercising the office of judge of any of the aforesaid courts. The General Assembly may for cause, entered upon their journals, upon due notice and opportunity of defence, remove from office any judge, upon concurrence of three-fourths of all the members elected to each House. Associate judges not learned in the law, shall be continued upon the bench of the Common Pleas until the expiration of their respective commissions, and thereafter the said office shall be and remain abolished.

Of the Judges of the Supreme Court.

Sect. 3. The judges of the Supreme Court, until otherwise ordered by law, shall consist of five; shall hold their offices for the term of fifteen years, if they shall so long behave themselves well; the oldest in commission shall be the chief justice of said court, and three of their number shall be necessary to constitute a quorum. They shall be paid a salary to be fixed by law, which shall be larger than the salary of any other judicial officer of the State, and which shall not be diminished by taxation or otherwise, during their continuance in office. They shall be justices of oyer and terminer, with the powers of committing magistrates in every county of the commonwealth; and one or more of their number may be empowered by law to hold courts of oyer and terminer in any county, and to try civil issues which they may order in any cause depending before them, but the Court of Nisi Prius, as now established by law, is abolished. The original jurisdiction of the Supreme Court shall not be extended by the Legislature to any cases except *habeas corpus, quo warranto, mandamus*, and revenue cases, in which the commonwealth is a party in interest; and the court may exercise its original jurisdiction in such cases, by one of its number, but shall sit in banc for the hearing of causes that come up by writs of error or appeal, at such one place as the Legislature may fix by law; and the judges of said court shall reside at the place so fixed, but may, for adequate reasons, adjourn its sessions for a single term, or less than a term, to any other suitable and convenient place. The jurisdiction and process of this court shall extend throughout the State.

Of the Circuit Courts.

Sect. 4. The Legislature shall, at its first session after this constitution takes effect, erect the several counties of the State into a convenient number of circuits, not exceeding twelve; each circuit to consist of contiguous or adjacent counties, and to be as nearly equal in population and legal business as may be possible; and for each of said circuits the governor shall, by and with the advice and consent of the Senate, appoint a circuit judge; and the said circuit judge shall, during his term of office, reside within the circuit for which he was appointed, shall hold his office for the term of twelve years, if he shall so long behave well, and shall receive a salary, to be fixed by law, at less than the salary of a judge of the Supreme Court, but more than the salary of a judge of the Court of Common Pleas or District Court, but which salary shall not be diminished, by taxation or otherwise, during his continuance in office.

The Circuit Court, in each circuit, shall consist of the said circuit judge as its presiding officer, and of all the law judges within the circuit. They shall arrange for holding as many terms of court in banc each year, as the business may require. The terms of the court in banc shall be held in any county of the circuit as the court may appoint, and shall be held by any five of the judges of the circuit as they may agree among themselves; and of the number holding a term in banc, three shall be a quorum. If the circuit judge is unable, for any cause, to preside at a term in banc, the judge whose commission is oldest, of those holding the term, shall preside.

The said Circuit Court shall have no original, but only an appellate jurisdiction. All civil cases in law or equity, decided by the courts of common pleas or the district courts, or in any of the courts of civil jurisdiction, that may be created by law, shall be removable by way of appeal, into the proper Circuit Court, under such regulations as may be prescribed by law; and the evidence upon which the inferior court rendered its decree or judgment, shall be fully certified, if required by either party, into the Circuit Court, by the judge who rendered the decree or judgment; and thereupon the Circuit Court shall, after due hearing and consideration, affirm, modify, or reverse the said decree or judgment. If a new trial be awarded as part of the judgment of the Circuit Court, the same may be had before the judge who tried the cause, or before the circuit judge in the same county, or any other county of the circuit, as the court may appoint; and the same cause may come again before the Circuit Court for review, and when a final judgment or decree shall be entered by the Circuit Court, the same shall conclude the rights of all parties to the record, unless the said Circuit Court, or one of the judges who sat at the hearing, shall allow a writ of error to remove the cause into the Supreme Court; and if such allowance be made, a writ of error shall issue out of the Supreme Court to the said Circuit Court, and be proceeded in as in other cases. Whenever the Supreme Court, in any case, shall award a writ of *venire facias de novo*, the new trial shall be had in the court where the cause originated, and shall be again re-

movable into and reviewable by the Circuit Court, as in other cases, with right to a second writ of error, if allowed, as aforesaid. In no case shall a judge of the Circuit Court take part in the decision of a cause tried before him in the Common Pleas or District Court, though he may sit at the argument as an assessor.

The circuit judge, besides performing the duties of president of the Circuit Court, may hold special courts, criminal or civil, in any county of his circuit, under such regulations as may be prescribed by law; and all motions for new trial, or in arrest of judgment, in criminal cases tried in the Court of Oyer and Terminer, shall be removable, by way of appeal, into the Circuit Court, under such regulations as may be prescribed by law; and the judgment of the Circuit Court, in such cases, shall be conclusive and final.

The Circuit Court shall be a court of record, and have a seal such as the Legislature may prescribe, and the lien of its decrees and judgments shall be regulated by law.

OF THE COURTS OF COMMON PLEAS AND DISTRICT COURTS.

SECT. 5. The courts of common pleas and district courts shall remain as now established, until otherwise ordered by law. The judicial districts shall be rearranged by the Legislature, so as to equalize the labors of the law judges as nearly as may be, and to bring the law judges of the several districts within the proper circuits: and if any additional judges shall be provided for by law, they shall be appointed in the manner herein prescribed. The jurisdictions of the courts of common pleas and of the district courts shall remain as they now are, except in counties where the jurisdiction of the Orphans' Court may be vested in courts of probate. The judges of the district courts shall be appointed for the term of ten years, and shall have the same jurisdiction in equity cases as may belong, for the time being, to the courts of common pleas. The judges of the courts of common pleas shall be appointed for the term of ten years, and shall be justices of oyer and terminer, and of the courts of quarter sessions of the peace, with the powers of committing magistrates.

OF PROBATE COURTS.

SECT. 6. In counties whose population shall exceed one hundred thousand, the Legislature may establish courts of probate, to consist of one or more judges, who shall be learned in the law, appointed in the manner hereinbefore provided for other judges, whose term of office shall be ten years, if they so long behave themselves well, and whose salaries shall be fixed by law.

The said courts of probate, when established, shall exercise all the jurisdictions and powers now vested in the Orphans' Court, the Register's Court, and the register for probate of wills and granting letters of administration; and thereupon the jurisdiction of the Common Pleas, in Orphans' Court proceedings, shall cease and determine, and the Register's Court, and the office of register of wills and granting letters of administration, shall be abolished.

SECT. 7. The several courts of probate shall appoint all necessary clerks, to be paid a salary fixed by law, shall have a seal, and be a court of record; but all auditing of accounts filed in said courts, shall be performed by the judges and clerks thereof, without expense to parties, except where all parties in interest in a pending proceeding, shall nominate an auditor, whom the court may, in its discretion, appoint; and in such case, the auditor's fees shall be paid by the parties

All proceedings of said courts of probate shall be removable into the Supreme Court for review, by appeal or *certiorari*, as the Supreme Court may prescribe.

Register of Wills, Philada.

In the matter of the LAST WILL OF FRANCIS SMITH, deceased.

The regular practice, when the Register's Court wishes to have additional testimony upon any point of a case before them, is to refer the matter back to the *examiner*, to take such additional testimony, and report the same to the court.

Opinion by WM. M. BUNN, Register of Wills. Delivered April 15th, 1873.

Upon the 21st of April, 1871, a paper, purporting to be the last will of Francis Smith, deceased, and bearing date August 26th, 1864, was offered for probate before me. Together therewith, there were offered a paper purporting to be a codicil thereto, bearing date April 17th, 1868, and a paper purporting to be a re-publication of said will and codicil, bearing date June 21st, 1870. The said papers were duly admitted to probate before me, as the last will, and codicil thereto, and the re-publication of the same, of the said Francis Smith, deceased, and letters testamentary thereon were regularly granted, no *caveat* against the admission to probate of said papers, nor against the grant of letters testamentary having been filed. Afterwards, to wit, November 15th, 1871, an appeal from the decision of the register admitting said papers to probate, was entered by Sarah Smith Morgan and Henry F. Smith, children of the decedent, and asking that an issue might be granted to try the validity of said papers. This appeal was heard before the Register's Court, which, upon the 22d of March, 1873, rendered a decree in the following words:

"And now, March 22d, 1873, this case having been heard and argued by counsel, after due consideration thereof, the appeal is sustained, and the instrument of writing purporting to be the last will and codicil of the decedent, and the re-publication thereof, is remitted to the register of wills, with instructions to take further proof of said alleged re-publication."

(Signed) WM. S. PEIRCE.

The decree is so worded, that I am unable to ascertain its full extent. The appeal being "sustained," the presumption would be that the probate of the will, codicil and re publication were set aside, and that the letters testamentary were vacated, and I was at first inclined to think that the court so intended, since the "instrument of writing purporting to be the last will and codicil of the decedent, and the re-publication thereof," were remitted to me by the court; but upon further examination of the decree, together with the opinion of the court, I have concluded that the court, instead of regularly referring the matter back to the examiner to take additional testimony as to the re-publication, preferred to remit it to the register for that purpose. I am confirmed in this view, since the court declare that "it would not be proper to consider at this time the other question of the mental capacity of the alleged testator to make a will, as the further proof to be taken by the register may give a new direction to the proceeding, or may otherwise have a bearing on the questions involved in the case." The court evidently desire to have fuller information as to said re-publication before setting aside the probate of said will, codicil and re-publication, and I have accordingly, at the suggestion of the court, taken additional testimony of said re-publication, and I hereby refer the said additional testimony, together with the said will, codicil and republication thereof, back to the court, for their further action thereon. From the testimony taken before me as to said re-publication, it appears to me that the testator, at the time of said re-publication, expressly authorized the signing of his name by Mr. Edward Olmsted, in his presence, and that at the doing thereof, he was of sound, disposing mind, memory and understanding; and I see no reason for setting the probate of any of the said papers aside, or for vacating the letters testamentary thereon granted.

After the decree of the Register's Court had been rendered, the appellants filed with me a formal *caveat* against the admission to probate of any of said paper writings, and a request to me to direct a precept for an issue to the Court of Common Pleas, for the trial of the matter of fact touching the validity of said writings. As the whole matter is still before the Register's Court, upon this reference back to them, it is unnecessary for me to take any action upon said request.

Geo. Biddle and *Geo. W. Biddle, Esqs.*, for will.

F. C. Brewster, Jr., W. N. Ashman, Esqs., and *Hon. F. Carrol Brewster*, contra.

Recent Decisions.

Head notes of decisions by the Supreme Court of New Hampshire, to appear in vol. 51, N. H. Reports. (Received from John M. Shirley, Esq., State Reporter.)

NEW HAMPSHIRE.

AGENCY.

1. A travelling merchant, who is authorized to sell all the goods of his principal that he can sell, within his business circuit, on a commission of ten per cent., is to be regarded as the general agent of his principal, and clothed apparently with the power of fixing the price, and the time and mode of the delivery of the goods, and the payment of the price, unless a different usage in such trade be shown. Daylight Burner Co. v. Odlin, 56.

2. And third persons will not be affected by a limitation on his authority, which is not brought to their notice, or in relation to which they are not put upon inquiry. Ib. 56.

3. Therefore, when such agent has sold goods on credit, which are forwarded by his principal by express, and marked "cash on delivery," the expressman, having no notice of any limitation of the agent's authority, may, upon the order of the agent, deliver the goods without pay ment of the price. Ib. 56.

4. It was *held*, also, that whether the entry of "cash on delivery" put the expressman on inquiry, was a proper question for the jury. Ib. 56.

5. Ordinarily, the cashier of a bank has no authority to discharge its debtors without payment, or to bind the bank by an agreement that a surety should not be called upon to pay the note he had signed, or that he would have no further trouble from it. Cochecho Nat. Bk. v. Haskell, 116.

6. If, upon inquiry by the surety, the cashier, knowing that he is a surety, inform him that the note is paid, intending that he should rely upon his statement, and the surety does so, and in consequence changes his position by giving up securities, or endorsing other notes for the same principal, or the like, the bank will be estopped to deny that such note is paid. Ib. 116.

7. The suggestion of the defendants' counsel, at the first trial of this cause, that a decision of the questions of law then raised would end the case, was held, on a second trial of the cause, not to have the character of the agreement which the court could specifically enforce. Ib. 116

8. Where a suit is brought by an attorney of this court in regular standing, his authority will be presumed until the contrary is shown. Lisbon v. Holton, 209.

PUBLICATIONS RECEIVED.

REPORT OF THE EXAMINATION OF LAW STUDENTS FOR ADMISSION TO THE BAR IN THE SUPREME COURT OF ILLINOIS, at the January Term, 1873, containing all the Questions propounded by the Examiners, the Answers of the Students, the Remarks of the Judges, the Final Determination of the Court, together with the Rules of Court Regulating the Admission of Attorneys. By Myra Bradwell. 8 vo., pp. 98. Chicago, Legal News Co., 1873. Price $1.00.

A very useful work for students, lawyers and judges. Our Board of Examiners would, no doubt, find it profitable to read it.

LEROI'S WALTZ (piece of music.) Sep. Winner & Son, Publishers, Philadelphia.

THE DENTAL COSMOS, for April, 1873, edited by James W. White, M. D., D. D. S.

SCRIBNER'S MONTHLY, for May, 1873, is an excellent number, containing several very agreeable articles, some of them being illustrated. Scribner's, in our opinion, is one of the best monthly magazines published in this country, being far ahead of Harper's, and better even than our own Philadelphia Lippincott.

Acts of Assembly—1873.

An act in relation to bonds of indemnity given to the sheriff of the city and county of Philadelphia, in his official capacity, for executing writs.

SECT. 1. Be it enacted, &c. That hereafter, all bonds given to the sheriff of the city and county of Philadelphia, in his official capacity, as indemnity for executing writs of replevin, foreign, domestic, and other attachments, and all other bonds of indemnity given in any cause, shall be justified before the judge of the proper court, and approved by said judge; and when the prothonotary shall certify said justification and approval to the sheriff, shall become the property of the successful party in the original suit, without recourse to the sheriff, who may have executed said process, or received said bond as indemnity.

Approved 10th April, 1873.

Legal Gazette.

REPORTS OF CASES

DECIDED IN THE

UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA; THE SUPREME COURT OF PENNSYLVANIA AT NISI PRIUS; THE DISTRICT COURT, COURTS OF COMMON PLEAS, QUARTER SESSIONS, OYER AND TERMINER AND ORPHANS' COURTS OF PHILADELPHIA;

AND IN THE COURTS OF THE THIRD, EIGHTH, NINTH, ELEVENTH, TWELFTH, TWENTY-SIXTH, TWENTY-EIGHTH, AND TWENTY-NINTH JUDICIAL DISTRICTS OF PENNSYLVANIA.

Originally Reported in the Legal Gazette,

From July 2, 1869, To January 5, 1872, inclusive.

BY JOHN H. CAMPBELL.

VOL. 1. JUST ISSUED.

The cases selected embrace a great variety of topics, concerning matters of law and practice in the Pennsylvania Courts.

The titles, City of Philadelphia, Equity, Equity Practice, Guardians, Orphans' Court Practice, Practice, Patents, are particularly full; while upon the titles Criminal Law, Criminal Practice, Husband and Wife, Construction of Wills, Admiralty, Wills, Landlord and Tenant, Executors and Administrators, Railroad Companies, Tax and many others, there is much valuable information.

These reports can now be obtained from no other source, as many of them were *exclusively* published in the Legal Gazette, a complete file of which cannot now be furnished.

The exhaustion of many of the numbers of the Gazette, and the repeated requests to publish the Philadelphia Cases separate in book form, have led the publishers to issue this volume of the

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The Legal Gazette Reports contains Opinions by the following Judges:

HON. WILLIAM MCKENNAN,
U. S. Circuit Court.

HON. JAMES THOMPSON,
Chief Justice, Supreme Court, Penna.

HON. JOHN M. READ,
Associate Justice, Supreme Court, Penna.

HON. DANIEL M. AGNEW,
Associate Justice, Supreme Court, Penna.

HON. GEORGE SHARSWOOD,
Associate Justice, Supreme Court, Penna.

HON. JAMES LYND,
Associate Judge, Phila. District Court.

HON. JOSEPH ALLISON,
President Judge, 1st Judicial District, Pa.

HON. JAMES R. LUDLOW,
Associate Judge, 1st Judicial District, Pa.

HON. WILLIAM S. PEIRCE,
Associate Judge, 1st Judicial District, Pa.

HON. E. M. PAXSON,
Associate Judge, 1st Judicial District, Pa.

HON. THOMAS K. FINLETTER,
Associate Judge, 1st Judicial District, Pa.

HON. F. CARROLL BREWSTER,
Associate Judge, 1st Judicial District, Pa.

HON. A. B. LONGAKER,
President Judge, 3d Judicial District, Pa.

HON. ALEXANDER JORDAN,
President Judge, 8th Judicial District, Pa.

HON. JAMES H. GRAHAM,
President Judge, 9th Judicial District, Pa.

HON. GARRICK M. HARDING,
President Judge, 11th Judicial District, Pa

HON. E. L. DANA,
Associate Judge, 11th Judicial District, Pa.

HON. JOHN J. PEARSON,
President Judge, 12th Judicial District, Pa.

HON. WILLIAM ELWELL,
President Judge, 26th Judicial District, Pa.

HON. JOHN TRUNKEY,
President Judge, 28th Judicial District, Pa.

HON. JAMES GAMBLE,
President Judge, 23th Judicial District, Pa.

RECOMMENDATIONS.

From HON. JAMES THOMPSON,
Chief Justice, Supreme Court, Pa.

"I have examined the Legal Gazette Reports which you did me the favor to send me, with great satisfaction. It is well gotten up, and neatly printed and bound. The variety of matter contained in it, emanating indiscriminately from courts in every portion of the State, renders the volume useful in every section to both lawyers and judges, and to them I cheerfully commend it." March 1st, 1872.

From HON. WM. S. PEIRCE,
Court of Com. Pleas, and Orphans' Court, Phila.

"It is presented to the public in good style, and so far as I have had opportunity to examine my own decisions, they are accurately reported, and the syllabi are concise and correct, and I am sure from the known ability of the Reporter, that they are so with respect to the other decisions."
Philada., March 1st, 1872.

From HON. JAMES LYND,
District Court, Phila.

"I have received and examined with interest and pleasure the first volume of Legal Gazette Reports. It contains much valuable matter, carefully edited and handsomely published. As multitudinous as the decisions of the Supreme Court seem to be, the number of quite important points that never reach that tribunal is very large; and the early publication, therefore, of cases disposed of in the courts of first resort is greatly to be commended. Permit me to express a hope that the Legal Gazette Reports will prove as profitable to the publishers as it will be serviceable to the bar and judiciary of our State." Philada, March 2d, 1872.

From HON. JOSEPH ALLISON,
President Judge 1st Judicial District, Pa.

"The work is in all respects most creditable to its Editor and Publishers, not only as to its external merit, but as a valuable addition to the reports of decided cases. The work affords abundant evidence of great care in its preparation, and is every way worthy of a favorable reception by the legal profession." Philadelphia, Feb. 23d, 1872.

From HON. THOS. K. FINLETTER,
Common Pleas and Orphans' Courts, Phila.

"I have examined volume one, Legal Gazette Reports, and am much pleased with the execution of the work. Many of the cases contained therein are familiar to me, as being argued and determined in the courts in which I sit, and I can testify to the fidelity and accuracy with which they are reported. I think that the volume will be a valuable addition to the Pennsylvania Reports." Philadelphia, March 21st, 1872

From HON. JAMES RYON.
President Judge 21st Judicial District, Pa.

"I have examined this volume with great pleasure. The volume is neatly gotten up and the other work executed in fine style. It contains a large number of legal decisions both of the Common Pleas and Supreme Courts which can be found in no other work, and is essential to every law library." Pottsville, Pa., March 4th, 1872.

From HON. JOHN TRUNKEY,
President Judge 28th Judicial District, Pa

"I have received and examined the volume of Legal Gazette Reports, and believe the work will prove very useful to the profession. I have preserved a file of the Legal Gazette, for its reports of cases, but would not be without this volume, which is so much more convenient for reference. The work is highly creditable to the Reporter and Publishers. It seems to contain so much information upon questions of practice, that, I think no practitioner can afford to be without it." Mercer, Pa., March 7th, 1872.

From HON. HENRY W. WILLIAMS,
President Judge 4th Judicial District, Pa.

"I have given some time to an examination of it, and am of opinion that in variety of matter and general interest to the profession, it is fully equal to any volume of our authorized reports. This is due in great degree to the exercise of judgment in the selection of cases." Wellsboro, Pa., April 25th, 1872.

From HON. JAMES T. MITCHELL,
District Court, Phila

"The volume is handsomely got up, and to those who have not a full set of the Legal Gazette will be necessary to complete the Pennsylvania series. and the bar will buy it with a good grace even in this day of multiplied reports, as it contains only cases that have not been elsewhere reported." Feb. 23d, 1872.

From HON. B. F. JUNKIN,
President Judge 9th Judicial District, Pa.

"I am convinced of its great value to the profession. It contains many decisions, involving questions which seldom reach the regular State Reports. You have done much for the bar and bench and they owe you a reward. The volume is neat and accurate." Bloomfield, Pa., April 2d, 1872.

From HON. A. W. ACHESON,
President Judge 27th Judicial District, Pa.

"It is replete with valuable information, and I think must be favorably received by the profession." Washington, Pa., April 6th, 1872.

From HON. J. B LIVINGSTON,
President Judge 2d Judicial District, Pa.

"I have carefully examined the 1st vol., "Legal Gazette Reports." The matter contained therein, taken as it is from the decisions and practice of different courts throughout the State, will render this work indispensable to the practicing attorney as well as the judiciary. The book is well gotten up, neat in appearance, the syllabi accurate and index complete. I have no doubt it will soon find a place in the library of every practising attorney in the Commonwealth." Lancaster, Pa., April 8th, 1872.

From HON. J. C. BUCHER,
President Judge 20th Judicial District, Pa.

"From the examination I have made, I am convinced that they (the Reports) will be of great value to the practitioner and indispensable to all who desire a complete record of all the Pennsylvania cases." Lewisburg, Pa, March 10th, 1872.

From HON. HENRY P. ROSS,
President Judge 7th Judicial District, Pa.

"The volume has so much to commend it, both in its external appearance as a book, with regard to paper, type and general typographical execution, and in the great practical utility of its contents, that any expression of individual opinion as to its merits seems to be superfluous. I hope it will be the first of a series, and that its successors will present as many valuable cases as carefully edited as this initial volume. Such a series will be an indispensable element in the library of every lawyer." Norristown, Pa., March 22d, 1872.

From HON. JAMES A. LOGAN,
President Judge 10th Judicial District, Pa.

"To me this seems an exceedingly valuable volume. Its decisions must prove of great assistance to both bench and bar, throughout the State. I regard as the peculiar excellence of these reports the class of well considered "lower court" decisions, which aside from their great aid to the profession must so largely tend to establish a most desirable uniformity of practice in the different districts in the State." Greensburg, Pa., March 28th, 1872.

From HON. SAML. A. GILMORE,
President Judge 14th Judicial District, Pa.

"I was so well satisfied of the value of the cases reported in the Legal Gazette, that I took care to file away that paper as it came to hand. This was inconvenient for reference, but is now obviated by the Legal Gazette Reports. Most of the cases are important and so well elaborated as to make them quite satisfactory. To a judge who has something to do with all the jurisdictions, the book is very convenient and to the bar we would suppose almost indispensable." Uniontown, Pa., March 27th, 1872.

From HON. WM. ELWELL,
President Judge 26th Judicial District, Pa.

"Your plan of preserving cases originally appearing in the Legal Gazette, by the publication of them in book form, will I have no doubt be very acceptable to the profession. The first volume of the Legal Gazette Reports is well executed, and will be found to be an indispensable adjunct to the library of every practicing lawyer in the State." Bloomsburg, Pa., March 7th, 1872.

From HON. JAMES R. LUDLOW,
Common Pleas and Orphans' Courts, Phila.

"Every valuable contribution to our legal literature ought to be a gratification to the profession, for additional knowledge is thereby contributed to the common stock, and is preserved for future use. Your volume contains many important cases, carefully selected, and must be of great service to the profession. Practical experience teaches me the worth of this publication, and its real value should secure for it an extended circulation." Philadelphia, April 13th, 1872.

From HON. THOS. H. WALKER,
Judge 21st Judicial District, Pa.

"I must express my satisfaction with the volume. The entire work does credit to the taste and ability of the reporter; the type is neat, the decisions are carefully arranged and accurately indexed. There are many important opinions collected in the book, and the legal profession will find it a valuable addition to our Supreme Court reports. The chief merit of the Legal Gazette is not only to furnish an early publication of the decisions of the Supreme Court, but also to embrace in a permanent form those of the Common Pleas Judges of our State for constant reference and easy access. The work has been successfully commenced and its continuance is essential to the labor of the bench and bar." Pottsville, Pa., April 13th, 1872.

From HON. SAML. S. DREHER,
President Judge 22d Judicial District, Pa.

"I am much pleased with these reports. They contain much valuable information, and from the high character of the judges whose opinions are reported, I feel safe in following them. The book is well printed, well bound, and so far as I have been able to read it since my return home, I find the syllabi full and accurate." Stroudsburg, Pa., March 26th, 1872.

From HON. GARRICK M. HARDING,
President Judge, 11th Judicial District, Pa.

"In point of mechanical execution the Legal Gazette Reports are not surpassed by any modern legal publication, and in point of useful service to the profession, the Reporter and the Publishers have done a work in every way praiseworthy." Wilkes Barre, Pa., March 2, 1872.

From HON. JOHN DEAN,
President Judge 24th Judicial District, Pa.

"Some copies of the paper have been lost or mislaid, in which were reports of cases of great value to me, and just as I was thinking of writing to you, to ascertain if you could replace them, your present valuable work is received." Hollidaysburg, Pa., March 8th, 1872.

From HON. E. M. PAXSON,
Common Pleas and Orphans' Courts, Phila.

"Its mechanical execution reflects much credit upon Messrs. King & Baird, the printers, whilst your own industry and care in the arrangement and report of the cases are equally apparent. I regard your book as a valuable addition to the library of every lawyer, and trust it will meet with such success as to make its continuation a certainty." Philadelphia, May 1st, 1872.

From HON. A. B. LONGAKER,
President Judge 3d Judicial District, Pa.

"The cases are well selected and important. It is a most valuable volume for the bench and bar, and very deservedly so as regards various points of practice. Every practitioner ought to have it." Allentown, Pa., April 20th, 1872.

From The Press, Philadelphia, Feb. 29th, 1872.

[Written by Dr. R. Shelton Mackenzie, the celebrated literary editor.]

"LAW LITERATURE.

In the *Legal Gazette*, from July 1869 to January, 1872, appeared numerous cases, decided in the Federal, State, and city courts in Philadelphia, and in the courts of several of the judicial districts of Pennsylvania. Mr. John H. Campbell, editor of the *Legal Gazette*, who reported these cases, has collected them into a handsome volume of 588 pages octavo. Most of them are now first placed in this permanent form, and many were exclusively reported for the *Gazette*. A great many important subjects are to be found here. A syllabus to the opinions delivered in each case, with a table of cases, lists of opinions and judges, and a full and clear index combine to make this volume, entitled "Legal Gazette Reports," of the greatest value to the profession; it is the first of a series from the same reliable source by the same competent editor. The work has been in a manner made historical by the arrangement of the opinions according to the dates of their delivery. In two cases, of great importance and interest, the charges to the jury are given in full. One of these is the notorious poison case, the Commonwealth v. Schoeppe, in the Ninth Judicial district of Pennsylvania, before Judge James H. Graham, June 3d, 1869; the other is the Middleton Will Case, Otterson et al. v. Middleton, in the Court of Common Pleas, Philadelphia, before Judge Ludlow, charge to the jury delivered December 15th, 1871. Accompanying the latter is a fac-simile, by a new process of photo-printing, of the six signatures of the testator, Edward P. Middleton, including the one alleged to be a forgery, but declared to be authentic by the verdict of the jury. The trial, it may be remembered, excited much interest, and continued from November 14th to December 15th, 1871. Among other cases of considerable interest here is the decision of the Supreme Court, delivered by Judge Sharswood, on the 30th of last December, on the claim of Miss Burnham to vote at the general election in Philadelphia last October, when it was legally declared that women are not entitled to vote in Pennsylvania. Several important patent cases are reported in this volume, and among other subjects are the dissolution of the old Volunteer Fire Department, the right to tax national bank stocks, the invalidity of the water-reservoir ordinance, the liability of passenger railway companies for street repairs, the House of Correction dispute, and many cases upon wills and Orphans' Court practice of value to both city and country lawyers. The cases reported clearly and fully have been judiciously selected, and in each instance, the preliminary statement is a condensed view of the main facts in each case."

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in May, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

Mar. 28, John B. Wagner et al., Executors of MARIA WAGNER, dec'd.

" 29, Peter Martin, Administrator of WILLIAM B. SMITH, dec'd.

" 29, William Badger, Executor of EDWARD R. BADGER, dec'd.

" 31, John Markle et al., Executor of GEO. MARKLE, dec'd.

April 2, Abraham D. Harley, Administrator of WASHINGTON RUMMEL, dec'd.

" 3, J. P. Robinett et al., Executors of G. HERMAN ROBINETT, dec'd.

" 3, Samuel White et al., Executors of LAETITIA G. RYAN, dec'd.

" 3, John McCormick, Guardian of MARY and FRANCIS McCORMICK, Minors.

" 4, Bridget T. O'Keefe, Administratrix of PATRICK O'KEEFE, dec'd.

" 5, Marmaduke C. Cope, Administrator of SARAH W. COPE, dec'd.

" 5, David T. Trites, Executor of NICHOLAS CONNELL, dec'd.

" 5, James S. Watson, Administrator of HENRIETTA RUSSELL, dec'd.

" 7, Jos. W. Mathers, Executor of EMMA BOCKIUS, dec'd.

" 8, Ed. Waln et al., Executors of S. MORRIS WALN, dec'd.

" 8, Ann Hoffner, Administratrix of SARAH HUNTLEY, dec'd.

" 9, Elias T. Hall, Administrator of JOHN B. EDWARDS, dec'd.

" 9, Wm. McKnight, Administrator of ELEANOR ANDREWS dec'd.

" 10, Henry P. Borie et al., Executors of MARIA LEECH, dec'd.

" 10, Daniel McShane, Administrator of CORMICK GALLAGHER, dec'd.

" 14, Eliza S. Dingee et al., Executors of CHARLES DINGEE, dec'd.

" 14, Sarah McCartney, Administratrix of PETER McCARTNEY, dec'd.

" 14, James Campbell et al., Executors of HUGH O'DONNELL, dec'd.

" 16, Penna. Ins. on Lives, &c., Executors and Trustees under the will of D. C. FULTON, dec'd.

" 17, Jacob Apple, Administrator of ELIZA APPLE, dec'd.

" 18, James E. Brown, Administrator of JANE BROWN STEWART, dec'd.

" 18, James H. Heverin, Administrator d. b. n. c. t. a. of THOMAS RYAN, dec'd.

" 19, John D. Engle, Executor of RACHEL ENGLE, dec'd.

" 19, Louisa Enger, Administratrix of WILLIAM ENGER, dec'd.

" 21, Margaret Stewart, Administratrix of GEORGE STEWART, dec'd.

" 21, William C. Stevenson, Administrator c. t. a. of ROBERT D. CLIFTON, deceased.

" 22, Mary C. Halderman, Administratrix of ELIZA JANE HOWARD, dec'd.

" 23, Charles W. Gesemyer, Guardian of MARGARET L. SCHNIDER, late Minor.

" 23, Henry C. Kellog, Executor of CONRAD KNIPE, dec'd.

" 23, J. Lowber Welsh et al., Executors of AUGUSTINE CASAMAJIR DE TRENARD, dec'd.

April 23, T. Frank Cooper, Administrator of JOSEPH COOPER, dec'd.

" 23, Christiana B. Sorber et al., Executors of MARY A. SORBER, dec'd.

" 23, John T. Fenton, Executor of MARGARET R. ROBB, dec'd.

" 23, Mary A. Barton, Administratrix c. t. a. of JOSEPH BARTON, dec'd.

" 23, Wm. Nuenemann, Administrator of CAROLINE ELIZABETH KRAEMER, dec'd.

" 23, William Morgan, Executor and Trustee of MARGARET D. SCHRYER, deceased.

" 23, Isaac F. Baker et al., Executors, and Isaac F. Baker, Trustee, under the last will of ANN MARIA ELLIOT, dec'd.

" 24, Ann B. West et al., Executors of JOHN H. WELSH, dec'd.

" 24, J. Ringgold Wilmer, Adm'r d. b. n. of J. C. A. MARLOT, dec'd.

" 24, Frank M. Naglee, Adm'r d. b. n. of ELLEN NAGLEE, dec'd.

" 24, Frank M. Naglee, Executor of ANN E. ROOD, dec'd.

" 24, Anna Teufel, Admin'x of JOSEPH TEUFEL, dec'd.

" 24, Jos. S. Riley, Adm'r of BENJAMIN S. RILEY, dec'd.

" 24, Kitty M Pepper et al., Executors of GEO. PEPPER, M. D., dec'd.

" 24, Jane P. Fales, Administratrix of OLIVER FALES, dec'd.

" 24, J. Granville Leach, Adm'r d. b. n. of OLIVER FALES, dec'd.

" 24, Horatio Gates Jones, Exec'r of REV. JOHN S. JENKINS, dec'd.

" 24, Horatio Gates Jones, Executor of HETTY ANN JONES, dec'd.

" 24, W. Henry Sutton, Administrator of NELLIE A. SMITH, dec'd.

" 24, W. Henry Sutton, Administrator of CHARLES J. SMITH, dec'd.

" 24, Israel H. Johnson et al., Executors of THOS. P. HOOPES, dec'd.

" 24, Solomon Rothschild, Guardian of ARNOLD'S Minors.

WILLIAM M. BUNN,
Register.

apr 25-4t

Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, MAY 2, 1873. No. 18.

PRINTED EVERY FRIDAY,
BY KING & BAIRD,
607 and 609 Sansom Street,
PHILADELPHIA.

ONE COPY FOR ONE YEAR, THREE DOLLARS.

Supreme Court, United States.

THE CLEVELAND, PAINESVILLE, AND ASHTABULA R.R. CO., Plaintiff in Error, v. THE COMMONWEALTH OF PENNSYLVANIA.

1. The power of taxation of a State is limited to persons, property, and business within its jurisdiction. All taxation must relate to one of these subjects.
2. Bonds issued by a railroad company are property in the hands of the holders; and when held by non-residents of the State in which the company was incorporated, they are property beyond the jurisdiction of that State. A law of Pennsylvania, passed on the 1st of May, 1868, which requires the treasurer of a company, incorporated and doing business in that State, to retain five per cent. of the interest due on bonds of the company, made and payable out of the State to non-residents of the State, citizens of other States, and held by them, is not, therefore, a legitimate exercise of the taxing power of the State. It is a law which interferes between the company and the bondholder, and, under the pretence of levying a tax, impairs the obligation of the contract between the parties.
3. The exemption from taxation by the State of Pennsylvania, of bonds thus issued to and held by non-residents of that State, citizens of other States, is not affected by the fact that the bonds are secured by a mortgage, executed simultaneously with them, upon property situated in that State. A mortgage there, though in the form of a conveyance, is a mere security for a debt, and transfers no estate in the mortgaged premises. It simply creates a lien upon them, and only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce the payment of his demand. This right has no locality independent of the party in whom it resides.
4. The tax laws of a State can have no extra-territorial operation; nor can any law of a State, inconsistent with the terms of a contract made with or payable to parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents of the State.

In error to the Supreme Court of the Commonwealth of Pennsylvania. Nos. 31, 32, 33. December Term, 1872.

Mr. Justice FIELD delivered the opinion of the court:

The plaintiff in error, the Cleveland, Painesville, and Ashtabula Railroad Company, was incorporated by an act of the Legislature of Ohio, passed in 1848, and authorized to construct a railroad from the city of Cleveland, in that State, to the line of the State of Pennsylvania. Under this act, and its supplement passed in 1850, the road was constructed. By an act of the Legislature of Pennsylvania, passed in 1854, the company was authorized to construct a railroad from the city of Erie, in that State, to the State line of Ohio, so as to connect with this road from Cleveland; and also to purchase a railroad, already constructed, between those points. This grant of authority was subject to various conditions, which the company accepted, and under its provisions the road between the points designated was constructed, or the one already constructed was purchased, and connected with the road from Cleveland, so that the two roads together formed one continuous line between the cities of Cleveland and Erie. The whole road between those places was ninety-five and a half miles in length, of which twenty-five miles and a half were situated in the State of Pennsylvania, and the rest, seventy miles, were situated in the State of Ohio. The company, so far as it acted in Pennsylvania under the authority of the act of her Legislature, has been held by her courts to be a separate corporation of that State, and as such, subject to her laws for the taxation of incorporated companies. 7 Casey, 371. But there was only one board of directors, who managed the affairs of both companies as one company, and had the entire control of the whole road between Cleveland and Erie.

In 1868, the funded debt of the company amounted to two millions and a half of dollars, and was in bonds of the company secured by three mortgages: one for five hundred thousand dollars, made in 1854, one for a million of dollars, made in 1859, and one for a million of dollars, made in 1867. Each of the mortgages was executed upon the entire road from Erie, in Pennsylvania, to Cleveland, in Ohio, including the right of way, and all the buildings and other property of every kind connected with the road. The principal and interest of the bonds first issued were payable in the city of Philadelphia; the principal and interest of the other bonds were payable in the city of New York. All the bonds were executed and delivered in Cleveland, Ohio, and nearly all of them were issued to, and have been ever since held and owned by, non-residents of Pennsylvania and citizens of other States.

On the 1st of May, 1868, the Legislature of the State of Pennsylvania passed an act, entitled "An act to revise, amend, and consolidate the several laws taxing corporations, brokers, and bankers;" the eleventh section of which provides as follows: "The president, treasurer, or cashier of every company, except banks or savings institutions, incorporated under the laws of this commonwealth, doing business in this State, which pays interest to its bondholders or other creditors, shall, before the payment of the same, retain from said bondholders or creditors, a tax of five per centum upon every dollar of interest paid as aforesaid; and shall pay over the same semi-annually, on the first days of July and January, in each and every year, to the State treasurer, for the use of the commonwealth; and every president, treasurer, or cashier, as aforesaid, shall annually, on the thirty-first day of each December, or within thirty days thereafter, report to the auditor general, under oath or affirmation, stating the entire amount of interest paid by said corporation to said creditors, during the year ending on that day; and thereupon the auditor general and State treasurer shall proceed to settle an account with said corporation, as other accounts are now settled by law."

The treasurer of the company, under this act, made a report in May, 1869, showing that, during the previous year, the company had paid interest on its funded debt of two and a half millions of dollars, at the rate of seven per cent., amounting to one hundred and seventy-five thousand dollars. Upon this report, the auditor general and State treasurer "settled an account" against the company, finding that it owed to the State the sum of $2,336.50 for the tax on the interest which the company had paid.

In reaching this conclusion, these officers apportioned the interest upon the debt owing by the company, according to the length of the road, assigning to the part in the State of Pennsylvania an amount in proportion to the whole indebtedness which that part bears to the whole road. There was no law, however, in existence, at the time, directing or authorizing this proceeding.

From the settlement thus made, the company appealed, under the law of the State, to the Court of Common Pleas of one of her counties, specifying various objections to the settlement, and among others, substantially the following:

That the greater portion of the bonds of the company having been issued upon loans made and payable out of the State, to non-residents of Pennsylvania, citizens of other States, and being held by them, the act in question, in authorizing the tax upon the interest stipulated in the bonds, so far as it applied to the bonds thus issued and held, impaired the obligation of the contracts between the bondholders and the company, and is, therefore, repugnant to the Constitution of the United States, and void.

The contest in the Court of Common Pleas took the form of a regular judicial proceeding, a declaration having been filed by the attorney general on behalf of the State against the company as for a debt, and the company having joined issue by a plea of non-assumpsit and payment. The Common Pleas sustained the validity of the alleged tax against the objections of the company, and verdict and judgment passed in favor of the State. On error to the Supreme Court of the State, the judgment was affirmed, and the case is brought here for review, under the second section of the amendatory judiciary act of 1867.

The question presented for our determination is, whether the eleventh section of the act of May, 1868, so far as it applies to the interest on bonds of the railroad company, made and payable out of the State, issued to and held by non-residents of the State, citizens of other States, is a valid and constitutional exercise of the taxing power of the State, or whether it is an interference, under the name of a tax, with the obligation of the contracts between the non-resident bondholders and the corporation. If it be the former, this court cannot arrest the judgment of the State court; if it be the latter, the alleged tax is illegal, and its enforcement can be restrained.

The case before us is similar, in its essential particulars, to that of Jackson v. The Railroad Company, reported in 7th Wallace. There, as here, the company was incorporated by the Legislatures of two States, Pennsylvania and Maryland, under the same name, and its road extended in a continuous line from Baltimore in one State, to Sunbury in the other. And the company had issued bonds for a large amount, drawing interest, and executed a mortgage for their security upon its entire road, its franchises and fixtures, including the portion lying in both States. Coupons for the different instalments of interest were attached to each bond. There was no apportionment of the bonds to any part of the road lying in either State. The whole road was bound for each bond. The law of Pennsylvania, as it then existed, imposed a tax on money owing by solvent debtors, of three mills on the dollar of the principal, payable out of the interest. An alien resident in Ireland was the holder of some of the bonds of the railroad company, and when he presented his coupons for the interest due thereon, the company claimed the right to deduct the tax imposed by the law of Pennsylvania, and also an alleged tax to the United States. The non-resident refused to accept the interest with these deductions, and brought suit for the whole amount in the Circuit Court of the United States for the district of Maryland. That court, the chief justice presiding, instructed the jury, that if the plaintiff, when he purchased the bonds, was a British subject, resident in Ireland, and still resided there, he was entitled to recover the amount of the coupons without deduction. The verdict and judgment were in accordance with this instruction, and the case was brought here for review.

This court held that the tax, under the law of Pennsylvania, could not be sustained, as to permit its deduction from the coupons held by the plaintiff would be giving effect to the acts of her Legislature upon property and effects lying beyond her jurisdiction. The reasoning by which the learned justice, who delivered the opinion of the court, reached this conclusion, may be open, perhaps, to some criticism. It is not perceived how the fact, that the mortgage given for the security of the bonds in that case covered that portion of the road which extended into Maryland, could affect the liability of the

bonds to taxation. If the entire road upon which the mortgage was given had been in another State, and the bonds had been held by a resident of Pennsylvania, they would have been taxable under her laws in that State. It was the fact that the bonds were held by a non-resident which justified the language used, that to permit a deduction of the tax from the interest, would be giving effect to the laws of Pennsylvania upon property beyond her jurisdiction, and not the fact assigned by the learned justice. The decision is, nevertheless, authority for the doctrine, that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition.

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imports, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though, as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape—in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted—in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State, as to the mode, form, and extent of taxation, is unlimited, where the subjects to which it applies are within her jurisdiction.

Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression, could add anything to its obvious truth, which is recognized upon its simple statement.

The bonds issued by the railroad company, in this case, are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State. The law which requires the treasurer of the company to retain five per cent. of the interest due to the non-resident bondholder, is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and under the pretence of levying a tax, commands the company to withhold a portion of the stipulated interest, and pay it over to the State. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms, and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract, by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement. The act of Pennsylvania, of May 1st, 1868, falls within this description. It directs the treasurer of every incorporated company to retain from the interest stipulated to its bondholders, five per cent. upon every dollar, and pay it into the treasury of the commonwealth. It thus sanctions and commands a disregard of the express provisions of the contracts between the company and its creditors. It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property. It is, in fact, a forced contribution, levied upon property held in other States, where it is subjected, or may be subjected, to taxation upon an estimate of its full value.

The case of Maltby v. The Reading and Columbia Railroad Company, decided by the Supreme Court of Pennsylvania in 1866, was referred to by the Common Pleas in support of its ruling, and is relied upon by counsel in support of the tax in question. The decision in that case does go to the full extent claimed, and holds that bonds of corporations held by non-residents are taxable in that State. But it is evident, from a perusal of the opinion of the court, that the decision proceeded upon the idea that the bond of the non-resident was itself property in the State, because secured by a mortgage on property there. "It is undoubtedly true," said the court, "that the Legislature of Pennsylvania cannot impose a personal tax upon the citizen of another State, but the constant practice is to tax property within our jurisdiction which belongs to non-residents." And again: "There must be jurisdiction over either the property or the person of the owner, else the power cannot be exercised; but when the property is within our jurisdiction, and enjoys the protection of our State government, it is justly taxable, and it is of no moment that the owner, who is required to pay the tax, resides elsewhere." There is no doubt of the correctness of these views. But the court then proceeds to state, that the principle of taxation, as the correlative of protection, is as applicable to a non-resident as to a resident; that the loan to the non-resident is made valuable by the franchises which the company derived from the commonwealth, and as an investment rests upon State authority, and therefore ought to contribute to the support of the State government. It also adds, that, though the loan is, for some purposes, subject to the law of the domicile of the holder, "yet, in a very high sense," it is also property in Pennsylvania, observing, in support of this position, that the holder of a bond of the company could not enforce it except in that State, and that the mortgage given for its security was upon property and franchises within her jurisdiction. The amount of all which is this: that the State which creates and protects a corporation, ought to have the right to tax the loans negotiated by it, though taken and held by non-residents—a proposition which it is unnecessary to controvert. The legality of a tax of that kind would not be questioned, if in the charter of the company the imposition of the tax were authorized, and in the bonds of the company, or its certificates of loan, the liability of the loan to taxation were stated. The tax in that case would be in the nature of a license tax for negotiating the loan, for in whatever manner made payable, it would ultimately fall on the company as a condition of effecting the loan, and parties contracting with the company would provide for it by proper stipulations. But there is nothing in the observations of the court, nor is there anything in the opinion, which shows that the bond of the non-resident was property in the State, or that the non-resident had any property in the State which was subject to taxation, within the principles laid down by the court itself, which we have cited.

The property mortgaged belonged entirely to the company, and so far as it was situated in Pennsylvania, was taxable there. If taxation is the correlative of protection, the taxes which it there paid were the correlative for the protection which it there received. And neither the taxation of the property, nor its protection, was augmented or diminished by the fact that the corporation was in debt or free from debt. The property in no sense belonged to the non-resident bondholder, or to the mortgagee of the company. The mortgage transferred no title; it created only a lien upon the property. Though in form a conveyance, it was, both at law and in equity, a mere security for the debt. That such is the nature of a mortgage in Pennsylvania, has been frequently ruled by her highest court. In Witmer's Appeal, 9 Wright, 463, the court said: "The mortgagee has no estate in the land, any more than the judgment creditor. Both have liens upon it, and no more than liens." And in that State, all possible interests in lands, whether vested or contingent, are subject to levy and sale on execution; yet it has been held, on the ground that a mortgagee has no estate in the lands, that the mortgaged premises cannot be taken in execution for his debt. In Rickert v. Madeira, 1 Rawle, 329, the court said: "A mortgage must be considered either as a *chose in action*, or as giving title to the land and vesting a real interest in the mortgagee. In the latter case it would be liable to execution; in the former, it would not, as it would fall within the same reason as a judgment bond or simple contract. If we should consider the interest of the mortgagee as a real interest, we must carry the principle out, and subject it to a dower and to the lien of a judgment;" * * and that it "is but a *chose in action*, a mere evidence of debt, is apparent from the whole current of decisions." Wilson v. Schoenberger's Executors, 7 Casey, 295.

Such being the character of a mortgage in Pennsylvania, it cannot be said, as was justly observed by counsel, that the non-resident holder and owner of a bond secured by a mortgage in that State, owns any real estate there. A mortgage being there a mere *chose in action*, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce, by its sale, the payment of his demand. This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State, when held by a resident therein; but when held by a non-resident, it is as much beyond the jurisdiction of the State as the person of the owner.

It is undoubtedly true that the actual *situs* of personal property, which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the State in which it may be taxed. The same thing is true of public securities consisting of State bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of, and are treated as property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners.

Cases were cited by counsel on the argument from the decisions of the highest courts of several States, which accord with the views we have expressed. In Davenport v. The Mississippi and Missouri Railroad Company, 12 Iowa, 539, the question arose before the Supreme Court of Iowa, whether mortgages on property in that State, held by non-residents, could be taxed, under a law which provided that all property, real and personal, within the State, with certain exceptions not material to the present case, should be subject to taxation; and the court said:

"Both in law and equity, the mortgagee has only a chattel interest. It is true that the *situs* of the property mortgaged is within the jurisdiction of the State; but the mortgage itself being personal property, a *chose in action* attaches to the person of the owner. It is agreed by the parties that the owners and holders of the mortgages are non-residents of the State. If so, and the property of the mortgage attaches to the person of the owner, it follows that these mortgages are not property within the State; and if not, they are not the subject of taxation."

In People v. Eastman, 25 Cal. 603, the question arose before the Supreme Court of California, whether a judgment of record in Mariposa county, upon the foreclosure of a mortgage upon property situated in that county, could be taxed there, the owner of the judgment being a resident of San Francisco, and the law of California requiring all property to be taxed in the

county where situated; and it was held that it was not taxable there. "The mortgage," said the court, "has no existence independent of the thing secured by it; a payment of the debt discharges the mortgage. The thing secured is intangible, and has no *situs* distinct and apart from the residence of the holder. It pertains to and follows the person. The same debt may, at the same time, be secured by a mortgage upon land in every county in the State; and if the mere fact that the mortgage exists in a particular county gives the property in the mortgage a *situs* subjecting it to taxation in that county, a party, without further legislation, might be called upon to pay the tax several times, for the lien for taxes attaches at the same time in every county in the State, and the mortgage in one county may be a different one from that in another, although the debt secured is the same."

Some adjudications in the Supreme Court of Pennsylvania were also cited on the argument, which appear to recognize doctrines inconsistent with that announced in Maltby v. Reading and Columbia Railroad Company, particularly the case of McKeen against the County of Northampton, 13 Wright, 519, and the case of Short's Estate, 11 Harris, 63, but we do not deem it necessary to pursue the matter further. We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State. Even where the bonds are held by residents of the State, the retention by the company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax upon that species of property in the State. When the property is out of the State, there can then be no tax upon it for which the interest can be retained. The tax laws of Pennsylvania can have no extra territorial operation; nor can any law of that State, inconsistent with the terms of a contract, made with or payable to parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents. The extra territorial invalidity of State laws, discharging a debtor from his contracts with citizens of other States, even though made and payable in the State after the passage of such laws, has been judicially determined by this court. Ogden v. Saunders, 12 Whea. 214; Baldwin v. Hale, 1 Wallace, 223. A like invalidity must, on similar grounds, attend State legislation which seeks to change the obligation of such contracts in any particular, and on stronger grounds, where the contracts are made and payable out of the State.

It follows that the judgment of the Supreme Court of Pennsylvania must be reversed, and the cause be remanded for further proceedings in conformity with this opinion; and it is so ordered.

THE PITTSBURG, FORT WAYNE, AND CHICAGO R. R. CO. v. THE COMMONWEALTH OF PENNSYLVANIA. 32.

THE DELAWARE, LACKAWANA, AND WESTERN R. R. CO. v. THE COMMONWEALTH OF PENNSYLVANIA. 33.

These cases involve the same question considered and decided in the case of Cleveland, Painesville, and Ashtabula Railroad Company v. The Commonwealth of Pennsylvania. The tax levied in these cases upon the bonds of non-residents of the State is three mills on the dollar, to be paid out of the interest. In the case decided, the tax levied was five per cent. upon the interest of the bonds. The difference in the mode of the assessment does not affect the principle decided.

Upon the authority of the case cited, the judgments in these two cases must be reversed, and the causes be remanded for further proceedings; and it is so ordered.

D. W. MIDDLETON,
C. S. C. U. S.

EASTERN DISTRICT OF PENN'A.

United States Circuit Court.

IN EQUITY.

THE DORSEY HARVESTER REVOLVING RAKE CO. v. MARSH, GRIER & CO.

1. Patents granted by a State or the general government, are to be taken as *prima facie* evidence that they were regularly granted.
2. Though the acceptance of a charter is essential in constituting a body politic, it will be presumed from facts, consistent only with such hypothesis, as where the corporation obtains and produces the letters to prove its existence.
3. Under the act of Assembly of Pennsylvania, of February 2 th, 1867, a corporation of that State may purchase and sell patents granted by the United States, and of rights and licenses under said patents, if they be related to the purpose of the corporation; such purpose may be inferred from the name of the corporation.
4. A provisional officer who is invested by law with the functions of the commissioner of patents, is properly described as commissioner, so far as the efficacy of his official acts are concerned.
5. A re-issue of a patent may by an amended specification restrict or enlarge the patent to the real invention.
6. The test of a description in a patent is whether a person skilled in the art to which the invention appertains, can construct and use it.
7. A machine having substantially the same mode of operation, doing the same work in the same manner, and accomplishing the same results as a patented invention, is an infringement.
8. The defendants having conducted their business under the impression that it was no invasion of the rights of others, and as a sudden stoppage would be ruinous; the court entered a decree for a injunction and an account, but ordered the injunction should not issue until further order if the defendant within thirty days should file a bond in such form and amount, and with such security as the court should approve.

Opinion of the court per MCKENNAN, Cir. J. Delivered April, 1873.

The bill in this case is founded upon an extended patent to Owen Dorsey, for an improvement in harvester rakes, dated March 4th, 1870.

Every material allegation of the bill is denied in the answer; and the validity of the patent and the sufficiency of the complainant's proofs have been contested in an argument of unusual minuteness of elaboration. It has failed to convince me that the complainant is not entitled to a decree, and the reasons for the conclusion reached by me can, perhaps, be more briefly and lucidly stated, by an examination of the points of that argument, in the order in which they were presented.

The suit is brought by the complainant as a corporation, and its existence as such is denied in the answer. It is proved by the exhibition of letters patent, issued under the great seal of the State of Pennsylvania, signed by the governor, and countersigned by the secretary of State. That the governor had authority to cause these letters to be issued is indisputable, and if they do not warrant a presumption that they were rightfully issued, and therefore that what the law prescribes as necessary to be done to that end had been done, it is difficult to perceive what significance they have. To the acts of public officers within the general scope of their power, some degree of faith and credit is due, and it is no stretch of presumption to consider that they have faithfully performed a duty imposed upon them by law, with a proper observance of all its preliminary conditions. Therefore, it has been held, and is settled law, that patents granted by a State or the general government are to be taken as *prima facie* evidence that they were regularly granted, and that they import conformity to the prerequisitions of the laws authorizing their allowance. Trenton R. R. Co. v. Stinson, 14 Pet. 458; Rubber Co., v. Goodyear, 9 Wall. 797.

Nor has the second branch of the objection, that the acceptance of the charter is not shown, any better foothold. This fact is undoubtedly essential in the process of constituting a body politic, and it must therefore, be proved where the existence of the corporation is put in issue. But it is well settled that it will be presumed from facts, which are consistent only with such hypothesis, without proof of any express declaration to that effect. Thus, where a law is enacted applicable to a designated corporation, the mere passage of the law will not sufficiently prove its adoption by the corporation. But where it appears that the law was enacted upon the application of the corporation, its acceptance is a necessary inference from that fact. And so where a general law is in existence, authorizing the creation of a corporation by letters patent, to be issued by a public officer upon the preliminary performance of certain things by the persons to be incorporated, and letters patent are duly issued, reciting the performance of the required conditions, and investing the corporation with the franchises of a body politic, and these letters are obtained and produced by the corporation for the very purpose of establishing its existence, can any doubt remain that they were granted at the instance of the alleged corporation, and were accepted by it? The possession by a grantee of a deed for his benefit, is everywhere sufficient *prima facie* evidence of its acceptance by him. Why, therefore, will not the same facts authorize a like presumption as to a corporation? The proofs here leave no doubt that the complainant was duly constituted a corporation according to law.

It is further denied that the complainant has any right to acquire and hold the patent in question. The corporate faculties of the complainant are not to be ascertained by reference exclusively to the statutes authorizing its creation. Notice will also be taken of any supplementary or general statute pertinent to the inquiry. Now the Pennsylvania statute referred to in the complainant's letters patent, authorizes the creation of a corporation upon the fulfillment of certain prescribed conditions, and they are recited to show that these conditions have been complied with, and as a consequence it is declared that the applicants are constituted a body politic, "with all the rights powers, and privileges," conferred upon it by "all the laws of the commonwealth." The creation of the corporation was thus complete, but its powers are not to be sought in these acts alone. The supplementary act of February 27th, 1867, extended the scope of the original act, so as to embrace companies thereafter formed for the purchase and sale of patents granted by the authority of the United States, and of rights and licenses under said patents. The right to acquire and hold patents is here clearly given to corporations organized under the original act, thus amplified. If the patent in controversy is related to the purpose of the complainant's organization, the right to take and hold it is expressly conferred upon it. It is not requisite that this purpose should be proved by direct evidence, but it may be inferred from the name of the corporation alone. So it was held in Blanchard's Gun Stock Turning Factory v. Warner, 1 Blatch. 271, where it was inferred that the corporation, plaintiff "had power enough to purchase an invention which would tend to facilitate the purposes of its incorporation, as indicated by its corporate name," in the absence of proof of any law expressly conferring it. But in this case the law expressly authorizes the purchase and tenure by the complainants of a patent, which is cognate to the purpose of its incorporation. That it is founded upon the Dorsey patent I think is manifestly indicated. It adopts the name of Dorsey's invention set forth in his patent as part of its own, but to individuate the patent more distinctly, it superadds Dorsey's name, so that its corporate style, "The Dorsey Revolving Harvester Rake Company," denotes exclusively Dorsey's invention. I think, therefore, the inference is both legitimate and obvious, that the purpose of the complainant was to operate in reference to the Dorsey invention, and that it has the right to acquire and hold his patent.

The third point is purely verbal. The bill alleges that the Dorsey patent was duly extended by the commissioner of patents, and the proof is that the extension was granted by S. H. Hodges, acting commissioner, and it is, therefore, urged that the bill must be dismissed because the proof does not support the averment. The gist of the averment is, that the patent was extended by an officer having authority to grant it, and if the proof substantially supports it, there is no discordance between them. A provisional officer who is invested by law with the functions of the commissioner of patents, is properly described as commissioner, so far as the efficacy of his official acts is concerned, and for this purpose only is it necessary to describe him at all. The validity of his act, not the verbal accuracy of his title, is the essential subject of inquiry.

The fourth and fifth points may be considered together. They affirm that the acting commissioner did not acquire jurisdiction to consider Dorsey's application for an extension, and that his patent was not extended until after the expiration of the original term.

The actual incumbent of a public office is presumed to be in the lawful possession of it, and no affirmative proof of his title

(*Continued upon page* 142.)

LEGAL GAZETTE.

Friday, May 2, 1873.

JOHN H. CAMPBELL, EDITOR.

THEODORE F. JENKINS, ASSOCIATE EDITOR.

THE JUDICIARY SYSTEM OF PENNSYLVANIA.

Just now the Pennsylvania Constitutional Convention is engaged in discussing the best means of revising the judiciary system of the State. That the evils in the administration of justice are great, no one familiar with the courts can deny, for, from one end of the State to the other, are heard continual complaints of the insufficiency of courts, the want of the requisite number of judges, the frequent delays in bringing causes to trial, the great loss of time to suitors and witnesses, and numerous other grievances, which amount to a practical denial of justice. That something must be done is an admitted fact; but the great question is, what is the best remedy?

The Judiciary Committee reported an elaborate scheme, (a summary of which we gave in our issue of 4th ult.), its principal feature being the establishment of circuit courts, intermediate between the courts of common pleas and the Supreme Court; Ex-Chief Justice Woodward submitted a minority report, in which he also coincided in the view that circuit courts were necessary; but the Convention on Tuesday last, in a very summary manner, decided that there should be no such intermediate courts as the ones suggested. This action leaves the system of *courts*, pretty much as at present, and now comes the question, can we not by increasing the number of justices, simplifying the modes of procedure, and increasing the facilities of the courts already in existence, get a solution of the problem now agitating the minds of the Pennsylvania bar? For our part, we think we can, and we propose to show in a few words how it can be done.

And first, we must begin at the foundation: the aldermen and justices of the peace. Let those ancient worthies, more especially in the large cities, be swept bodily out of existence, and substitute in lieu thereof, minor courts, call them justices', police, or what you will. Let the judges of these minor courts be elected in threes in large cities, so as to have all classes of the people represented and politics eschewed; let their districts be based upon population, and be formed sufficiently large as to make it troublesome for petty local politicians or ward rulers to be nominated, and yet not so large as to prevent the people from making the proper discrimination in casting their votes; let the judges sit *together*, and have all the proceedings before them conducted orally; no written pleadings being tolerated. Let the judges be learned in the law, of at least thirty years of age, and five years' legal practice, and let them receive competent salaries and *no fees*; transfer to them the jurisdiction in matters of contract up to $250, their judgments to be final up to $25, or even more, and *also transfer to them* jurisdiction over the numerous petty misdemeanors which now block up the calendars of the courts of quarter sessions, and prevent the judges of those courts from getting through with their business. *By thus relieving the courts of common pleas and criminal courts of an immense number of trifling cases, we can secure the more speedy administration of justice in those courts, and justice in small cases, which are the most numerous, will be really brought home to the doors of the people, and be obtained rapidly and cheaply.*

Second, as to the common pleas courts, which, excepting perhaps a few orphans' courts in large cities, should be the *only* intermediate courts between justices and the Supreme Court, we would have the number of judges greatly increased by electing them, in regard to the population of the district—having one judge for every 30, 35, or 40,000 population, as may be determined upon, and making every county, containing the requisite population, a separate district. Let the judges *all be elected on the same day*, and by some minority plan, in order to secure a non-partisan bench; let their terms of office be ten years, commencing in the year after the promulgation of the decennial census returns; vest in them, final jurisdiction over many of the cases that now go to the Supreme Court, and thus relieve that court; give them good salaries, and where there is a large number of judges in a district, let them sit in rotation, in chambers of three, or five judges, as most convenient. All references to examiners, auditors, masters, etc., should be totally abolished, and no non-judicial appointments of any kind should be exercised by the judges. The purity of the ermine is its greatest beauty.

And, lastly, the Supreme Court. By making the Common Pleas judgments final in many cases, there would not be the difficulty now experienced, in hearing and determining cases in this court. The judges should be *elected* all at the same time, and by a minority plan, and for long terms. Their number should also be regulated by the population of the State, say one judge for every half-million inhabitants. Let them sit in two chambers, if necessary for the dispatch of business, and by all means, let them be permanently located in one place, and not be perambulating through the State, like the old Court of Common Pleas in England.

By amplifying the above summary, and providing for the details of its execution, we can no doubt get a rational judiciary system. Cheap, rapid, certain administration of justice is what the people want, and we think our plan would give it to them. Messieurs of the Convention, we submit it to your careful examination.

We have received from Messrs. A. L. Bancroff & Co., San Francisco, the first volume of Sawyer's Reports of Cases in the Circuit and District Courts of the United States for the Ninth or California Circuit. In our next issue we will notice it and other publications received.

The Constitutional Convention have decided this week two good things—to have no Circuit Courts, and to have the judges of *all* the courts *elected*.

Register's Court of Philada.

MARTHA WINPENNY'S ESTATE.

1. In granting administration, the primary object is the interest of the estate, and where the discretion to appoint is not expressly controlled by statute, it should be exercised with that view.
2. Two brothers applied for administration *pendente lite*, where there was a dispute as to which of two wills of decedent was entitled to probate. One brother, Bolton, was named as executor in both wills; the other brother, John, was entitled to the *residue* of the estate under both wills, and letters were granted to him as having the greatest interest in the estate.

Sur reference to the Register's Court, without appeal, of application for administrator *pendente lite*,

Opinion of the court by ALLISON, P. J. Delivered April 26th, 1873.

The act of the 15th of March, 1832, sect. 22, Purdon, vol. 1, p. 410, pla. 27, provides that wherever letters of administration are by law necessary, the register having jurisdiction shall grant them in such form as the case shall require, to the widow, if any, of decedent, or to such of his relations or kindred as by law may be entitled to the *residue of his personal estate*, or to a share or shares therein, after payment of his debts. And in all cases of an administration with a will annexed, where there is a general residue of the estate bequeathed, the right to administer shall belong to those having the right to such residue; and the administration in such case shall be granted by the register to such one or more of them as he shall judge will best administer the estate.

The power of the register to grant letters of administration, is regulated by statute; he is, therefore, not at liberty to exercise a discretion contrary to the commands of the statute; but where the law has given no directions, temporary administration may be granted to any fit person. In such case, the register is free to exercise a sound discretion (Elmaker's Estate, 4 Watts, 39), which is not to be controlled or reversed if performed with proper caution, and with a regard to the specialties of the case, as they are presented for his consideration and decision. But where there is no good reason for a departure from the well defined principles governing the grant of general administration, it is better to adhere to them as the safest guide in the exercise of the power with which the law clothes the register. The citations from the act of 1832, show that the person or persons who are entitled to the residue of the estate, are, subject to the enumerated classes, to be favored, and unless good cause be shown to the contrary, are entitled to the grant of administration. Upon a contest for letters *pendente lite*, where harm cannot come to the estate, we do not see why the same principle should not be applied. The person entitled to the residue of the estate has the greater interest in the proper discharge of the duties of the office, which, for the time being, are in part the same as those of ordinary administration; he must file an inventory, take care of assets, collect and pay debts. He is, until suit ended, to take care of the estate and to see that it suffer no harm, though he cannot pay legacies or make distribution. Commonwealth v. Mateer, 16 S. & R. 416; Adams v. Shaw, 1 Schoales & Lefroy, 254.

The objection most strongly urged against the party entitled to the residue of the estate, is that if administration pending the controversy is given to him, it will subject the estate to double costs in the settlement of the accounts; but as this loss, if any, can fall only on the remainderman, and he does not object, but on the contrary claims to have letters given to him, it surely does not lie in the mouth of Bolton Winpenny, the executor to urge this against the claim of John Winpenny, to whom the residue of the estate is given. He may believe, and probably does so believe, that the costs of the settlement of an additional account may be far below that which he thinks he can save to the estate, by having its management during the suit, in his own hands.

But there are good reasons why Bolton Winpenny should not have the letters *pendente lite* awarded to him. He stands in one view, as a litigant with the estate, not for himself, but for his children and sisters. In that which is claimed to be the last will, $1,000 is given to a minor son of the executor, and the whole of the residue absolutely to John Winpenny. In the will produced by Bolton, before the register, legacies of $1000 each are given to two of his children; half the residue to his three sisters, for life, with remainder only as to this half, to John. In Elmaker's Estate, it is said, that where a party stands as a litigant to the estate, the court have constantly declined putting a person so situate in possession of the property, by granting administration to him pending suit. The charge against Bolton Winpenny, is that he has suppressed the last will, which gives less of the estate to his family than does the will produced by him, and in the case above cited, the court further say, that the least taint of fraud is a conclusive objection; it works a legal incompetency to perform the duties of the office. It may be answered, that John Winpenny is also a litigant, but the reply to this is, that he is standing solely on the defensive; he makes no war on the estate; he has an interest, it is true, as between the two wills, but there is much greater propriety in putting the estate in charge of one whose duty as well as interest it is to resist assaults upon it, in place of giving it to another, who is likely to try to tear down rather than to build it up.

In England, the law seems to be administered in accordance with the course suggested as the proper one to be pursued. Sir John Nichols, in the case of the Earl of Warncliffe v. Greville, 1 Phillamore, 123, and in Wetdrill v. Wright, 2 Phillamore, 242, recognized the principle, that by statute and by practice, the management of property *pendente lite* is given to the person having the greatest interest in it, and in Stratton v. Ford, 2 Lee, 49, Sir George Lee refused administration pending suit to the executors, and decreed it to the nominee of the residuary legatee, who had the greatest interest. It is laid down in Dodd & Brooks' Probate Practice, 398, that the primary object is the interest of the estate. The court is not to be guided by the wishes and feelings of the parties, or even the deceased, but to look to the benefit of the estate, and to that of all the persons interested in the distribution of the property.

In either case, John Winpenny, the applicant, is the only person entitled to the

residue of the estate, both personal and real.

Letters *pendente lite* awarded to John Winpenny.

John A. Bickel and *John H. Campbell, Esqs.*, for John Winpenny.

John Dolman, Esq., for the executor.

District Court of Philad'a.

TOWNSEND v. ROY.

1. A purchaser at an orphans' court sale in partition, paid, by leave of court, only so much of the purchase money as was not distributable to himself, and three others, whom he represented: *Held*, if there were a resulting trust in favor of the persons so represented, it should be asserted by them in the appropriate mode, and within the time limited by the act of April 22d, 1856.
2. A defendant in ejectment may set up an outstanding title in a third person, but it must be an outstanding legal title. That the plaintiff holds the legal title in trust for a third person, cannot avail the defendant.
2. One who recovers in ejectment, claiming the whole estate, cannot set up the record as evidence that he is in possession as a *cestui que trust* for an undivided portion, and thereby escape the operation of the act of 1856.

Opinion by LYND, J. Delivered April 26th, 1873.

Rule for new trial, and motion for judgment upon a point reserved.

This was an ejectment. The title of the plaintiff was under a sale in partition in the Orphans' Court, of the estate of Michael Roy, deceased. The proceedings were regular and usual, except that the purchaser, instead of paying to the trustee, appointed by the court to make the sale and conveyance, the entire purchase money, paid, by leave of court, so much of said sum as was not distributable to himself and three other heirs of Michael Roy, deceased, whom, as was alleged, he represented.

The defendant maintained that as to these three heirs, each of whom was entitled to one-seventh, there was a resulting trust, and that the verdict should have been in favor of the plaintiff for an undivided four-sevenths only of the premises.

We are of opinion that the purchaser took, by the sale, a *legal* title to the whole property, and any resulting trust for other parties must be asserted by them in the appropriate mode, and within the time limited by the act of April 22d, 1856.

A defendant in ejectment may set up an outstanding title in a *third* person, but it must be an outstanding *legal* title. That the plaintiff holds the legal title in trust for such third person, certainly could not avail the defendant.

But the defendant happens to be one of the three heirs, whom the purchaser, at the sale in partition, claimed to represent as above stated; and he maintains that he can set up, at least, his own equitable title to the one-seventh of the said property; and hence, that the verdict for the plaintiff should, at most, have been for an undivided six-sevenths.

Unfortunately for this position of the defendant, his own evidence discloses that he came into possession of the premises by proceedings in ejectment, commenced on the twenty-third day of March, A. D. 1864, in which he claimed the *whole* premises.

But the deed in partition was delivered and recorded June 14th, 1853, and the resulting trust in favor of defendant could not, therefore, under the provisions of the act of 1856, be enforced after the 22d day of April, 1858. *Prima facie*, therefore, the ejectment commenced in 1864, was too late; the record was not of itself evidence that the action was to enforce the said resulting trust, nor that the possession acquired under said action was acquired in pursuance of said trust.

On the contrary, as he claimed the *whole* premises, when the resulting trust in his favor was as to one-seventh only, it is evident from the record that his action was *not* brought to enforce the resulting trust.

Upon all the evidence, then, the defendant is not a *cestui que trust* in possession; his possession is that of a mere stranger, and he must yield to the plaintiff's legal title.

At the trial, the question as to whether there was a resulting trust in favor of the defendant was reserved. The views just expressed show that the reservation was immaterial. Hence, the motion for judgment upon the point reserved is dismissed, and the rule for a new trial is discharged.

Katz, for plaintiff.

Parsons, for defendant.

THIRTIETH JUDICIAL DISTRICT.
Crawford County Common Pleas.

COMMONWEALTH v. MORLEY AND TAYLOR.

1. In criminal trials before justices of the peace with a jury of six, their records must show in some reasonably intelligible form a case within their jurisdiction, and that all the elements of a fair legal trial have been observed, and that a definite and authorized judgment has been entered.
2. A greater degree of precision is required in these criminal cases than in the ordinary civil cases that are tried before them.
3. A *certiorari* in such cases cannot issue without at special allowance by the court or the district attorney.

On a charge of larceny against the defendants, made and tried before a justice of the peace and brought up by the defendants by *certiorari*.

Opinion of the court by LOWRIE, P. J. Delivered April 8th, 1873.

This is a case of complaint before a justice of the peace, against the defendants for stealing, and a trial and conviction by a jury of six, and a sentence thereon, and it is brought here by a *certiorari*. Many errors are assigned to the proceedings, and we proceed to consider such of them as are necessary to the proper trial of the case.

The acts of Assembly under which this cause was tried are those of 1st May 1861 (P. L. 682), and 5th April, 1862 (P.L. 274), extended to this county by that of 1st April, 1863 (P. L. 215), and it is these acts that we are called upon to interpret and apply to this case, and we shall endeavor to do it briefly and clearly.

1. It may be stated as a general principle, that in proceedings before justices of the peace, the law is not usually so exacting as to demand the precision of form that is usual in the higher courts; it is satisfied if their records show in some reasonably, intelligible form, a case within their jurisdiction, and that all the elements of a fair legal trial of it have been observed, and that a definite and authorized judgment has been entered. Even where a form of proceeding and of recording it is partially or wholly prescribed by act of Assembly, it is not a literal but only a substantial conformity to it that is demanded. The great variety of cases as well as of official qualifications and training, forbids a demand of formal rigidity. 2 T. R. 23; 3 Burr, 1785; 1 East. 649; 11 Harris, 521; 10 Casey, 403; 4 P. F. Smith, 93.

2. But a greater degree of precision is required in cases where justices of the peace are invested with a jurisdiction that is new, than in those that are within their general civil jurisdiction. When such a special jurisdiction is conferred on justices of the peace, they must proceed strictly within the limits assigned by the law conferring it, and substantially according to the forms prescribed for it, and their record of the case must show that they have done so. 4 P. F. Smith, 230; 12 Id. 133. Even if it be a proceeding for the forfeiture of a hog under the stray laws, this is required; 8 Id. 496; and not less than this can be required when men are not charged with crimes. It is the same as is required in the short ejectments by landlords against tenants; 5 S. & R. 174; 2 Barr, 294; 9 Id. 213; and it is the same as is required of any court invested with such special authority.

3. The laws under which this case was tried, give justices of the peace authority to try cases of larceny, if the property stolen shall not exceed $10 in value, and the complaint here is of larceny of a barrel of vinegar of the value of about $10, and of this the defendants are convicted. As about $10 is plainly not the same as not exceeding $10, the record does not show that the justice had authority to try the case, and therefore this is a fatal error. It might perhaps have been cured if the jury of six had found the value to be not exceeding $10.

4. There can be no larceny except of things belonging to some person, but this record does not aver that this vinegar had any owner, it merely described it as stolen "out of car No. 1295 (L. S. R. R. car.)" This is also a fatal error.

5. The justice's jurisdiction does not appear unless his record show that the act was done in this county. Here it is not said where the larceny was committed, and therefore this is an error.

6. The jurisdiction of the jurors does not appear, because it is not stated in the proceedings that they were good and lawful men, citizens of the township, borough, or city, in which the case was tried and having the qualifications of electors therein, and this also is error.

There are some other defects in this record, which we do not specify, because they were not sufficiently discussed before us, and some of them may be cured by the presumption of regularity where nothing appears to the contrary. Some things that ought to have been done do not appear, and this may be because all that was done is not fully recorded. In no case is it proper to record a case against any one, without giving his or her christian name, if it can be learned, and not merely the initial letter of it, and so the jurors ought to be named. 6 Barn. & Cr. 247.

In these cases justices of the peace ought to be very strict in following the law under which they act, though some things which they do may not need to be recorded. When they send up their proceedings on a *certiorari*, they ought to send up every part of them, including the complaint, warrant, *venire facias*, and all the relevant acts of the justice and parties. A justice does not properly obey the *certiorari* by sending merely a copy of the short notes entered on his docket (when he keeps short notes), but from these notes he must make up a full record of all the proceedings actually had by and before him, and certify this to the court, with the complaint and writs, in return to the *certiorari*.

It is proper to remark, moreover, that it is irregular to issue a *certiorari* in such cases as this, without a special allowance by the court or by the district attorney. We may possibly, hereafter, find it proper to make a rule of court that such allowance may be granted by a judge at chambers.

These proceedings are to be reversed, because (among other reasons) of a curable defect in the statement of the offence, and therefore we must send them to the district attorney, that the statement may be amended, and then remit the cause to the justice of the peace for a new trial.

The sentence of the justice is reversed, and a new trial awarded, and the proceedings of the justice are referred to the district attorney, that the complaint may be duly amended, and then remitted to the justice for further proceedings, according to law.

Recent Decisions.

NEW HAMPSHIRE.

Head notes of decisions of the Supreme Court of New Hampshire, to appear in vol. 51, N. H. Reports. (Received from John M. Shirley, State Reporter.)

ALLUVION.

Land formed by alluvion, on the bank of a river not navigable, by the gradual wearing away of the opposite bank, is to be divided, ordinarily, among the riparian owners entitled to it according to this rule: Ascertain the length of the old shore line, and of the part of it belonging to each proprietor; then measure off for each proprietor a part of the new shore line in proportion to what he held in the old shore line; and then draw lines from the boundaries at the ancient bank to the points of division on the new shore, as thus ascertained. In this way, if such land is formed in the bend of a river, and the new shore line is just one-half the length of the old one, each proprietor will take of the new shore line just one half the extent of his former shore line. Batchelder v. Keniston, 496.

CHANCERY.

A bill in equity, brought to redeem stocks pledged to the defendants, may be sustained, although they may have sold the stocks; and in case it be out of their power to return the stocks, the court may, in a proper case, decree compensation. Merrill v. Houghton, 61.

A court of equity will not suspend proceedings at law to enable the defendant to obtain an adjustment of partnership concerns that he may set off a balance due him from the plaintiff, unless the bill shows that a balance will be due to him on taking a partnership account. Robinson v. Wheeler, 384.

(*Continued from page* 139.)

is required to support his official acts. This is a familiar maxim. Accordingly, it was held in Winans v. The York & Maryland Line R. R. Co., 17 How. 41, that "the court will take notice, judicially, of the persons who, from time to time, preside over the patent office, whether permanently or transiently, and the production of their commission is not necessary to support their official acts." So, therefore, the contingency upon which the examiner in chief is authorized to assume the duties of commissioner, is primarily to be taken to exist from his actual discharge of these duties. That this presumption is conclusive, in a contest between third parties, is, I think, a logical result of the principle affirmed and applied in the Rubber Co. v. Goodyear, 9 Wall. 796. But at any rate the burden of showing the non-existence of the prescribed contingency is upon the party who denies the validity of the ostensible officer's act. That burden the respondents here have not sustained. They have shown only that the commissioner was at the patent office part of the day on which the extension was granted, not later than 11½ o'clock A. M.; while it appears that the commissioner, in writing, informed the chief examiner of his intended absence at the time of the decision of Dorsey's application, and that the case was actually decided by the chief examiner. There was an actual abdication by the commissioner of his official functions, and an exercise of them by the chief examiner; and, as this was done with a distinct reference to the provisions of the act of Congress, the inference that they were strictly observed is legitimate and fair.

The granting of an extended patent is a judicial act. Authority to that end is conferred upon the commissioner of patents by act of Congress. The manner in which it is to be exercised, and the time within which it may be exercised, are prescribed by the act. The extension must be granted before the term of the original patent expires; but when it is granted in apparent conformity to the act of Congress, the decision of the officer has the attributes of a final judgment. It is not subject to appeal or revision. This is the clear import of numerous decisions of the Supreme Court. In Seymour v. Osborne, 11 Wall. 516, the court say: "When the commissioner accepts a surrender of an original patent, and grants a new patent, his decision in the premises, in a suit for infringement, is final and conclusive, and is not re-examinable in such suit in the Circuit Court, unless it is apparent upon the face of the patent that he has exceeded his authority; that there is such a repugnancy between the old and new patents that it must be held as matter of legal construction; that the new patent is not for the same invention as that embraced and secured in the original patent." And this doctrine is asserted with equal distinctness, in reference to the granting of an extended patent, in the Rubber Co. v. Goodyear, 9 Wall. 798. It is there said: "The law made it the duty of the commissioner to examine and decide. He had full jurisdiction. The function he performed was judicial in its character. No provision is made for appeal or review. His decision must be held conclusive until the patent is impeached in a proceeding had directly for that purpose, according to the rules which define the remedy, as shown by the precedents and authorities upon the subject."

It is plain, from these authorities, that in a suit by a patentee against an infringer, it cannot be shown that the commissioner who granted the patent exceeded or irregularly exercised his authority, except by matter apparent on the face of the patent, and that it is conclusively valid until it is successfully impeached in a direct proceeding properly instituted for that purpose.

We have, then, a case where a patent has been extended with every apparent legal sanction; which it is sought to invalidate by parol evidence contradictory of its purport, and claimed to show that it was granted at a time and place contrary to law. This is a forbidden inquiry in this case, and it is, therefore, unnecessary to notice the evidence presented in relation to it.

The invention of Dorsey belongs to the widely useful class of mechanical devices designed to facilitate the harvesting of grain. His special object was to produce a device which would automatically separate the standing grain in suitable gavels, press it against the vibrating knives of a reaping machine, and sweeping it in the arc of a circle, deposit in the rear of the machine, out of the way of the team, when it passed around again. By no pre-existing invention was this double effect produced. The function of discharging the cut grain had been performed by a rake sweeping over the platform of the machine, and separating and gathering the standing grain to the cutters by a revolving reel. These were the more recent and approved automatic devices for these purposes, preceeding the invention of Dorsey. But in all the literature of the art, which has been so exhaustively exhibited, no instance is shown in which the gathering office was performed by a rake.

To effectuate his object, Dorsey constructed a continuously revolving rake, with arms attached by a pivot to a shaft or head around which they revolve, and so as to allow of their being elevated or depressed by an inclined cam way on which they rest. Guided by the cam, the rake is caused to fall in front of the cutter-bar into the standing grain, thereby separating it for each gavel, pressing it against the cutting knives, and sweeping it over the platform in the arc of a circle, depositing it behind the horses and out of their track on their next round.

The novelty of the operation consists in the performance of the functions of gathering the grain to the cutters and discharging it from the platform by the same instrumentality, and in the mechanical means employed to guide and cause it to rise and fall to perform these functions together. And in these features the complainant's invention is distinguishable from the various devices exhibited by the respondents. I do not propose to consider them in detail, but content myself with saying, that in none of them is a rake employed to separate and gather to the cutters the standing grain, nor is there in any of them a similar pivotal attachment of a rake arm, by which it is capable of rising and falling in its revolving movement; and in all of them, except in Seymour's and Palmer and Williams', the cut grain is discharged directly behind the cutter. I can have no doubt, therefore, of the novelty of the invention.

It is urged that the patent in controversy is void, because the reissue is not for the same invention described in the original.

That a reissued patent cannot be allowed for an invention different from the one of which the original patent is the basis, is undoubtedly true. But it is equally true, that any feature of the invention, which is actually a part of it, that was only suggested or indicated in the specification or drawings, may be distinctly described in an amended specification and protected by a reissued patent, and that accordingly the claims of the patent may be restricted or enlarged to cover the real invention.

It is a just rule that patents are to be construed liberally, so as to sustain the right of the inventor. Mere verbal discrepancies, therefore, are entitled to but little consideration, especially where in view of the mechanism devised, the functions it was designed to perform, and its mode of operation, there is substantial accordance between the original and reissued patents. Nor is it any objection to a renewed patent that part of the original invention is omitted. This an inventor may do, because the public may use it, and there is nothing in the policy or terms of the patent act which forbids it. Carver v. The Braintree Manufacturing Co., 2 Story, 438.

I do not think, however, that it requires any great liberality of construction to harmonize the original and reissued patents. The main ground of the objection is, that in the reissue the invention is described as a continuously revolving, gathering and discharging rake, which decends into the standing grain in front of the cutters, so as to gather the grain for each gavel, and that the gathering function thus defined is not suggested or indicated in the original patent. In the latter it is said "the rake-head is brought by a sweeping descent upon the front edge of the platform, and in so doing draws the uncut grain towards the cutters." And again, describing the operation of the rake, "by continuing its movement the rake reaches over the heads of the grain, and gradually descending by the guide-rail, draws the wheat towards the cutters; by this means I dispense entirely with the reel used on harvesters for drawing the grain to the cutters." Now the reference here to the gathering function of the rake is distinct. It is expressly stated to be a substitute for the reel, the sole function of which is to gather the grain to the cutters. And it operates so as to reach over the heads of the grain and descending gradually draws or gathers the grain to the cutters. Every step in the process is not as fully described as in the amended specification, but it is obviously implied that the rake, reaching over the heads of the grain, was intended to descend below them into the grain, as it could thus only perform its appointed duty of drawing it to the cutter. And in so operating it must necessarily effect a separation of the grain between the rake-head and the cutter-bar from that standing in the rest of the field. The description, therefore, plainly points to a rake adapted to gather the grain to the cutter, as well as to discharge it from the platform, and, in so performing its intended office, necessarily passes down into the grain in front of the cutters, and divides it so as to form the succeeding gavel in the standing grain.

Again, it is objected that the original and amended specifications are vitally irreconcilable in this: that in the former is described a rake attached to the end of a diametrical arm; "each pair of arms, formed of metal or wood, with an opening at their half length of a longitudinal form, so as to allow them to pass over the end of a vertical turning shaft;" and that this description is omitted in the latter. Diametrical arms are undoubtedly one form of embodiment of the patentee's conception, but they are not the only one to which the principles of his invention is susceptible of application, nor is it so declared. His patent covered equivalent, although formally different, mechanical devices, which operated in the same way and to the same end with diametrical arms. Hence it was legitimate to modify the specification so as to secure protection broadly to the real invention of the patentee against any form of infringement. This is well and accurately illustrated by Acting Commissioner Hodges, in his opinion, where he says, in reference to the distinctive merit of the invention: "It lies in attaching the rake arm by a pivot to a shaft around which it revolves, and may be made at the same time to rise and fall upon the pivot. By this construction the rake may be guided in the direction desired. These are the essential features of the invention, and equally so whether the arms are diametrical or merely radial. After trying the latter, Dorsey adopted the former, because he found he could use the limb opposite the rake as means for guiding it. But the combination of the revolving movement of the arms and their swinging movement upon their pivots, which alone gave him the power to direct the path of the rake at will, was common to both, and constitutes the merit of the contrivance."

Nor does the objection apply with any greater effect to the claims of the reissue. It has been already shown that the original and amended specifications describe a continuously revolving rake, with a pivotal connection to the shaft on which it revolves, which performs the functions of gathering and discharging the grain, so arranged as to enter the uncut grain in front of the cutter, and discharge the cut grain in the arc of a circle, and so as to separate the grain which is to form the next gavel in the standing grain.

It follows, therefore, that the claims of the reissue which embrace the device and combination of devices by which these functions are performed, are in entire harmony with the specification,

Another objection to the validity of the patent is, that the patentee has not so described his raking device and its arrangement as to enable an ordinary mechanic to make, construct, and use the same. Absolute precision as to details is not required in the specification. It is only intended as a guide; but it is not the sole instructor. Nor is it addressed merely to ordinary mechanics; but the

test of its sufficiency is, whether a person skilled in the art to which the invention appertains can construct and use it. The special skill of the mechanic, derived from familiarity with the art, may be applied in aid of the instruction given by the specification; and this skill may be exerted to modify any direction in the specification as to the matters of mere adjustment or adaptation of the invention to its intended use, else the authority to employ it at all is of but little value. "It will, perhaps, rarely happen, even where the utmost vigilance and care are observed, that the machine or structure will be so accurately described as that the description can be literally and strictly followed in every particular. The skilful mechanic will see that in some particulars there is some vagueness, and some discretion is required; but that fact will not invalidate the patent." 3 Fish. 555. But it is a complete answer to the objection that the thing which, it is argued, cannot be done, has actually been done. In 1858 Adam Reese acquired a license to use the Dorsey invention, and, in substantial accordance with the specification and drawings, he made and applied it to over fifteen hundred machines, which worked successfully. Against such a practical demonstration, argumentative speculation, reinforced though it may be by the untested opinions of experts, will be of little avail.

In the Union Sugar Refinery v. Matthiessen, 2 Fish, 626, Mr. Justice Clifford said to the jury: "You will regard the well-known substantial equivalent of a thing as being the same as the thing itself; so that, if two machines have the same mode of operation, do the same work in substantially the same way and accomplish substantially the same results, they are the same; and so, also, if the parts of two machines, having the same mode of operation, do the same work in substantially the same way, and accomplish substantially the same result, these parts are the same, although they may differ in name, form, or shape."

The invention of Dorsey consists of a rake with its arm attached by a pivot to a shaft, with which it revolves, and so that it will rise and fall as the arm passes along the surface of a cam by which this latter movement is regulated and controlled. It operates with a continuous revolution, descending with the inclination of the cam in front of the cutter-bar, thence sweeping backward in the arc of a circle to the rear of the platform, where it is elevated by the cam to clear the frame of the machine, and passing again to the front, repeats the movement. Its functions are to descend into the standing grain in front of the cutter, thus separating the grain which is to form the next gavel, to draw or gather it to the cutter, and when cut, on to the platform, and then to sweep it across the platform in the arc of a circle, and to discharge it on the ground out of the way of the return of the machine in cutting its next swarth. These are the characteristic features of the invention.

Now the alleged infringing devices embodied in the defendants' machines, "have substantially the same mode of operation, do the same work in substantially the same way, and accomplish substantially the same results" as those claimed by the complainants. In the defendants' machine is to be observed a rake head with an arm attached to a crown-wheel or head with which it revolves, and to which it is pivotally connected, so that it will rise and fall under the guidance and control of a cam-way. It revolves continuously, descending into the grain in front of the cutter, separating the gavel, gathering it to the cutter and traversing the platform in the arc of a circle, discharges the grain in the rear by a side delivery, out of the way of the return of the machine, and then rising, clears the machine and renews the operation. It is obvious then, that the functions and mode of operation of both devices are substantially the same. In their construction the differences are formal rather than substantial. Instead of a vertical post, the shaft and head of which are of one piece and revolve together, to which the rake-arm is attached, as in the Dorsey invention, the defendants employ a vertical iron shaft which passes through the centre of a metal head, to which the rake-arm is attached, and which revolves around this shaft instead of with it, but the mode of operation and the results accomplished by both devices are the same. In Dorsey's drawings and model a diametrical rake-arm is shown; in the defendants' machine the rake-arm is radial, but both are pivoted at the same point to the central revolving head, and are alike guided and governed by the cam in their rising and falling movement. The defendants use a cam formed in the segment of a circle while Dorsey's cam is a complete circle; but I think the part of the latter at its lowest inclination where the defendants' cam is open, exerts no essential agency in guiding the rake in its traverse on the platform, and that, therefore, the difference in form between the two is immaterial.

Upon the whole case, I am of opinion the complainant is entitled to a decree, but it ought to be so framed as not to subject the defendants to any avoidable loss or injury. The complainant is not a manufacturer of reaping machines, so far as appears, and will be adequately protected by the payment of a just compensation for the use of the Dorsey invention. The defendants have an extensive establishment and a large capital invested in it for the manufacture of machines, and seem to have conducted their business under the impression that it was no invasion of the rights of others. A sudden stoppage of it would be disastrous to them, and would not benefit the complainant.

A decree will, therefore, be entered for an injunction and an account, but no injunction will issue until the further order of the court, if the defendants within thirty days from the date of this decree, file a bond in such form and amount, and with such security, as the court or a judge thereof may approve, to secure to the complainants the profits and damages which they may ultimately be decreed to pay.

George Harding, Esq., for complainants.
David Wright, Esq., for respondents.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in May, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

Mar. 28, John B. Wagner et al., Executors of MARIA WAGNER, dec'd.
" 29, Peter Martin, Administrator of WILLIAM B. SMITH, dec'd.
" 29, William Badger, Executor of EDWARD R. BADGER, dec'd.
" 31, John Markle et al., Executor of GEO. MARKLE, dec'd.
April 3, Abraham D. Harley, Administrator of WASHINGTON RUMMEL, dec'd.
" 3, J. P. Robinett et al., Executors of G. HERMAN ROBINETT, dec'd.
" 3, Samuel White et al., Executors of LAETITIA G. RYAN, dec'd.
" 3, John McCormick, Guardian of MARY and FRANCIS McCORMICK, Minors.
" 4, Bridget T. O'Keefe, Administratrix of PATRICK O'KEEFE, dec'd.
" 5, Marmaduke C. Cope, Administrator of SARAH W. COPE, dec'd.
" 5, David T. Trites, Executor of NICHOLAS CONNELL, dec'd.
" 5, James S. Watson, Administrator of HENRIETTA RUSSELL, dec'd.
" 7, Jos. W. Mathers, Executor of EMMA BOCKIUS, dec'd.
" 8, Ed. Waln et al., Executors of S. MORRIS WALN, dec'd.
" 8, Ann Hoffner, Administratrix of SARAH HUNTLEY, dec'd.
" 9, Elias T. Hall, Administrator of JOHN B. EDWARDS, dec'd.
" 9, Wm. McKnight, Administrator of ELEANOR ANDREWS dec'd.
" 10, Henry P. Borie et al., Executors of MARIA LEECH, dec'd.
" 10, Daniel McShane, Administrator of CORMICK GALLAGHER, dec'd.
" 14, Eliza S. Dingee et al., Executors of CHARLES DINGEE, dec'd.
" 14, Sarah McCartney, Administratrix of PETER McCARTNEY, dec'd.
" 14, James Campbell et al., Executors of HUGH O'DONNELL, dec'd.
" 16, Penna. Ins. on Lives, &c., Executors and Trustees under the will of D. C. FULTON, dec'd.
" 17, Jacob Apple, Administrator of ELIZA APPLE, dec'd.
" 18, James E. Brown, Administrator of JANE BROWN STEWART, dec'd.
" 18, James H. Heverin, Administrator d. b. n. c. t. a. of THOMAS RYAN, dec'd.
" 19, John D. Engle, Executor of RACHEL ENGLE, dec'd.
" 19, Louisa Enger, Administratrix of WILLIAM ENGER, dec'd.
" 21, Margaret Stewart, Administratrix of GEORGE STEWART, dec'd.
" 21, William C. Stevenson, Administrator c. t. a. of ROBERT D. CLIFTON, deceased.
" 22, Mary C. Haldeman, Administratrix of ELIZA JANE HOWARD, dec'd.
" 23, Charles W. Gesemyer, Guardian of MARGARET L. SCHNIDER, late Minor.
" 23, Henry C. Kellog, Executor of CONRAD KNIPE, dec'd.
" 23, J. Lowber Welsh et al., Executors of AUGUSTINE CASAMAJIR DE TRENARD, dec'd.
" 23, T. Frank Cooper, Administrator of JOSEPH COOPER, dec'd.
" 23, Christiana B. Sorber et al., Executors of MARY A. SORBER, dec'd.
" 23, John T. Fenton, Executor of MARGARET R. ROBB, dec'd.
" 23, Mary A. Barton, Administratrix c. t. a. of JOSEPH BARTON, dec'd.
" 23, Wm. Nuenemann, Administrator of CAROLINE ELIZABETH KRAEMER, dec'd.
" 23, William Morgan, Executor and Trustee of MARGARET D. SCHRYER, deceased.
" 23, Isaac F. Baker et al., Executors, and Isaac F. Baker, Trustee, under the last will of ANN MARIA ELLIOT, dec'd.
" 24, Ann B. West et al., Executors of JOHN H. WELSH, dec'd.
" 24, J. Ringgold Wilmer, Adm'r d. b. n. of J. C. A. MARLOT, dec'd.
April 24, Frank M. Naglee, Adm'r d. b. n. of ELLEN NAGLEE, dec'd.
" 24, Frank M. Naglee, Executor of ANN E. ROOD, dec'd.
" 24, Anna Teufel, Admin'x of JOSEPH TEUFEL, dec'd.
" 24, Jos. S. Riley, Adm'r of BENJAMIN S. RILEY, dec'd.
" 24, Kitty M Pepper et al., Executors of GEO. PEPPER, M. D., dec'd.
" 24, Jane P. Fales, Administratrix of OLIVER FALES, dec'd.
" 24, J. Granville Leach, Adm'r d. b. n. of OLIVER FALES, dec'd.
" 24, Horatio Gates Jones, Exec'r of REV. JOHN S. JENKINS, dec'd.
" 24, Horatio Gates Jones, Executor of HETTY ANN JONES, dec'd.
" 24, W. Henry Sutton, Administrator of NELLIE A. SMITH, dec'd.
" 24, W. Henry Sutton, Administrator of CHARLES J. SMITH, dec'd.
" 24, Israel H. Johnson et al., Executors of THOS. P. HOOPES, dec'd.
" 24, Solomon Rothschild, Guardian of ARNOLD'S Minors.

WILLIAM M. BUNN,
apr 25-4t Register.

CHARLES H. T. COLLIS, ATTORNEY AT LAW, 208 W. Washington Square, NOTARY PUBLIC AND COMMISSIONER OF DEEDS for the States of Vermont, New Hampshire, Maine, Massachusetts, Ohio, Illinois, Connecticut, Texas, Wisconsin, West Virginia, Rhode Island, Maryland, Virginia, Louisiana, Missouri, North Carolina, Georgia, New Jersey, Kentucky, Michigan, Iowa, Tennessee, Mississippi, Minnesota, California, Indiana. jul14-tf

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Orphans' Court Absolute Sale.—4th street. Three-story Brick Dwelling and Large Three-story Brick Manufacturing Building, fronting on Cadwallader street, above Columbia avenue. Lot 34 x 80 feet. Estate of George Kessler, dec'd.

Orphans' Court Absolute Sale—1735 N. 4th street. Genteel Three-story Brick Dwelling, with Brick Shop in rear, on Hale street. Lot 15 x 100 feet. Same Estate.

Orphans' Court Absolute Sale.—Antoinette street. Three-story Brick Dwelling, north of Haverford street, 24th Ward. Lot 21 x 67 feet. Estate of Edward Quay, dec'd

Orphans' Court Sale.—Tasker street. Three-story Brick Dwelling, west of 8th street. Lot 16 x 60 feet. Estate of Hugh Carney, dec'd.

Executors' Sale.—Powelton avenue. Modern Three-story Brick Dwelling with Back Buildings and Side Yard, east of 37th street. 24th Ward. Lot 37½ x 78 feet. Estate of Cornelius McMullan, dec'd.

2139 Callowhill street. Business Location—Modern and Well-built Three-story Brick Dwelling, with Back Buildings. Lot 17 2-3 x 140 feet to Shamokin street. Could with very little expense be altered into a store. Possession with the Deed.

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1227 Poplar street.—Business Stand—Three-story Brick Store and Dwelling, and Lot 16 x 110 feet.

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Vine, No. 1033—Modern Three-story Brick Residence. Orphans' Court Peremptory Sale.—Estate of Margaret H. Harlan, dec'd.

Filbert, No. 1213—Modern Three-story Brick Residence. Same Estate.

Arch, No. 325—Very Valuable Business Stand—Four story Iron Front Store.

Lafayette, Cape Island, N. J.—Modern Three-story Brick Cottage, 80 feet front. Executors' Sale—Estate of Joseph M. Thomas, dec'd.

Lafayette, adjoining the above—Stable and Coach House and Large and Valuable Lot. Same Estate.

Lafayette, adjoining the above—Desirable Lot. Same Estate. See plan.

Lancaster avenue, No. 4416—Three-story Brick Tavern and Dwelling. Peremptory Sale.

Race, No. 1027—Very Valuable Three-story Marble and Brick Building.

Nineteenth, (North,) Nos. 1530 and 1534—2 Modern Three-story Brick Residences. They have the modern conveniences.

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Richmond and William, N. E. Corner—Business Stand—Three-story Brick Tavern and Dwelling and 4 Brick Dwellings. Executors' Sale—Estate of Philip Duffy, dec'd.

Atlantic and Kentucky avenues, S. E. Corner, Atlantic City, N. J.—Business Stand—Three-story Frame Hotel, known as the "Constitution House."—Executors' Sale—Estate of Hugh Barr, dec'd.

Market, No. 2134—Business Stand—Three-story Brick Store and Dwelling,

Carlton, Nos. 1900, 1902, 1904 and 1906—4 Three-story Brick Dwellings.

Vine, No. 131—Business Stand—Four-story Brick Hotel and Dwelling.

Eighth, (North,) No. 1621—Modern Three-story Brick Dwelling. Executors' Peremptory Sale—Estate of David Evans, dec'd.

Francis, Nos. 1710, 1712 and 1714—3 Modern Three-story Brick Residences.—Same Estate.

Seventh, (South,) No. 28—Very Valuable Business Stand—Three story Brick Building. Same Estate.

Vine, No. 814—Very Valuable Business Stand—Modern Three-story Brick Store and Dwelling, with a Four-story Brick Building in the rear, fronting on Haviland place, No. 11. Same Estate.

Lease for 7 years on Large Lot, Queen street, between Fourth and Fifth, 3d Ward.

Race, No. 1724—Modern Three-story Brick Residence. Executors' Peremptory Sale—Estate of John Robinson; dec'd.

Eleventh and Mark's lane, S. W. Corner—3 Three-story Brick Dwellings. Same Estate.

Catharine, No. 407—Three-story Brick Dwelling. Same Estate.

Second, (North,) No. 331—Business Stand—Brick Store and Warehouse.

Seventeenth, (South,) No. 1317—Business Stand—Three-story Brick Store and Dwelling.

Twelfth, (South,) No. 1011—Modern Three-story Brick Dwelling.

Callowhill, No. 1804—Business Stand—Three-story Brick Store and Dwelling.

Moore, No. 515—Genteel Two-story Brick Dwelling.

East Walnut lane, East of Morton street, Germantown—Handsome Modern Three-story Pointed Stone Residence.

Fifteenth and Ontario, N. W. Corner—Lot.

Ontario and Mather, N. E. Corner—2 Lots.

Tenth, (North,) No. 963—Modern Three-story Brick Residence. Executors' Peremptory Sale—Estate of Abigail Emes, dec'd.

Hancock, No. 2344—Genteel Three-story Brick Dwelling.

Sixth, (North,) No. 2239—Genteel Three-story Brick Dwelling.

Third, (South,) No. 1031—Genteel Three-story Brick Dwelling.

Huntingdon and Edgemont, S. E. Corner—Desirable Lot.

Gaul, N. E. of Allegheny avenue—6 Two-story Brick Dwellings.

Fairhill, No. 2232—Modern Three-story Brick Residence. Has the modern conveniences.

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B, No. 2239—Two-story Brick Dwelling.

Noble, No 817—Genteel Dwelling.

Twelfth, (North,) No. 2045—Genteel Dwelling.

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Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, MAY 9, 1873. No. 19.

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Court of Common Pleas.

JOHN M. MARIS et al. v. THE UNION PASSENGER RAILWAY COMPANY.

1. The act of March 13th, 1873, enabling the Union Passenger Railway Company to lay tracks on Market street, is constitutional.
2. The use of the streets of municipal corporations are subject to the control of the Legislature.
3. Consequential damage is not within the prohibition against taking private property for public use without compensation.

Opinion by ALLISON, J. Delivered May 3d, 1873.

The bill in this case is filed by a large number of persons, who state that they are citizens, tax-payers, and some of them owners and occupants, and all of them occupants of premises, situate either upon Market street or upon Front street, in the city of Philadelphia.

They pray that the Union Passenger Railway Company may be restrained by injunction, from constructing an extended line of their railway upon Market street, between Ninth street and Front street, and connecting the line of their proposed tracks by a loop at and extending into Front street.

The defendants propose to make such extension of their railway, under the authority of an act of the Legislature of this State, approved the 13th day of March, 1873, which in its title and enacting clauses, read as follows:

"A further supplement to an act to incorporate the Union Passenger Railway Company of Philadelphia, approved April 8th, one thousand eight hundred and sixty-four, authorizing said company to extend their railway into and lay double tracks on Market street, from Front street to Ninth street, in the city of Philadelphia, to connect the new tracks with their present railway, to cross and intersect other railways at grade, to connect the new tracks with their present track by a curve or curves, and to connect with other railways without the consent of the councils of said city."

"Whereas, the interests of the public demand that no corporation should have the monopoly of carrying passengers over the streets of a city between points which require the advantages of competition.

"SECTION 1. That in addition to the powers and franchises heretofore granted to the Union Passenger Railway Company of Philadelphia, the said corporation shall have the following rights, privileges and franchises, to wit: To lay a double track of railway and railroad on Market street, in the city of Philadelphia, from any point or points west of the eastern curb of Front street to any point or points east of the western curb of Ninth street, in said city; to connect both of said double tracks with the present railway of said corporation now laid on Seventh street and on Ninth street, in said city; to cross all railways and railroads now or hereafter to be laid on Market street, between Front street and Ninth street, at grade, and to intersect the same at grade; to run the cars of said corporation and to carry passengers along and over the route hereby authorized; to remove the cobble-stones and beds of highways as may be necessary for the laying of the tracks hereby authorized; to put in said tracks all necessary loops, curves, frogs, and switches to connect the two tracks hereby authorized to be laid with a curve or curves, and to do all other things useful and necessary for extending the present route and railway of said corporation from Ninth street to Front street on said Market street.

"SECT. 2. The powers hereby granted may be exercised without the consent of the councils of the city of Philadelphia, and all laws and ordinances inconsistent herewith are hereby repealed."

The prayer for injunction rests on two grounds: First, that the act of March 13th, 1873, contains more than one subject, and that the same is not clearly expressed in its title. And second, that the occupancy of Market street, between Ninth and Front streets, by two additional passenger railway tracks, will seriously impair the usefulness and convenience of the street for business and commercial purposes; and that it is not competent for the Legislature to authorize such abridgment of access to the premises of complainants.

We are of the opinion that the exception taken to the act for the cause first assigned is not well taken. The title professes to give authority among the other powers enumerated to connect with other railways; in the body of the act no such right is given, unless it be held to apply to the other railways of the defendants on Seventh and Ninth streets; this power had already been recited in the title, and is given in the first section. But to the recital objected to is added the additional clause, "without the consent of the councils of the city;" it may, therefore, be regarded as a repetition of the power of making connection with Seventh and Ninth streets railways, but with the added privilege of doing it independently of the consent of councils. It does not of necessity follow that the words "other railways" must be interpreted to mean railways that do not belong to the defendants; such a meaning could be given to them, but we are to maintain the act if it can be done; and where two interpretations can be given, one for and the other against it, it is our duty to accept the one which will uphold the law rather than that upon which it is sought to be overthrown. But if the entire strength of the position of the complainants be conceded to them, we are not prepared to say that the objection ought to prevail.

The second ground upon which the prayer for relief by injunction rests, is more clearly untenable than the first. In the case of the Philadelphia and Trenton Railroad Company, 6 Wharton, 25, the law was so clearly and soundly stated that it has remained unshaken by subsequent decision ever since. In Pennsylvania, highways are the property of the people of the whole State, who may dispose of them by their representatives at their pleasure. Over them, Judge Gibson remarks, the State holds despotic sway; nor is there any difference between the streets of a municipality, and common roads and highways. The public sovereignty over them is universal, where such sovereignty is not excluded by legislative grant; and though streets may be placed under corporate regulations in certain respects, yet they are subject to the paramount authority of the Legislature, in the regulation of their use by carriages, rail-cars, or other means of locomotion yet to be invented. Upon this broad and comprehensive doctrine, the court rests the denial of the claim of the individual citizen to compensation under the constitutional prohibition against taking private property for public use, for anything which falls short of an actual taking. Matters of annoyance and inconvenience are not within the constitutional interdict; they say it consists in the obstruction of the right of passage which is personal, or in a depreciation of the value of property, by decreasing the enjoyment of it, but no part of it is taken from the owner. And though the State usually compensated consequential damages, it is of favor not of right. For such compensation the citizen must depend on the forecast and justice of the Legislature.

This is the established law of Pennsylvania, too well settled, we believe, ever to be shaken by judicial authority. What then becomes of the complainants' assignment of annoyance and partial deprivation of the enjoyment of their property for business purposes? We are compelled to say that it is no reason for granting the injunction for which they pray; it is a hardship which the law places upon them and for which it affords no remedy; certainly none that a court of equity can grant in the manner in which it is here brought.

The Legislature having, therefore, absolute dominion over Market street, except as they had in part stripped themselves of it by previous grant to the Market street railway company, the right of the defendants to lay their road upon the street, under their grant from the Legislature, cannot be questioned, provided it is done in such a way as not to interfere with the corporate franchises of the Market street company, with which the plaintiffs have no concern. We are, therefore, required to dissolve, and do hereby dissolve, the injunction heretofore granted at the instance of the plaintiffs.

THE MARKET STREET PASSENGER RAILWAY v. THE UNION PASSENGER RAILWAY COMPANY.

1. The right of the Union Railway to cross and intersect the tracks of the Market Street Railway, is limited to only such crossings as are absolutely necessary.
2. An express grant to one road to cross and recross another at pleasure, without necessity to justify it, is an infringement of corporate franchises which the Legislature has no right to make.
3. Necessity will not justify such a grant without making provision for compensation.

Opinion by ALLISON, P. J. Delivered May 3d, 1873.

The views briefly expressed in the foregoing opinion, are, in part, applicable to the present case. There is, indeed, but one material point upon which they differ—that relates to the alleged interference with the chartered rights of the plaintiff. The ground of complaint under that head is that defendants propose to lay their track upon and across the track of the plaintiff; the affidavit of the surveyor shows that 178 feet of the track of the complainants' road will be traversed by the track of the defendants' road, each using their separate track, including rails, frogs, &c.; but this, it is charged, is to superimpose another road, to the extent of 178 feet on the Market street railway; that no such power is expressly given by the act of 1873, and that, therefore, no such right has been attempted to be conferred, and if given, could only be exercised after making compensation.

A reference to the act shows that it is declared to be a right of the defendants to cross all railways and railroads, now or hereafter to be laid on Market street, between Ninth and Front streets, at grade, and to intersect the same at grade.

The plan submitted by the defendants, showing the track of the proposed extension of their road, has been approved by the board of surveyors, and it is there made to appear that the proposed crossings or intersecting of the railway of the plaintiffs, by that of the defendants, by curves and by obtuse angles, are seven in number. This, we think, cannot be done. First, because we do not interpret the right to cross and intersect other roads

to mean a general and unlimited right to cross, but only such crossing as is absolutely necessary to enable the defendants to build their road on Market street. Now the plan shows that no such necessity exists; that there is room on each side of the plaintiffs' tracks for the tracks of the proposed road, and there is, therefore, no absolute need of interference with the roadway of the plaintiffs; this, as we take it, is not a question of convenience merely, but one of necessity. If a necessity be shown, and the right is clear, however great the hardship, the hardship must be endured. Nor can this claim of right to cross be at all likened to the crossing of other roads at the intersections of streets, or the use of the track by vehicles; for every corporation that accepts a grant to lay a railway in a street, takes it with the clear, though it may be an implied condition, that it is to be subject to such use; by such a grant, there is taken from the public only so much use of the highway as is necessary for the proper working of the road; every other privilege which belonged to the public, remains unaffected by the grant. But in the second place we are of the opinion, that an express grant to one road to cross and recross another at pleasure, without necessity to justify it, is an infringement of the corporate franchises, which the Legislature have no right to grant; nor is it conceded that a necessity will even justify it without making provision in either case, for compensation for injury to such corporate franchises.

This doctrine was sustained in 5 Green, 72, Jersey City R. R. v. Jersey City Horse R. R., where the rails were continuously used for the business of the defendants. Here it is a continuous use of the bed of plaintiffs' road, and a continuous obstruction of the track. For the same general doctrine see also 32 Barber, 358, 45 Baker, 138. It is approved by Judge Redfield, in his Law of Railways, vol. 1, page 541, sections 6, 13, 646. At page 638, he says he had no doubt the company building the track must be regarded as having a property in it. Such tracks must be regarded in the nature of private property, and that it cannot in any proper sense be regarded as devoted by the makers to public use. And in Grover v. Powel, 21 Stockton, 211, it was held that a partial destruction or diminution of the value of corporate franchises is a taking of private property.

The right in this case to cross seven times, carries with it the right to cross seventy times, whereby the value of the road of the plaintiffs, which they hold under contract with the State, would be to a great extent destroyed. For it will not be forgotten that the charter of the plaintiffs stands not alone in the doctrine recognized in the Dartmouth College Case, that the grant as a pure donation of corporate franchise, accepted by the grantees, is a binding contract; there was a money consideration paid for it, in the purchase of the omnibus line, under direction of the Legislature, and a further outlay of money, annually expended, for paving the streets upon which the railway is laid. But there is a third reason for restraining the defendants from building their road in the manner proposed; the act does not in terms even give the right to cross the track of the plaintiffs as it is now constructed. It reads railways and railroads now or hereafter *to be* laid on Market street. This act must be read as it was passed, without punctuation, and certainly without supplying words necessary to make clear the right claimed by the defendants. If it read now laid or hereafter to be laid, this point would not arise; but the punctuation and the word laid have been omitted, and it speaks, literally interpreted, of railroads and railways now to be laid, or thereafter *to be laid*. This probably was not the intention of the draftsman of the act, but in a charter we look to the letter of the law alone; no grant of corporate power can be taken, unless it be by plain words or by necessary implication, especially where such power trenches on individual or corporate rights previously acquired. Com. v. Erie & N. E. Railroad Company, 3 Casey, 351. Upon the question of the right to construct the loop at Front street, we are with the defendants, but for the reasons assigned the injunction is continued.

PIERCE and PAXSON, JJ., dissent.

Theo. Cuyler, G. W. Biddle and *Wm. Henry Rawle, Esqs.*, for plaintiffs.

Hons. Jas. Thompson, F. Carroll Brewster and *C. H. T. Collis, Esq.*, for defendants.

Acts of Assembly—1873.

An act to fix the salary of the governor of this commonwealth.

SECT. 1. Be it enacted, &c., That the salary of the governor of this commonwealth is hereby fixed at the sum of ten thousand dollars per annum, payable quarterly; this act to take effect upon and at the expiration of the present gubernatorial term.

Approved January 15th, 1873.

An act to provide for the ordinary expenses of the government, &c.

The following are some of the items of general interest contained in this bill:

SECT. 6. Be it enacted, &c. For the salary of the attorney general, three thousand five hundred dollars.

For the salary of the deputy attorney general, one thousand eight hundred dollars.

SECT. 26. For the salaries of the judges of the Supreme Court, the sum of thirty-five thousand dollars, or the sum of seven thousand dollars to each judge for the present year, to be in lieu of all daily pay, mileage or other expenses heretofore allowed by law.

SECT. 27. For the payment of the salaries of the judges of the District Court and the judges of the Court of Common Pleas of the city of Philadelphia, the sum of fifty thousand dollars, or five thousand dollars to each judge for the present year.

SECT. 28. For the payment of the judges of the District Court, and the president and assistant law judges of the Court of Common Pleas of the county of Allegheny, twenty-five thousand dollars, or five thousand dollars to each one of the law judges for the present year.

SECT. 29. For the payment of the president judge of the twelfth judicial district, who performs increased labor in trying the commonwealth civil cases in the county of Dauphin, the sum of five thousand dollars.

SECT. 30. For the payment of the salaries and mileage of the president, additional and associate law judges of the several courts of common pleas in the commonwealth, except in the city of Philadelphia, in the county of Allegheny, and the twelfth judicial district, the sum of one hundred and thirty-four thousand dollars, or so much thereof as may be necessary; each president and law judge to receive four thousand dollars salary during the present year, except the president judge of the District Court of Cambria county, whose salary for the present year shall be one thousand eight hundred dollars.

SECT. 31. For the payment and mileage of the associate judges of the courts of this commonwealth, the sum of fifty thousand dollars, or so much thereof as may be necessary; each associate judge to receive, in lieu of the salary now allowed by law, five dollars per day for every day he may be employed in the discharge of his official duties: *Provided*, That the salary of no associate judge shall be less than three hundred dollars.

SECT. 47. For the Jefferson Medical College of the city of Philadelphia, to be used for and toward the erection and equipment of a hospital for medical and surgical treatment of sick and maimed persons of this commonwealth, the sum of one hundred thousand dollars, upon the precedent condition that it shall raise and secure to be paid and applied to this object, the sum of one hundred thousand dollars in addition thereto; and upon the further expressed condition that at least one hundred beds, free for persons injured, shall be forever therein maintained: *Provided*, That no portion of said appropriation shall be paid by the State treasurer until satisfactory evidence is furnished to the auditor general and State treasurer, upon the oath or affirmation of the proper persons, officers of said college, that the required sum of one hundred thousand dollars shall have been subscribed and paid, or secured to be paid, by valid subscription, to said college, to be used only for the erection, support and maintenance of said hospital: *And provided further*, That the said sum shall only be drawn by the trustees of said college, from time to time, as the work progresses, and not more than one-fourth part thereof shall be paid in any term of six months.

SECT. 52. To the University of Pennsylvania, the sum of one hundred thousand dollars, upon condition that it shall raise the sum of one hundred thousand dollars in addition thereto; the entire appropriation to be expended in the erection of a general hospital in connection with said institution, in which at least two hundred beds, free for persons injured, shall be forever maintained: *Provided*, That no portion of the State appropriation to said university shall be paid by the State treasurer before the year one thousand eight hundred and seventy-four, and until satisfactory evidence is furnished to the auditor general and State treasurer, upon the oath or affirmation of the proper persons, that the required subscription of one hundred thousand dollars has been subscribed and paid in, or secured to be paid by subscription, to said university.

SECT. 59. For the pay of the expenses of the Constitutional Convention, including the pay of the members, clerks and officers thereof, and the printing therefor, the sum of five hundred thousand dollars, or so much thereof as may be necessary, to be settled by the auditor general; and the amount of the salaries of the members and clerks, and the pay of the officers and employees thereof, shall be fixed by the said Constitutional Convention, and the money shall be paid by the State treasurer, on the warrant of the president of the said convention, countersigned by the chief clerk of the convention; and any statute inconsistent herewith be and the same is hereby repealed.

SECT. 62. For the expenses of three commissioners to represent the commonwealth of Pennsylvania at the Vienna Exposition, the sum of six thousand dollars, or two thousand dollars each; said commissioners to be designated by the governor, from those appointed under joint resolution, approved March 19th, one thousand eight hundred and seventy-three; the amount herein appropriated to be paid said commissioners when so designated by the governor: *Provided*, Said commissioners shall be required to proceed to Vienna on or before the first day of May next, and make report to the governor by the first of December next, of all such matters as may be of interest to the citizens of the commonwealth.

General Appropriation Bill. Approved April 9th, 1873.

An act to provide for the incorporation of iron and steel manufacturing companies.

SECTION 1. Be it enacted, &c., That when any three or more persons may desire to form a company, under the provisions of this act, for the purpose of making iron or steel, or of manufacturing iron or steel in any shape or form, either of these metals exclusively, or in combination with other metals or with wood, and shall have subscribed as capital stock for that purpose, a sum not less than twenty thousand dollars, and actually paid in to such person or persons as they may have appointed to receive the same, ten per centum of the capital stock so subscribed, it shall and may be lawful for them to prepare a certificate in writing, in which shall be stated the corporate name of said company, and the amount of the capital stock thereof, the number and value of the shares into which said stock has been divided, the amount of stock subscribed, the amount actually paid in and to whom paid, the names and residence of the subscribers, and the number of shares subscribed by each, the name of the county in which the chief operations of the company are to be carried on, and the names of the president and directors who shall manage the affairs of said company until the next election, which shall be signed and verified by the affidavit of the president and directors therein named.

SECT. 2. That the said certificate shall be filed in the office of the secretary of the commonwealth, who shall enter thereon the date of the filing of the same, and submit it to the attorney general of the commonwealth for examination; and if the attorney general shall find the certificate to be properly drawn, signed, and acknowledged, according to the provisions of this act, then the secretary of the com

monwealth shall cause a true copy thereof to be recorded at length in a suitable book to be kept in his office for that purpose, and the governor shall issue letters patent under the great seal of the commonwealth, declaring the subscribers to the stock of said company, and those who may thereafter become subscribers or holders of the said stock, to be a body politic and corporate, in fact and in law, by the name, style, and title stated in the certificate as aforesaid.

SECT. 3. That every such company shall have power to make and use a common or corporate seal, and to change, alter, or amend the same at pleasure, and by their corporate name shall be competent in law to sue and be sued in any court of this commonwealth; and they shall have power to make and establish such rules, regulations, and by-laws, not inconsistent with the constitution and laws of this commonwealth, as they may deem necessary or convenient for the government of the corporation and for conducting or managing their business, providing for the election or appointment of a treasurer and secretary, and such other officers and agents as the business of the company may require.

SECT. 4. That the capital stock of every such company shall consist of not less than twenty thousand dollars, nor more than one million dollars, and shall be divided into shares of not more than one hundred dollars each; and all subscriptions to the capital stock shall be paid in such instalments, and at such times as the directors may require; and if default be made in any payment, the person or persons in default shall be liable to pay, in addition to the amount so called for and unpaid, at the rate of one per centum per month for the delay of such payment, and the directors may cause suit to be brought for the recovery of the amount due, together with the penalty of one per centum per month as aforesaid; and no stockholder shall be entitled to vote at any election, or at any meeting of the stockholders, on whose share or shares any instalment or arrearages may have been due and unpaid for the period of thirty days immediately preceding such election or meeting. The shares of the capital stock of every such company may be transferred on the books of the company, in person or by attorney, subject to such regulations as the by-laws may prescribe. The amount of the capital stock may be increased or diminished at any general election or special meeting of the stockholders, by a vote of two-thirds of all the shares of the stock held by such company: *Provided*, Every such increase or diminution shall be certified by the president and secretary, within thirty days, to the secretary of the commonwealth and to the auditor general.

SECT. 5. That the business of every such company shall be managed by the president and board of directors, who shall be selected annually by stockholders from among their number, at such time and in such manner as the by-laws may prescribe, and shall continue in office until their successors are duly chosen: *Provided*, The board of directors shall not consist of less than three members, including the president, and a majority of the board shall be citizens of this commonwealth. All elections by the stockholders shall be by ballot, and every share of stock shall entitle the holder thereof to one vote in person or by proxy.

SECT. 6. That every such company shall have the right to purchase, lease, hold, mortgage, and sell real estate and mineral rights, to prove and open mines, to mine and prepare for market, or for their own use and consumption, iron ore and other minerals, and to erect and construct furnaces, forges, mills, foundries, manufactories, and such other improvements and erections as they may deem necessary, and to manufacture iron and steel, in all shapes and forms, either of these metals exclusively, or in combination with other metals, or with wood, and to transport all of said articles, or any of them, to market, and to dispose of the same, and to do all such other acts and things as a successful and convenient prosecution of said business may require: *Provided*, They shall not at any one time have more than five thousand acres of land within this commonwealth, including leased lands.

SECT. 7. That every such company may make and issue bonds, with or without coupons attached, bearing interest not exceeding eight per centum per annum, and sell, exchange, or otherwise dispose of the same, upon such terms and conditions as they may deem advisable; and such bonds and the interest thereon may be secured by a mortgage or mortgages upon the corporate franchises, real and leasehold estate: *Provided*, They shall not issue bonds for a greater sum than three times the amount of the capital stock paid in.

SECT. 8. That every company incorporated under the provisions of this act, shall pay into the treasury of the commonwealth, a bonus of one quarter of one per centum upon the original amount of the capital stock, and upon any increase thereof, in five equal annual instalments, and such taxes as are or may be required by law; and the stockholders shall only be individually liable for debts due to the laborers for services, and in that case for no period exceeding six months.

SECT. 9. That the president and directors of every such company shall annually lay before the stockholders a full and complete statement of the business and affairs of the company, for the preceding year; and it shall also be their duty to make report to the auditor general annually, at such time and in such form as he may prescribe, of the operations of the company for the preceding year, to the end that he may ascertain the amount of tax due by said company to the commonwealth; and such report shall be verified by the oaths or affirmations of the president and treasurer of such company; and any such company which shall neglect or refuse, for sixty days after notice given, to report to the auditor general as aforesaid, shall be liable to a penalty of five hundred dollars, for the use of the commonwealth, to be sued for and recovered as debts of like amount are or may be by law recoverable.

SECT. 10. That whenever any persons, forming a company under the provisions of this act, shall state, in the certificate required by the first section of said act, that they are willing that the stockholders shall be individually liable for all debts of the company, as fully as if they were members of a partnership, then, and in that event, the stockholders of such company, whether holding the certificates of stock in their own name, or being the parties beneficially interested therein, shall be jointly and severally liable, in their individual capacities and estates, for all debts, contracts, or other liabilities of the company, contracted or incurred during the time such stockholders respectively own their stock, or are beneficially interested therein: *Provided*, That all companies incorporated under this act, upon the condition aforesaid, and whose stockholders shall thereby assume such individual liabilities as aforesaid, shall be subject to only one-half the taxation now or hereafter imposed by the laws of this commonwealth upon such incorporated companies.

SECT. 11. That it shall and may be lawful, for any corporation organized under this act, to appropriate any stream or streams, spring or springs, flowing through or along, or rising upon any lands belonging to and owned by such corporation, in the vicinity of their works, for the purpose of supplying the same with steam or water power, upon the said corporation filing, in the office of the prothonotary of the Court of Common Pleas of the county in which such works may be located, a draft or drafts, showing the stream or streams, spring or springs, which may have been appropriated for the purposes aforesaid; whereupon it shall not be lawful for any other corporation or individual, to divert or use the water of any stream or streams, spring or springs, thus appropriated, so as to diminish the usual accustomed and natural flow thereof: *Provided*, That every corporation thus appropriating any stream or streams, spring or springs, shall, after using the waters of the same for their manufacturing necessities, return the same into the usual and accustomed channel, whereby the waters of such stream or streams, or spring or springs, have theretofore been accustomed to flow off or along the lands of such corporation.

SECT. 12. The incorporation of any association of persons, under the provisions of this act, shall be held and taken to be of the same force and effect as if the powers and privileges conferred, and the duties enjoined, had been conferred and enjoined by special act of the Legislature; and the franchises granted shall be construed according to the same rules of law and equity as if it had been created by special charter, and no modification or repeal of this act will affect any franchise obtained under the provisions of the same.

SECT. 13. That it shall and may be lawful for any incorporated company of this commonwealth, to subscribe and take shares of stock in any company incorporated under the provisions of this act, or to purchase the bonds or stock, or guarantee the payment of said bonds and the interest thereon, or either principal or interest.

SECT. 14. That all laws and parts of laws inconsistent with this act, be and the same are hereby repealed, so far as they may relate to or affect any company incorporated under the provisions of this act, or the stockholders of any such company: *Provided*, This shall not apply to laws imposing taxes upon such corporations.

Approved March 21st, 1873.

An act to increase the pay of jurors in this commonwealth.

SECT. 1. Be it enacted, &c., That from and after the passage of this act the pay of jurors in this commonwealth shall be two dollars a day, with mileage as now allowed by law: *Provided*, That the provisions of this act shall not apply where the pay of jurors is now fixed by law at more than two dollars per day.

Approved February 28th, A. D. 1873.

An act to facilitate the settlement of estates of decedents.

SECT. 1. Be it enacted, &c., That where moneys or other estate of a decedent have been or shall be attached in the hands of executors or administrators, the garnishee may, after the third term, apply by petition to the court out of which the attachment issued, asking the court to grant a rule on the plaintiff and defendant to appear and show cause why the attachment shall not be proceeded in within such time as the court may order and direct; and upon hearing had, it shall be lawful for the court, upon neglect or refusal of the plaintiff to proceed as required to make an order on the record discharging the garnishee and the property in his hands from all liability for such debt or demand: *Provided*, That this act shall not apply where the property sought to be attached shall not be yet due and payable by the garnishee.

Approved February 28th, A. D. 1873.

A supplement to an act providing for the taking of game.

SECT. 1 Be it enacted, &c., That the true intent and meaning of section eight of an act approved the twenty-first day of April, Anno Domini one thousand eight hundred and sixty-nine, entitled "An act providing for the taking of game," is, that the same applies to the trapping or snaring, in any manner, of any bird or birds mentioned in said section, subject, however, to the proviso therein contained.

Approved March 12th, A. D. 1873.

An act to authorize railroad corporations to secure the payment of their bonds and obligations by a mortgage upon their property, rights, and franchises.

SECT. 1. Be it enacted, &c., That it shall be lawful for any railroad corporation of this commonwealth to secure the payment of any and all bonds and obligations which they have heretofore made and issued, or may hereafter make and issue, by a mortgage bearing a rate of interest not exceeding seven per centum per annum upon the whole or any part of their property, rights and franchises, subject to any prior incumbrances thereon: *Provided*, That this act shall not be construed to empower any railroad company to issue bonds in excess of the capital stock actually paid in.

Approved March 13th, A. D. 1873.

An act authorizing assignees of insurance policies to sue in their own name.

SECT. 1. Be it enacted, &c., That from and after the passage of this act it shall be lawful for the assignee or assignees of the whole or any part of any policy of life, fire, or marine insurance, his executors or administrators, to bring suit, in the name of the assignee or assignees, for his, her, or their interest in any policy of insurance, against the company issuing the same, upon the happening of the contingency provided against.

Approved March 14th, A. D. 1873.

LEGAL GAZETTE.

Friday, May 9, 1873.

JOHN H. CAMPBELL,
EDITOR.

THEODORE F. JENKINS,
ASSOCIATE EDITOR.

THE LATE CHIEF JUSTICE.

In the United States Circuit Court shortly before 3 o'clock, on Wednesday, District Attorney McMichael came into court and addressed his honor, Judge Cadwalader, saying:

"It is my painful duty to announce to the court the death of the chief justice of the Supreme Court of the United States. Intelligence has reached this city that he expired this morning. His long and honorable career of public service is a matter of familiar history. As governor of Ohio, senator of the United States, and secretary of the treasury at a time when our finances needed the greatest skill in their management, he displayed such distinguished ability as gave him a national reputation. In the still more important position which he held at the time of his death, his high qualities have been equally conspicuous. He was learned, able, and just, and although for some time past impaired in health by disease, his strong intellect rose superior to his physical infirmities and enabled him to continue in the discharge of his judicial duties. His death will be mourned by the profession which he adorned, and the country which he so faithfully served."

Judge Cadwalader said he fully subscribed to the remarks of the district attorney, and without repeating what had been so well said, he would add that the opinions of Chief Justice Chase displayed a degree of ability rarely equalled.

In respect to the memory of the chief justice, he adjourned the court, and directed a minute of these proceedings to be entered upon the record.

HUGH NELSON McALLISTER,

One of the delegates at large to the Constitutional Convention now sitting in this city, died Monday morning last, at 4.30 o'clock, in the 65th year of his age. The deceased delegate was chairman of the committee on election, suffrage and representation, and a member of the committee on railroads and canals. He was a native of Juniata county, Pennsylvania. After graduating at Jefferson College, Cannonsburg, where he received the highest honors of his class, he finished his studies at the law school at Dickinson College, and soon after commenced the practice of the law in Bellefonte, where he rapidly rose to distinction in his profession, and where in the latter part of his life he was regarded as the leader of the bar in the part of the State in which he practiced. His great energy of character, unquestioned integrity, and large public spirit were well known.

As one of the original projectors of the Farmers' Agricultural College of Pennsylvania, and a member of its board of trustees, he devoted much of his time and means to that institution, and materially assisted to insure its present great success. He was also for many years a leading member and elder of the Presbyterian Church. Though frequently solicited to accept official position, the deceased never would consent to be a candidate for public office, and only came to the convention from the highest sense of his duty to the State of which he was a citizen. As an advocate of real and judicious reforms, and particularly as chairman of the election committee, his zeal and fidelity were conspicuous, and the unusual and severe strain thus imposed upon an already impaired constitution, evidently hastened his death. The deceased leaves a widow and two daughters, both of whom are married and reside at Bellefonte.

It was our fortune to be associated with Mr. McAllister, upon both of the committees of which he was a member, and we can testify to the indomitable energy of character, the thorough earnestness of purpose, and the perfect straightforwardness he evinced in the performance of the duties allotted to him. In his death, the convention loses a trustworthy and valuable member.

INTERESTING TO STUDENTS.

The District Court and Court of Common Pleas of this city, have approved the following course of study submitted by the board of examiners for applicants for admission as attorneys.

COURSE OF STUDY—*Obligatory.*

Introduction to Robertson's Charles V.; Blackstone's Commentaries, Sharswood's Edition; Kent's Commentaries; Story or Adams on Equity; Greenleaf on Evidence, Vol. 1st; Stephen on Pleading; Constitution of the United States; Acts of Congress relating to the Judiciary; Bankrupt Act; Constitution of Pennsylvania; Rules of Equity Practice; Troubat and Haly's Practice.

Acts of Assembly in Purdon's Digest relating to:

Actions Personal; Execution; Actions Real; Factors; Amendments; Assignments; Bills of Exchange; Bonds; Contracts of Decedents; Crimes; Decedents' Estates; Deeds and Mortgages; Defalcation; District Court; Dower; Ejectment; Equity; Estates Tail; Real Estate; Replevin; Trustees; Foreign Attachment; Fraud and Perjuries; Ground Rents; Habeas Corpus; Intestates; Joint Tenancy; Judgments; Landlord and Tenant; Liens; Limitation of Actions; Marriage; Orphans' Court; Partition; Promissory Notes; Real Estate; Register and Register's Court; Replevin; Trespass; Trustees; Wills.

COURSE OF STUDY—*Recommended.*

Smith on Contracts; Williams on Real Property; Greenleaf on Evidence, Vols. 2 and 3; Starkie on Evidence, Vol. 1; Wharton's Criminal Law.

Acts of Assembly in Purdon's Digest relating to:

Attorneys at Law; Charities; Criminal Procedure; Interest; Collateral Inheritance; Limited Partnerships; Mechanics' Liens; Verdict; Equitable Plaintiff; Evidence; Feme Sole Traders; Aliens; Divorce; Lunatics and Habitual Drunkards; Practice.

The foregoing course of study shall apply to all applicants for admission as attorneys who have been registered since January 1st, 1872, or who shall hereafter be registered.

Published by order of the Board of Examiners.

S. S. HOLLINGSWORTH,
Secretary.

PUBLICATIONS RECEIVED.

REPORTS OF CASES DECIDED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES, FOR THE NINTH CIRCUIT; embracing Cases at Law, civil and criminal, in Equity, Admiralty and Bankruptcy, and cases on appeal from the American Consular and Ministerial Courts in China and Japan. Reported by L. S. B. Sawyer, Counsellor at Law. Volume 1, 8vo., pp. xiii., 786. San Francisco, A. L. Bancroft & Co., Publishers, Booksellers and Stationers, 1873. Received from the Publishers.

This is the first volume of a series of reports of cases in the United States courts of the Pacific coast. It will, of course, be a necessity to all practitioners in the various Federal courts throughout the country. Independent of its being needed to complete sets of United States reports, it is intrinsically valuable, as containing a great many important and useful cases. In another column, we publish some of the head notes of the cases reported in the volume, from which our readers can judge themselves of the value of Sawyer's Reports. The book itself is gotten up in the usual style of Messrs. Bancroft & Co., well printed, well bound, and altogether a highly creditable production.

LA REVUE CRITIQUE DE LÉGISLATION ET DE JURISPRUDENCE DU CANADA, for April, 1873.

The present number of this excellent quarterly contains an article on the Navigation Laws of Canada, by D. Girouard; one by J. C. Hatton, on Foreign Marriages, and one by S. Pagnuelo, entitled "Législation à Québec." The Review also contains a collection of head notes of recent Quebec and other Canada decisions, as well as of New Brunswick, St. Lucia and English cases. It is well worth reading.

Recent Decisions.

UNITED STATES COURTS.

[Head notes of cases reported in 1st Sawyer's Reports, 9th (California) Circuit—Received from A. L. Bancroft & Co., Publishers, San Francisco.]

ABSCONDING DEBTOR.

1. An absconding debtor is one who is about to leave the State, either openly or secretly, with intent to hinder, delay or defraud his creditors of their just debts. Norman v. Manciette, 484.

2. A debtor who is about to remove from this State without the consent of his creditors, and without a mind to return, is presumed to be acting with such intent, and *prima facie* is an absconding debtor. Id.

3. The Legislature has power to authorize the arrest and imprisonment of such a debtor, so as to enable his creditors to enforce the establishment and collection of their debts by legal proceedings in the tribunals of this State. Id.

ADMIRALTY.

The lien of domestic material men will be enforced against proceeds in the registry in preference to the demand of a subsequent mortgagee of the vessel, notwithstanding that since the repeal of the 12th rule in admiralty, such liens cannot be enforced in this court by a proceeding *in rem.*, nor in the State courts by any proceeding which involves the exercise of admiralty jurisdiction. Francis v. Barque Harrison, 353.

1. An appeal, or writ of error, in the name of a steamboat, or any other than that of a human being, or some corporate or associated aggregation of persons, cannot be sustained. Steamer Spark v. Lee Choi Chum, 713.

2. So, also, appeals in the name of a firm without stating the names of the individuals composing the firm, are nugatory. Id.

BANKRUPTCY.

An adjudication in bankruptcy relates to the filing of the petition, and works a dissolution of an attachment before then levied upon the bankrupt's goods from that date. Zeiber v. Hill, 268.

In a petition in bankruptcy, the debt and the act of bankruptcy constitute the cause of action, and the defence thereto may go to either or both of these matters, but if there are several defences they must be separately pleaded. In re Ouimette, 47.

1. A payment or other disposition of property by a debtor after petition in bankruptcy filed against him, is not a preference within the meaning of sections 23, 35 and 39 of the bankrupt act, but simply an unlawful meddling with the property of the assignee, and therefore a nullity. In re Randall, 56.

2. Objection to the proof of debt must be made by the assignee, unless the court for cause otherwise directs. Id.

ALABAMA.

[Head notes of decisions of the Supreme Court of Alabama, rendered at January Term, 1873. Received from John W. Watts, Esq., State Reporter.]

CONFESSION.

PECK, C. J.—1. Before a confession can be received as evidence in a criminal case, it must be shown to be voluntary. If obtained by operating on the hopes or fears of the prisoner, it ought to be rejected.

2. Where a negro boy eighteen years old, of ordinary intelligence, is in custody on a charge of burglary, if the person with whom he has been living for about two years, says to him: "Tom, this is mighty bad; they have got 'the dead wood' on you, and you will be convicted;" and at the same time says something about "owning up," and further: "that he could have nothing to do with any one who had acted so badly, and if he had anything to say as to his helping him in the difficulty, to do so;" and if the prosecutor also says to him: "You are very young to be in such a difficulty, there must have been some one with you who was older, and I, if in your place, would tell who it is, that it is not right for you to suffer the whole penalty, and let some one who is guiltier go free, that it may go lighter with you;" and thereupon he makes a confession, it ought to be rejected as involuntary, and improperly obtained. Newman v. The State.

CONSIDERATION.

SAFFOLD, J.—The consideration of a promissory note given for borrowed money, is not the check on a bank by which it is to be drawn, but the money obtained by the borrower, and when this money was

Confederate currency, the note is without consideration in a suit upon it by the payee against the maker. Whitfield v. Tulford.

MARRIAGE.

PETERS, J.—The contract of marriage in this State is indissoluble by agreement of the parties, and can only be dissolved by divorce or by death, or to a certain extent by the exceptions to prosecution for bigamy. (Con. Ala. 1867, article 4. § 30; Rev. Code §§ 2357, 2599, 3600.) McConnice v. The State.

TOURNAMENTS.

SAFFOLD, J.—1. At a tournament held by an agricultural association during one of its annual fairs, the most successful knight was to receive a prize of $400, to be awarded by judges who were to decide upon their own observation, and information given by heralds.

2. Such awards are in the nature of awards at common law, and should be governed by the same rules in respect to setting them aside.

3. If the judges, or arbitrators, having made an award, reverse it and make another the same evening or the next morning, before their duties can be reasonably said, under the circumstances, to have terminated, the latter is their award.

4. The judges, in making their awards as to the skill and address of the knights, are not at liberty to examine any witnesses except such as were charged with the duty of ascertaining the facts, nor should the court do so in a suit brought on the award.

5. When the judgment cannot be different, this court will not reverse for errors committed.—Alabama Agricultural Association v. Trimble.

UNSTAMPED INSTRUMENT.

PETERS, J.—Where there is no charge of a fraudulent purpose to evade the revenue law of the United States, a failure to affix the proper stamp to an instrument, at the time it is signed and issued, does not render the instrument void; but it cannot be used as evidence in any court, *until* a legal stamp or stamps denoting the amount of tax shall have been affixed thereto, as prescribed by law. (14 U. S. Stats. at Large, p. 98 and §§ 158, 163; also pamphlet acts of Congress, 1871-72, p. 245, No. 205, § 36.) Miller v. Underwood.

CONSTITUTIONAL LAW.

[The following are abstracts of the opinions of the judges in the case of Screws v. Ragland, involving the consideration of the recent political troubles in Alabama.]

PECK, C. J.—1. Every officer who, by the constitution or laws of the State, is required to be elected by the people, derives his right to the office by his election, and the evidence of his election in the first place usually is the certificate of the proper officer, or if he is an officer who by the constitution or laws is required to be commissioned by the governor, then, his commission is the evidence. This evidence, the certificate or commission, is not conclusive, but *prima facie* evidence only, which may be overcome or destroyed by better evidence, to wit: by the judgment of a competent court, if he is an executive or judicial officer; if a legislative officer, a senator or representative of the General Assembly, then, such evidence is the determination of the legislative body of which he claims to be a member, to wit: The Senate or House of Representatives, declaring him to be, or not to be, a member of said body. Each house of the General Assembly is, by the constitution, made the sole judge of the qualifications, elections, and returns of its own members. (Act 4, § 6 of the Con.)

2. When, therefore, either house declares that a certain person is a member of its body, that is final and conclusive and no court can go behind it.

3. The Senate and House of Representatives each, since their organization under the proposal of the attorney general of the United States, made for that purpose, has declared that certain persons, who had one certificate of election, were elected by the people, and certain other persons, who had certificates of election, were not elected by the people; and the first named persons have been declared and recognized as members of the respective houses. This is conclusive upon us, and we have no power to review or revise what has thus been done. These persons, if elected by the qualified electors, were members of the General Assembly from the day of their election, and being members, then the two bodies who convened and organized at the court house in Montgomery, had a majority in both houses, and having such majority, when recognized by the governor, were a constitutional General Assembly, and were competent to do any act, as a General Assembly, except such acts as can only be done by a majority of two-thirds of the members of each house. They could elect a public printer or a senator to the Congress of the United States.

4. I do not regard it necessary that the General Assembly should convene and organize in the capitol building, neither the constitution nor any law of the State requires this. They are required to convene in Montgomery, not in the capitol building; nor in the organization is it necessary that the lieutenant governor, or the speaker be present. These officers preside—the lieutenant governor over the Senate, and the speaker over the House of Representatives—after they are organized, not necessarily before.

5. The statement of facts, in this case, settled and agreed upon by the parties, shows, that on the 10th day of December, 1872, after the bodies that convened and organized at the court house in Montgomery, claiming to be the General Assembly, was recognized by the governor, as the General Assembly of the State of Alabama, elected Arthur Bingham, the public printer of the State.

6. We hold, that notwithstanding the peculiar circumstances attending the meeting and organization of said bodies, and their recognition by the governor, said election was not void, but valid; and that as said Bingham has given his official bond, which was approved of by the governor, and has received a commission as public printer, &c.; he is to be regarded as the public printer of the State, and entitled to all the privileges and emoluments of said office, and authorized to discharge the duties of the same, consequently, the decision of the City Court denying the *mandamus* prayed for by the petitioner in his petitions, is free from error and must be affirmed at petitioner's cost.

PETERS, J.—I concur not only in the reasoning, but also in the conclusion of the opinion of the chief justice, which has just been read in this case.

1. The State printer is an officer elected by the General Assembly at the time appointed by law. That time had arrived when the election of Mr. Bingham was made in this case. After the election of the State printer by the General Assembly, he is required to give bond as prescribed by the statute, and to take the constitutional oath of office. (Rev. Code §§ 123, 127; Constitution of Ala., 1867, Art. xv., St.)

2. When this is done he becomes one of the executive officers of the State. And although he is not one of those officers specially required to be commissioned by the governor, yet the governor alone can approve his bond. And if as evidence of his approval and of the proper qualification of the officer so appointed to discharge the functions of his office, he is commissioned by the governor, this court cannot say that such commission has been inadvertently issued, and step in and aid the chief executive of the State in the manner of performing his duties, or perform them for him. (Rev. Code, §§ 148, 126.) We must presume that the governor knows his own duties and how to perform them; and that he would not approve the bond and commission any person as State printer, without the proper evidence of his appointment by the proper authority, and particularly when this is done during the session of the General Assembly and with their full knowledge; and while that body, having control for the time being of the sovereign power of the State, over the very question in controversy, acquiesces in such approval and commission.

3. When this is the case, the courts have no other alternative than to acquiesce also. This is necessarily so, at least until the General Assembly, which speaks the legislative mind of the people of the State, shall decide otherwise. Then it will become the duty of the governor and of this court to conform to this declaration of legislative will; otherwise a State printer may be made by this court against the will of the General Assembly and the commission of the governor. This is not a power vested in this tribunal. An office created and filled by the General Assembly is a revocable franchise given by statute. It may also be taken away or abolished by the statute, unless it is protected by a constitutional provision. (Perkins v. Corbin, 45 Alabama, 103.)

4. Such office is not a vested right which is above legislative control. Then in what way the Legislature shall bestow it, or in what manner that body shall put an end to it, is a matter over which they exercise the sole, unlimited, sovereign power. (45 Ala. 103, *supra.*) If I had much greater doubt about the regularity of the organization of the legislative body that elected Arthur Bingham State printer, on the 10th day of December last, than I do, I would still feel a very grave reluctance to declare such election void.

5. The constituent elements of the same body are still acting in the capacity of the General Assembly of this State, and they have not, and do not repudiate the election thus made. It is their affair. If they are content with it, they have the powe and the right to be so content. In this matter they alone speak the sovereign will, and in this they must be followed by the courts. No judgment of this court or any other, so long as they act within their constitutional limits, can reverse or interfere with their decisions.

6. In such a matter they are a law unto themselves. They are the sole judges of the thing to be done and the manner in which it should be done. Their action, however irregular it may be, when compared with former usages, is the law with them, and it is equally the law of this court. Until they choose to change their action it must be final with this tribunal. Courts cannot regulate Legislatures, but Legislatures can regulate courts. It is the duty of the courts, so far as they can, to find out the legislative will and to follow it in their judgments. Guided by this maxim, I can do no more than to concur with the venerable chief justice of this court in declaring Arthur Bingham State printer, until it is the will of the General Assembly to determine otherwise. The legislative body may make mistakes. They may do wrong. They may commit what the over fastidious may pronounce serious blunders. They are but men, and humanity is never, in a legislative sense, infalliable. But this court can only interfere to control their mistakes, should such mistakes occur, when they involve a disregard of some constitutional restraint or limitation of their powers in this enactment of a law. Beyond this, courts cannot go. *Non nastrum est tantus componere lites.* (See Challefaux et al. v. Ducharnei et al., Wis. 554; Kottam et al. v. Ayer, 3 Strob, 92; Drake ex rel. v. Mahany, 137 Mich. 481; The State v. Johnson, 17 Ark. 407; Marbury v. Madison, 1 Cranch, 137, and Luther v. Borders, Haw. U. S. R. 1, et seq.)

7. The judgment of the court below is free from error and should be affirmed.

SAFFOLD, J.—I concur with the chief justice in the following propositions:

1. That it is not indispensable to the organization and existence of the General Assembly that it should meet in the capitol, or be presided over in the Senate by the lieutenant-governor, and in the House of Representatives by the speaker, or to be recognized by the governor.

2. That the members thereof derive their authority to act as such from their election by the people, and not otherwise.

3. But I maintain that there are cases in which there is no General Assembly, notwithstanding a majority of each house may meet at a time and place appointed by law, and organize and assume to be the General Assembly; and that the present is such a case.

4. We know now who are entitled as members thereof to compose the General Assembly, because it has been ascertained by an undoubted General Assembly. It appears from the finding that the prior assemblage at the capitol lacked the indispensable requisite of a General Assembly, to wit: a majority of the members of each house. This was the only defect of that assemblage, either in form or substance. But it is vital and fatal to its claim to be the General Assembly.

5. The assemblage at the United States court room, lacking every mere form in its organization, had, as has been subse-

quently ascertained, a majority of the duly elected members of each house. In refusing to attend at the capitol, and in organizing at another place, its members staked their defence upon the *truth* of their claim to be a majority of each house. The result of a proper investigation vindicated this claim, and prevented the other body from constituting the General Assembly. Necessity is a law. But the validity of acts, dependent alone upon it, fails, if there was not the necessity. The court house assemblage might have been held to have been the Legislature, if nothing else had transpired within a reasonable time.

6. Appeal was made by each claimant to the President of the United States for recognition. One body was meditating the impeachment of the governor for refusing to recognize it, and both were proceeding to declare vacant the seats of members who belonged to the other. Nothing but force would have decided the dispute, if it had not been for the intervention of the President through the United States attorney general. In obedience to his suggestion, the House of Representatives readily organized and awaited the organization of the Senate which was effected some time afterwards. The most important of the contested seats have been determined in this new organization, by the whole number of members undoubtedly entitled to seats, and others are awaiting its action. Notwithstanding this inquest determine that the court house assemblage had a majority of each house, I insist it was not the General Assembly.

7. A Legislature to be such must, of course, have all the powers which it may exercise. Some of the powers require to be exercised by two-thirds of each house. Can a bare majority in favor of such exercise in a particular instance, expel the minority opposed, or refuse to let them meet with them? may the majority, wherever congregated in the city of Montgomery, assume on the instant to be the Legislature, and pass a law? These extreme cases suggest the right, both of the minority and of the people to have their voice in the passage of laws, or the performance of other duties by the Legislature.

8. The rule I deduce for determining the right of the majority to hold a session of the Legislature and the right of the minority to be present, without which the majority cannot legislate, is this—the minority must be absent either necessarily or wilfully, without fault on the part of the majority, to enable the latter to hold such session. If they are sick, or unable from any cause to come, or if they are refractory and will not come, the majority may proceed without them. But if their absence proceeds from a reasonable belief that the body claiming their attendance has no right to do so, their objections ought to be removed through conference with them, or they should be placed in fault by such attempt, so that they may be brought in by compulsion. When a large number are absent, their attendance ought to be compelled, because the people have a right to the influence they may exert, and also to have all doubts about the validity of the Legislature removed.

9. In this instance the conference was held, and resulted in the proper organization of the Assembly according to all the forms of law. No necessity exists now for regarding the court house assemblage as the General Assembly, and without such necessity it ought not to be so regarded. The undoubted General Assembly has been in session more than a month, with the question of the validity of the claims of the former assemblages to be such, constantly before it, and it has been unable to formally ratify or repudiate either, while the acts of both, with some exceptions, have been ignored or revised.

10. The Convention Parliament which restored Charles II., met without the summons of the king, and the first thing done after the king's return, was to pass an act declaring it to be a good parliament, notwithstanding the defect of the king's writs. Blackstone says the meeting was for the necessity of the thing which supersedes all law, for if they had not so met, it was morally impossible that the kingdom should have been settled in peace. So, at the time of the Revolution in 1688, the lords and commons, by their own authority, met in a convention and disposed of the crown and kingdom. This assembling was upon a like principle of necessity as at the restoration; that is upon a full conviction that King James II. had abdicated the government, and that the throne was thereby vacant, *which supposition of the individual members* was confirmed by their concurrent resolution when they actually came together. The convention was declared to be really the two houses of parliament, notwithstanding the want of writs, or other defects of form, by statute 1 Wm. and M. St.; 1 ch. 1; 1 Blackstone's Comm. p. 151. 152.

11. In the People v. Hatch, 33 Ill. 9, a portion of the members of the Legislature came together and assumed to act as the Legislature after it had been adjourned by the governor under a misapprehension of a disagreement. The members had been disconcerted by the prorogation, and for twelve days had taken no action. This was considered an acquiescence in the action of the governor and the subsequent Assembly was declared by the court not no have been a meeting of the Legislature. In that case every ingredient of validity seems to have existed. A meeting at a time and place appointed by law—no dispute as to membership. A session begun and not actually terminated. An admitted mistake of the governor in proroguing the body. Disconcertion of the members rather than acquiescence.

12. How easy will it be when the parties into which the members may be divided are nearly equal, for a sufficient number of seats to be contested to raise genuine doubts about who are entitled to them? The State is liable to be convulsed on the most frivolus occasions, and long afterwards private citizens may be greatly injured without fault of theirs by judicial determination of the validity of laws which they were unable in any way correctly to determine for themselves. Such doubt and difficulty now exist in the State: and to the beneficent interposition of the Federal authority alone, are we indebted for the privilege of deciding this case before a civil tribunal, rather than having it submitted to the cruel arbitrament of intestine strife.

NEW HAMPSHIRE.

Head notes of decisions of the Supreme Court of New Hampshire, to appear in vol. 51, N. H. Reports. (Received from John M. Shirley, State Reporter.)

Consideration.

The defendant, being the teacher of a high school, undertook, at the request of the school committee, to examine candidates for admission to said school as scholars therein, and truthfully to report to the committee concerning their qualifications. The plaintiff submitted himself to such examination, and was found properly qualified; but the defendant maliciously, deceitfully, and falsely reported to the committee that the plaintiff was not so qualified; by reason whereof the plaintiff was excluded from the high school and deprived of its benefits. *Held*, that the plaintiff might maintain an action on the case against the teacher to recover his damages, occasioned by reason of such false and malicious report. Hammond v. Hussey, 40.

Contract.

The plaintiff contracted in April to work for the defendants one year, at $25 per month, or $300 for the year, and had drawn his pay monthly, at the rate of $25 per month from the city treasury, until October, when he was discharged without sufficient cause. *Held*, that he was entitled to recover of the city, upon a *quantum meruit* for work and labor, what his services were reasonably worth during the whole period he worked, deducting what he had received. Clark v. Manchester, 594.

Divorce.

Courts have power to set aside or vacate decrees of divorce for fraud or imposition, as in the case of other judgments, and will exercise that power where such fraud or imposition is clearly established. Adams v. Adams, 588.

Dog.

Under General Statutes, ch. 105, sect. 8, the owner or keeper of a dog is liable to the person injured by it for double the damages sustained, whether such owner or keeper had notice of the vicious habits of the animal or not. Orne v. Roberts, 110.

Evidence.

Where three parties are entitled to recover of a town, after demand, a reward for the arrest of criminals, such demand may be made by one of them, and need not be made expressly in behalf of each of the parties engaged in the joint undertaking which entitled them to the reward. Abbott v. Strafford, 148.

Mortgage.

Where, on a mortgage of a stock of goods in a country store, it was agreed, verbally, that the mortgagor should continue in possession of the store and goods, and sell the goods as before for his own benefit, and he did so—it was *held*, that such an arrangement was inconsistent with the avowed object of the mortgage, and rendered it fraudulent and void as to the mortgagor's creditors. Putnam v. Osgood, 192.

Note.

A negotiable note, payable on demand, was endorsed thirteen months after it was given,—the consideration for the endorsement being an agreement to support the payee. In an action by the endorsee against the maker, it was *held* that the maker might set off a debt due to him from the payee at the date of the endorsement. Cross v. Brown, 486.

Probate Court.

The primary probate jurisdiction of everything pertaining to the settlement of estates is exclusively in the place of the domicile of the deceased. Leonard v. Putnam, 247.

The rights and powers of guardians are considered as strictly local, and as not entitling them to exercise any authority over the person, or personal property of their wards in other States. Ib. 247.

Railroad.

A railroad corporation, claiming to act under legislative authority, removed a natural barrier situated north of E.'s land, which theretofore had completely protected E.'s meadow from the effects of floods and freshets in a neighboring river. In consequence of this removal, the waters of the river, in times of floods and freshets, sometimes flowed on to E.'s land, carrying sand, gravel, and stones thereon. *Held*, that this was a taking of E.'s property, within the meaning of the constitutional prohibition; and that the Legislature could not authorize the infliction of such an injury without making provision for compensation. Eaton v. B. C. & M. R. R. 504.

Wife.

Under the provisions of Gen. Stats., ch. 164, sect. 1, married women *shall* hold all property at any time earned by them to their sole use, free from the interference or control of any husband. Cooper v. Alger, 172.

Money due to a married woman for services rendered after the passage of that statute, is her property, whether it be due on account or on note, just as much as though it had been paid in money. Ib. 172.

Will.

A bequest of "all my accounts" does not pass a deposit in a savings bank; but a bequest of "all my personal property of whatever kind, except my notes, bonds, and accounts"—*held*, to include such a deposit. Gale v. Drake, 78.

Acts of Assembly—1873.

An act relating to the revenues of the commonwealth.

Whereas, In order to meet the increased expense resulting from the late war, and to extinguish the loan of three millions of dollars created for that purpose, as well as to place the credit of the commonwealth on a secure basis, it became necessary to establish an anomalous and somewhat burdensome system of taxation:

And whereas, The revenue raised by taxing the capital or the industry of the State, ought not to exceed the amount necessary to meet the ordinary expenses of government and reduce the debt at a reasonable rate:

And whereas, In the act of February twenty-third, eighteen hundred and sixty-six, imposing a tax on the gross receipts of railroads and carrying companies, as well as in the revised tax laws of eighteen hundred and sixty-eight, it was clearly expressed to be for the purpose of extinguishing the loan created by the act of May fifteenth, Anno Domini one thousand eight hundred and sixty-one, known as the

war loan, which purpose is now substantially accomplished; therefore,

SECT. 1. Be it enacted, &c., That all laws or parts of laws, now in force in this commonwealth, under and by virtue of which taxes for State purposes are levied and assessed upon horses, mares, geldings, mules and cattle, shall be and they are hereby repealed, so far as they give authority to impose State taxes on the same: *Provided*, That this section shall not take effect until the next meeting of the board of revenue commissioners of this commonwealth.

SECT. 2 That so much of the sixth section of the act entitled "An act to revise, amend, and consolidate the several laws taxing corporations, brokers and bankers," approved May first, Anno Domini one thousand eight hundred and sixty-eight, as imposes a tax upon the net earnings or income of incorporated companies liable to the tax on capital stock under the fourth section of said act, be and the same is hereby repealed, said repeal to take effect from and after the first day of November, Anno Domini one thousand eight hundred and seventy-two: *Provided*, That this act shall not be construed to release any taxes which accrued prior to the first day of November aforesaid, nor in any way to affect suits heretofore or hereafter brought in the name of the commonwealth for the collection of such taxes, and the penalties and interest attached thereto, nor to release private bankers, brokers or incorporated companies having no taxable capital stock, but for such purposes the section hereby repealed shall continue in full force and effect.

SECT. 3. That so much of the eighth section of the act last aforesaid, as imposes a tax upon the gross receipts of railroad, canal, and transportation companies, be and the same is hereby repealed, said repeal to take effect from and after the first day of July next: *Provided*, That any company which has been exempt from the tax on tonnage by any special law, shall be liable to pay the tax of three-fourths of one per centum upon their gross receipts; and that this act shall not be construed to release any taxes upon gross receipts accruing prior to the first day of July next, nor in any way to affect suits heretofore or hereafter instituted in the name of the commonwealth for the collection of such taxes, and the penalties and interest attached thereto.

SECT. 4. That every company, except bank or savings institutions incorporated under the laws of this commonwealth, and authorized to issue bonds or other evidences of indebtedness, and which pays interest to its bondholders or other creditors, shall pay to the State treasurer, for the use of the commonwealth, semi-annually, on the first days of July and January in each and every year, beginning with the first day of July, Anno Domini one thousand eight hundred and seventy-three, a tax equal to five per centum upon every dollar of interest paid as aforesaid: and it shall be the duty of any company aforesaid to make semi-annual reports to the auditor general, under oath, showing the total amount of the indebtedness of said company, and the amount of interest paid to their bondholders or other creditors.

That the eleventh section of the act approved May first, eighteen hundred and sixty-eight, entitled "An act to revise, amend and consolidate the several laws taxing corporations, brokers and bankers," is hereby repealed, said repeal to date from and after the first day of July next, saving, however, to the commonwealth the right to collect any taxes accruing under said section prior to the date of repeal aforesaid.

Approved March 21st, A. D. 1873.

SHERIFF'S SALES.

The following are the prices obtained for the properties sold at Sheriff's sale on Monday last.

George W. Forepaugh. $100
Mary E. Helmbold. 1975
Chas. Ewings. 1400
Daniel Waters. No. 1 $100. No. 2, 100
Samuel K. Haines. No. 1, $30. No. 2, 5. No. 3, 5
Lewis Wirth. 100
Henry Sassmanshausen. 300
Chas. Carlin, dec'd. 950
Geo. M. Fried. 100
Joseph M. Kirby. No. 1, $1300. No. 2, 75
John P. Reilly. 10
Michael Gibbons. No. 1, $200. No. 2, 100. No. 3, 105. No. 4, 105. No. 5, 205. No. 6, 200. No. 7, 300
Owen Morris. 1300
Amor Walton. No. 1, $50. No. 2, 25. No. 3, 125. No. 4, 400. No. 5, 700
Thomas Tracy, owner, &c. 150
Caleb Wilkey. 100
Oliver P. Arment. 1,000
Wm. Sharswood. No. 1, $1,000. No. 2, 100. No. 3, 250
Wm. Sharswood. 700
Henry T. Shepherd. 700
Geo. W. Zehnder. 40
Peter E. Abel. 50
Wm. S. Turner. 50
Wm. J. Holt. 100
Alexander Turkington. 50
Wm. Crawford. 550
Robert B. Long. 1,225
Elisha E. Hevelon. 70
Henrietta Bernheimer. No. 1, $30. No. 2, 30. No. 3, 30
Fonrose Millett. No. 1, $20. No. 2, 25. No. 3, 30. No. 4, 25. No. 5, 30. No. 6, 30. No. 7, 25. No. 8, 25. No. 9, 25
John B. Goldbeck, dec'd. 2,200.
Samuel H. Martyn. 1500
John Schaeffer. 1300
John Sands. 800
Joseph G. Wills. No. 1, $1900 No. 2, 2,000.
Edward Hughes. 9,500
Friend J. Streeton. 1,100
Robert McGregor. 750
Mary Dalton. 3,400
Wm. W. Patton. 100
Geo. O. Evans. 70
James Hartley. 250
Eliza McLaughlin. No. 1, $1,400. No. 2, 2,000. No. 3, 2,000
Neil McCaun. 40
John Robinson. No. 1, $875. No. 2, 900
Aaron A. Dutcher. 400
James McKenna. 50
Geo. O. Evans, and Martha Jane, his wife. No. 1, $7,150. No. 2, 800. No. 3, 6,000
Finnix Stretcher. No. 1, $400. No. 2, 830. No. 3, 850. No. 4, 400
Veron Fletcher, dec'd. 3,500
John A. Gendell. No. 1, $2,000. No. 2, 4,050
Thomas Donahue. 325
James F. Shannon. No. 1, $5. No. 2, 5
Stephen P. Bancroft. No. 1, $1,000. No. 2, 1,100. No. 3, 1,100
Geo. E. Henderson. No. 1, $800. No. 2, 800. No. 3, 800
George W. Wellington. 2,200
Stephen P. Bancroft. No. 1, $200. No. 2, 200. No. 3, 30
Friend J. Streeton, Jr. Nos. 1 to 5, $10 each.
James Boals. 500
Stephen P. Bancroft. No. 1, $50. No. 2, 50
John G. Fleck. No. 2, 5,300
John G. Fleck. No. 1, $100. No. 2, 50
J. C. Sweeney. No. 1, $120. No. 2, 75
Edward Hughes. No. 1, $8,200. No. 2, 8,200
Benjamin U. Hollenback. 7,000
Benjamin U. Hollenback. No. 1, $3,300. No. 2, 1,000
Benj. U. Hollenback. 2,500
Patrick Carroll. No. 1, $200. No. 2, 200
Thomas E. Combs. 2,800
Patrick Carroll. 200
Sarah Mooney. 300
Wm. C. Lobb. 2,500
Wm. H. Gesner. 800
Wm. H. Ambler. 3,800
Levis Passmore. 4,100
John Farrar. No. 1 to 3, $50 No. 4, 50
Geo. Rowe. 100
George W. Dewees. 1,600
John Alexander Simpson. No. 1, $550. No. 2, 400
John Charles Frederick Lach. 6,200
John Charles Frederick Lach. No. 2, $200. No. 3, 300
Thomas Clark. No. 1, $20. No. 2, 20. No. 3, 15. No. 4, 15. No. 5, 15. No. 6, 15
J. Matthew Schwarz. 300
Geo. Blackburn. 1,600
Geo. Trump. 1,400
Geo. Sailer. 300

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested:

Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in May, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

Mar. 28, John B. Wagner et al., Executors of MARIA WAGNER, dec'd.
" 29, Peter Martin, Administrator of WILLIAM B. SMITH, dec'd.
" 29, William Badger, Executor of EDWARD R. BADGER, dec'd.
" 31, John Markle et al., Executor of GEO. MARKLE, dec'd.
April 2, Abraham D. Harley, Administrator of WASHINGTON RUMMEL, dec'd.
" 3, J. P. Robinett et al., Executors of G. HERMAN ROBINETT, dec'd.
" 3, Samuel White et al., Executors of LAETITIA G. RYAN, dec'd.
" 3, John McCormick, Guardian of MARY and FRANCIS McCORMICK, Minors.
" 4, Bridget T. O'Keefe, Administratrix of PATRICK O'KEEFE, dec'd.
" 5, Marmaduke C. Cope, Administrator of SARAH W. COPE, dec'd.
" 5, David T. Trites, Executor of NICHOLAS CONNELL, dec'd.
" 5, James S. Watson, Administrator of HENRIETTA RUSSELL, dec'd.
" 7, Jos. W. Mathers, Executor of EMMA BOCKIUS, dec'd.
" 8, Ed. Waln et al., Executors of S. MORRIS WALN, dec'd.
" 8, Ann Hoffner, Administratrix of SARAH HUNTLEY, dec'd.
" 9, Elias T. Hall, Administrator of JOHN B. EDWARDS, dec'd.
" 9, Wm. McKnight, Administrator of ELEANOR ANDREWS dec'd.
" 10, Henry P. Borie et al., Executors of MARIA LEECH, dec'd.
" 10, Daniel McShane, Administrator of CORMICK GALLAGHER, dec'd.
" 14, Eliza S. Dingee et al., Executors of CHARLES DINGEE, dec'd.
" 14, Sarah McCartney, Administratrix of PETER McCARTNEY, dec'd.
" 14, James Campbell et al., Executors of HUGH O'DONNELL, dec'd.
" 16, Penna. Ins. on Lives, &c., Executors and Trustees under the will of D. C. FULTON, dec'd.
" 17, Jacob Apple, Administrator of ELIZA APPLE, dec'd
" 18, James E. Brown, Administrator of JANE BROWN STEWART, dec'd.
" 18, James H. Heverin, Administrator d. b. n. c. t. a. of THOMAS RYAN, dec'd.
" 19, John D. Engle, Executor of RACHEL ENGLE, dec'd.
" 19, Louisa Enger, Administratrix of WILLIAM ENGER, dec'd.
" 21, Margaret Stewart, Administratrix of GEORGE STEWART, dec'd.
" 21, William C. Stevenson, Administrator c. t. a. of ROBERT D. CLIFTON, deceased.
" 22, Mary C. Halderman, Administratrix of ELIZA JANE HOWARD, dec'd.
" 23, Charles W. Gesemyer, Guardian of MARGARET L. SCHNIDER, late Minor.
" 23, Henry C. Kellog, Executor of CONRAD KNIPE, dec'd.
" 23, J. Lowber Welsh et al., Executors of AUGUSTINE CASAMAJIR DE TRENARD, dec'd.
" 23, T. Frank Cooper, Administrator of JOSEPH COOPER, dec'd.
" 23, Christiana B. Sorber et al., Executors of MARY A. SORBER, dec'd.
" 23, John T. Fenton, Executor of MARGARET R. ROBB, dec'd.
" 23, Mary A. Barton, Administratrix c. t. a. of JOSEPH BARTON, dec'd.
" 23, Wm. Nuenemann, Administrator of CAROLINE ELIZABETH KRAEMER, dec'd.
" 23, William Morgan, Executor and Trustee of MARGARET D. SCHRYER, deceased.
" 23, Isaac F. Baker et al., Executors, and Isaac F. Baker, Trustee, under the last will of ANN MARIA ELLIOT, dec'd.
" 24, Ann B. West et al., Executors of JOHN H. WELSH, dec'd.
24, J. Ringgold Wilmer, Adm'r d. b. n. of J. C. A. MARLOT, dec'd.
April 24, Frank M. Naglee, Adm'r d. b. n. of ELLEN NAGLEE, dec'd.
" 24, Frank M. Naglee, Executor of ANN E. ROOD, dec'd.
" 24, Anna Teufel, Admin'x of JOSEPH TEUFEL, dec'd.
" 24, Jos. S. Riley, Adm'r of BENJAMIN S. RILEY, dec'd.
" 24, Kitty M Pepper et al., Executors of GEO. PEPPER, M. D., dec'd.
" 24, Jane P. Fales, Administratrix of OLIVER FALES, dec'd.
" 24, J. Granville Leach, Adm'r d. b. n. of OLIVER FALES, dec'd.
" 24, Horatio Gates Jones, Exec'r of REV. JOHN S. JENKINS, dec'd.
" 24, Horatio Gates Jones, Executor of HETTY ANN JONES, dec'd.
" 24, W. Henry Sutton, Administrator of NELLIE A. SMITH, dec'd.
" 24, W. Henry Sutton, Administrator of CHARLES J. SMITH, dec'd.
" 24, Israel H. Johnson et al., Executors of THOS. P. HOOPES, dec'd.
" 24, Solomon Rothschild, Guardian of ARNOLD'S Minors.

WILLIAM M. BUNN,
apr 25-4t Register.

Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, MAY 16, 1873. No. 20.

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Court of Common Pleas of Mercer County.

COMMONWEALTH v. SAAL.

1. The Legislature may create new offences and prescribe the mode of ascertaining the guilt of persons charged therewith.
2. An offence triable by jury, at the time of the adoption of the constitution, cannot, without the consent of the accused, be submitted to any other tribunal.
3. A trial by jury means a jury of twelve men, who must unanimously concur in the guilt of the accused, before a legal conviction can be had.
4. The act of May 24th, 1871, giving jurisdiction to a justice of peace, and a jury of six persons in Mercer county, to try those charged with selling liquor without a license, in so far as it compels the accused to submit to such jurisdiction, is unconstitutional.

Certiorari.

Opinion by TRUNKEY, P. J. Delivered April 11th, 1873.

Information was made before D. A. Thalimer, justice of the peace, charging that Peter Saal had sold liquor without license, in violation of the act of May 24th, 1871. By the sixth section of the act, jurisdiction is given to a justice of the peace and a jury of six persons concurrent with the Court of Quarter Sessions. The defendant, without his consent, was tried before such justice and jury and convicted—and was sentenced by the justice. He complains that he has been deprived of the constitutional guaranty, "That trial by jury shall be as heretofore, and the right thereof remain inviolate."

It is scarcely necessary to remark, that a trial by jury means a jury of twelve men, who must unanimously concur in the guilt of the accused before a legal conviction can be had. No less number can satisfy the requirement in the bill of rights.

The right of trial by jury, as it existed when the constitution was adopted, has been preserved—not extended. The first constitution, adopted in 1776, secured the right in similar phrase, and with like effect as in that of 1790, amended in 1838. Then, neither usage nor right required every litigated question of fact to be submitted to a jury. We will not speak of the various civil proceedings, affecting rights of property in courts of equity and other courts. Summary convictions for petty offences have been had for centuries in England, and in Pennsylvania since her settlement. By virtue of the undefined police power, vagrants, a very comprehensive term, were always liable to summary conviction. In this State, a man may be charged as a pickpocket, or professional thief, and arrested in church or other public place, and tried before a police magistrate, who may commit him to prison not exceeding ninety days. As honest a man, or as great a rogue, as ever entered church or theatre, may be seized and summarily convicted and sentenced to imprisonment at labor for three months. Byers et al. v. Com., 6 Wr. 89. The Legislature may create new offences and prescribe what mode it pleases of ascertaining the guilt of those charged with them. The act of April 14th, 1851, forbidding the sale of certain liquors on the Subbath day, in Allegheny county, under a penalty to be imposed by summary conviction, is constitutional. Van Swartow v. Com., 12 Har. 131. Authorities need not be multiplied. Those cited show that the Legislature has the undoubted power to create new crimes, prescribe new penalties with new modes of conviction, and to extend the application of many old laws, under the police power, for summary proceedings. The right of trial by jury, as a safeguard of the citizen, is sacred as to all offences thus tried when the constitution was adopted; but, for others, it seems a shadow, not substance.

In Van Swartow v. Com., *supra*, Judge Black says, "The purpose of the constitution undoubtedly was to preserve the jury trial where the common law gave it, and in all other cases to let the Legislature and the people do as their wisdom and experience might dictate." I do not think he intended to apply the right strictly to where it was given by the common law, but would include cases where the right had been previously enjoyed. In the same opinion, he remarks, "Every class of cases triable by jury in 1790, are still triable in no other way, at least this statute has not diminished the number. * * * Summary convictions were well known before the formation of the constitution, and they are not expressly or impliedly prohibited by that instrument, except in so far as they are not to be substituted for a jury where the latter mode of trial had been previously established." In Byers et al. v. Com., *supra*, it is said that none of the constitutions contemplated any extension of the right beyond the limits within which it had been enjoyed previous to the settlement of the State or the adoption of the constitution. These cases, and all others bearing on the question which I have seen, recognize the right in any class of cases where it existed when the constitution was adopted. The point was not made in the cases cited as to a statutory offence to which the right then existed, but the care in the *dictums* give them much force, especially when they accord with the letter and spirit of the bill of rights.

In the Court of Appeals of New York, in the case arising under "An act for the prevention of intemperance, pauperism and crime," passed April 9th, 1855, it was held that the proceeding in a court of special sessions, authorized by the said act for the trial of an offender, was unconstitutional and void, on the ground that the accused was thereby deprived of the right of trial by jury. Justice A. S. Johnson says, "We find that from 1830, at least, misdemeanors by violations of the excise law were not triable in courts of special sessions at all, but in courts of general sessions, or of oyer and terminer, which were courts proceeding according to the course of the common law. * * * It does not at all affect this argument to say at an earlier period jury trial was not a right in such cases. The course of the law is to enlarge private right, not to restrict it. When jury trial was given for the first time in such cases, it was bestowed because the Legislature desired to extend its protecting influences, and when afterwards the new constitution was adopted, jury trials in cases where it was then accustomed, received the sanction and protection of organic law. Writings are to be construed as of the time when they are made, and 'heretofore,' in this clause, means before 1846, and cannot, to limit its meaning, be carried back to 1777, and confined to the cases which at that earlier period were triable by jury. The act provides that offences prosecuted personally against the offender, and for which he is punishable by fine, by forfeiture, and sometimes by imprisonment, shall be tried by any one of the numerous inferior magistrates, either without a jury at all, or a jury of six men. * * * This is not what the constitution meant by jury trial. That must be, within the terms of the constitution, a jury of twelve men. * * * The whole provision, which was made only with a view to this kind of trial (before inferior magistrates), and not for the purpose of holding the offender to answer elsewhere, must fall." The People v. Toynbee, 2 Parker's C. C, 490.

This decision of a neighboring State, upon a question analogous to the one now pending, is entitled to great weight. The constitution of New York was adopted in 1846, and the court held that its guarantee of a jury trial included statutory offences thus triable at that time, though they had not been at a former period, and were offences unknown to the common law. How stood the law prior to the adoption of the constitution of Pennsylvania? Was it a misdemeanor to sell liquor without a license, and if so, how triable? Modifications of the law, or in the severity of the penalty, in no wise can affect the question.

Selling spiritous, vinous or malt liquors, without license, was not a common law offence. Under the old English statutes, keeping an ale house without license was not indictable, for they provided that the prescribed penalty should be inflicted upon conviction before justices of the peace. These statutes were not in force in Pennsylvania, nor were they imitated in the mode of trial.

The act of 1710 1 Sm. L. 73. prohibited keeping a dram shop without license, under the penalty of five pounds. By a supplement, passed August 26th, 1721, 1 Sm. L. 127, no person, without license, could sell or barter with, or deliver any rum, wine, &c., to be used or drank on or near the premises, or retail or sell any spirits by less quantity than one quart, nor any wine by less quantity than one gallon, nor any beer, ale or cider, by less quantity than two gallons, under like penalties as prescribed by the act of 1710. By act of 19th March, 1783, if any person sold any rum, wine, brandy or other spirits in less quantity than one quart, he should forfeit and pay for every offence the penalty of ten pounds. Two of these acts were in force long before 1776, and the other before 1790. Under them the penalty was enforced by indictment. Upon the question of the sufficiency of an indictment, in 1818, Justice Duncan said: "This form of indictment having prevailed for eighty years, been adopted by successive attorney generals, the provisions of the several acts being nearly if not altogether in the same words, the court will not say that all the prosecutions during that long period of time are erroneous; for it is admitted that this has been the only form. * * * The only remedy is by indictment." Com. v. Baird, 4 S. & R. 151. The colonial Legislature prescribed the offence of selling intoxicating beverages without license, and the offender was punishable only by indictment and conviction by a jury. So stood the law before, and at the time the constitution was adopted. All persons charged with selling intoxicating beverages without license were tried by jury. This was their right in 1776, in 1790, and in 1838. If since taken away from that class of cases, to that extent the right does not remain as it did before. I speak of the specific offence of selling liquor without license. Other offences may be created, as selling on Sunday, to men when intoxicated, and the like, in which there would be no right of trial by jury. Under the colonial law, at one time, persons guilty of selling to minors were liable to a penalty inflicted upon summary conviction before justices of the peace. Of course in such a case the right does not exist, and the Legislature could now cause the offence to be tried in the same way.

In all the supplements and changes in the law since the year 1710, I have heard of none which attempted to deprive the accused of a jury trial, except the act of May 24th, 1871; and never was the penalty under any former act so severe. By

this local act, the minimum for the first offence is a fine of $100, and for the second a fine of $200 and imprisonment for ninety days; the maximum is in the discretion of the court, or a justice of the peace. Below the grade of murder of the first degree, it is difficult to find any other crime, named in our statutes, where the maximum of fine, or imprisonment, is not fixed by law. Mercer county is favored with a singular exception. So highly penal a misdemeanor is no petty offence. As we have seen, it is not one created since the adoption of the constitution; and it is one of a kind then tried by jury. The only question here is as to the validity of that part of the act which compels the accused, against his will, to be tried by a justice of the peace and jury of six persons. For this misdemeanor, under former acts, the penalty was moderate and certain, or confined within certain limits. The act before us authorizes fine and imprisonment without stint. The former secured to those charged as offenders a trial in a court of record according to the course of the common law—this provides that the accused may be tried before a court not of record without the safeguard of a jury trial. It is not the business of a court to judge of the wisdom or policy of a law; nor of the propriety of a provision whereby a prosecutor may choose the justice of the peace, and the neighborhood, charge a person with violating a highly penal statute, and compel him to submit to a summary investigation. But it is necessary to consider what the law was, and what the new act is, that we may judge of its validity. No act of Assembly can be pronounced invalid, by any court, unless it clearly, plainly and palpably, violates the constitution. I cannot hesitate nor doubt in concluding, that so much of the sixth section of the act as compels a defendant to be tried before a justice of the peace, violates the guaranty, "That trial by jury shall be as heretofore, and the right thereof remain inviolate."

To avoid any misapprehension, I will add that this decision does not interfere with the right of a defendant to plead guilty before the justice, or demand a trial by the justice and a jury of six persons. When he does so, the justice will proceed in like manner as in other criminal cases wherein jurisdiction has been given to justices for final disposition at the request of the defendant. But when the defendant refuses to plead, and refuses a trial before the justice, then the justice will hear the case, and if cause appear, hold him to answer at the next term of the Court of Quarter Sessions, as in other criminal cases. For the offence charged against Peter Saal, the justice may yet give him a hearing, and thereupon discharge, hold to bail, or, in default of bail, commit him for trial at the next term of the court.

Acts of Assembly—1873.

An act to establish an insurance department.

SECT. 1. Be it enacted, &c., That there is hereby established a distinct department, to be known as the insurance department, which shall be charged with the execution of the laws of this State in relation to insurance.

SECT. 2. The chief officer of said department shall be denominated the insurance commissioner of Pennsylvania; he shall be appointed by the governor, with the advice and consent of the Senate, within thirty days after the passage of this act, for the term of three years, and until his successor is duly qualified, and shall receive the annual salary of three thousand dollars: *Provided*, That the person first appointed commissioner under this act, shall enter upon the duties of his office on the first Monday of May next; in case of a vacancy in said office by death, resignation or otherwise, the governor shall fill such vacancy for the unexpired balance of the term; he shall employ, from time to time, with the approval of the governor, not exceeding, in addition to deputy, three clerks to discharge such duties as he shall assign them, whose compensation shall be paid them by the State treasurer, at the same rate and in the same manner as the clerks in the office of the secretary of the commonwealth; he shall appoint one of the said clerks to be his deputy, who shall perform the duties attached by law to the office of principal, during the absence or inability of his principal, who shall receive an annual salary of eighteen hundred dollars, payable as aforesaid; within fifteen days from the date of his appointment, the commissioner shall take and subscribe the oath of office prescribed by the constitution, and file the same in the office of the secretary of the commonwealth, and shall also give to the commonwealth a bond in the penalty of ten thousand dollars, with two sureties, to be approved by the governor, conditioned for the faithful discharge of the duties of his office.

SECT. 3. All books, papers, records and securities whatever, in the office of the auditor general, relating to the business of insurance, shall on demand be delivered and transferred to the insurance commissioner, and be and remain in his charge and custody.

SECT. 4. There shall be assigned to the said commissioner, by the commissioners of public buildings and grounds, a suitable room or rooms for conducting the business of said department; and the said commissioner shall, from time to time, with the approval of the commissioners aforesaid, procure the necessary furniture, stationery, and other proper conveniences for the transaction of the said business, the expenses of which shall be paid on the certificate of the commissioner and the warrant of the auditor general.

SECT. 5. It shall be the duty of the insurance commissioner;

First. To see that all the laws of this State respecting insurance companies, and the agents thereof, are faithfully executed, and for this purpose he is hereby invested with all the powers now conferred by law upon the auditor general in relation to the licensing of the agents of foreign insurance companies; to file in his office any charter of a company, now or hereafter required by law to be filed, and upon application, to furnish a certified copy thereof.

Second. He shall, as soon as practicable, in each year, calculate, or cause to be calculated, the net value on the thirty-first day of December, of the previous year, of all the policies in force on that day, in each life insurance company doing business in this State, organized by authority of this State, and of every other life insurance company doing business in this State that shall fail to furnish him, as hereinafter provided, a certificate of the insurance commissioner of the State by whose authority the company was organized, or by the State in which it may elect to have its policies valued and its deposit made, in case the company is chartered by the government of the United States, giving the net value of all policies in force in the company on the thirty-first day of December, of the preceding year, which calculation of the net value of each policy shall be based upon the American experience table of mortality, and four and one-half per cent. interest per annum: *Provided*, That when any life insurance company shall have a cash capital of not less than five hundred thousand dollars, fully paid in and safely invested, the reserve to provide for the liabilities on all policies of such company not participating in the profits of the company, shall be computed by the American experience table of mortality, with interest at not less than four and a half nor more than six per centum per annum, in the discretion of the commissioner, and with reference to the rates of premium charged by such company; the net value of a policy at any time, shall be taken to be the single net premium which will at that time effect the insurance, less the value at that time of the future net premiums called for by the table of mortality and rate of interest designated.

Third. In case it is found that any life insurance company doing business in this State, has not on hand the net value of all its policies in force, after all other debts of the company and claims against it, exclusive of capital stock, have been provided for, it shall be the duty of the insurance commissioner to publish the fact that the then existing condition of the affairs of the company is below the standard of legal safety established by this State, and he shall require the company at once to cease doing new business, and he shall immediately institute proceedings to determine what further shall be done in the case; and it is hereby made the duty of the insurance commissioner, after having determined, as above, the amount of the net value of all the policies in force, to see that the company has that amount in safe legal securities, after all its other debts and claims against it, exclusive of capital stock, have been provided for.

Fourth. He shall accept the valuations made by the insurance commissioner of the State, under whose authority a life insurance company was organized, when such valuations have been properly made on sound and recognized principles and legal basis as above: *Provided*, The company shall furnish to the insurance commissioner of this State, on or before the first day of March, in each and every year, a certificate from the insurance commissioner of such State, setting forth the value, calculated on the data designated above, of all the policies in force in the company on the previous thirty-first day of December, and stating that after all the other debts of the company and claims against it at that time were provided for, the company had, in safe securities, an amount equal to the net value of all its policies in force, and that said company is entitled to do business in its own State; and every life insurance company doing business in this State during the year for which the statement is made, that fails promptly to furnish the certificate aforesaid, shall be required to make full detailed lists of policies and securities to the insurance commissioner of this State, and shall be liable for all charges and expenses consequent upon not having furnished said certificate.

Fifth. For every company doing fire insurance business in this State, he shall calculate the re-insurance reserve for unexpired fire risks, by taking fifty per centum of the premiums received on all unexpired risks that have less than one year to run, and a pro rata on all premiums received on risks that have more than one year to run; and in marine and inland insurance, he shall charge all the premiums received on unexpired risks as a re-insurance reserve.

Sixth. Having charged against a company the re-insurance reserve, as above determined, for fire, inland and marine insurance, and adding thereto all other debts and claims against the company, he shall, in case he finds the capital stock of the company impaired to the extent of twenty per centum, give notice to the company to make good its whole capital stock within sixty days; and if this is not done, he shall require the company to cease to do new business within this State, and shall thereupon, in case the company is organized under authority of this State, immediately institute legal proceedings, as required in this act, to determine what further shall be done in this case. Any company receiving the aforesaid notice of the insurance commissioner, to make good its whole capital stock within sixty days, shall forthwith call upon its stockholders for such amounts as will make its capital equal to the amount fixed by the charter of said company; and in case any stockholder of such company shall neglect or refuse to pay the amount so called for, after notice personally given or by advertisement, in such time and manner as the said commissioner shall approve, it shall be lawful for the said company to require the return of the original certificate of stock held by such stockholder, and in lieu thereof to issue new certificates for such number of shares as the said stockholder may be entitled to in the proportion that the ascertained value of the funds of the said company may be found to bear to the original capital of the said company; the value of such shares for which new certificates shall be issued to be ascertained under the direction of the said commissioner, and the company paying for the fractional parts of shares; and it shall be lawful for the directors of such company to create new stock and dispose of the same, and to issue new certificates therefor to any amount sufficient to make up the original capital of the company. Whenever the capital stock of any joint stock fire or marine insurance company of this State becomes impaired, the commissioner may, in his discretion, permit the said company to reduce its capital stock and the par value of its shares in proportion to the extent of impairment: *Provided*, That in fixing such reduced

capital no sum exceeding twenty-five thousand dollars shall be deducted from the assets and property on hand, which shall be retained as surplus assets: *And provided*, That no part of such assets and property shall be distributed to the stockholders: *And provided further*, That the capital stock shall not be reduced to an amount less than that required by law for the organization of the company.

Seventh. It shall be the duty of the insurance commissioner after he has notified a life insurance company, organized under the authority of this State, to cease doing new business until the net value of its policies in force is equal to that called for by the standard of safety established by the State, at once to cause a rigid examination in regard to all the affairs of such company; in case it shall appear that there is no fraud or gross incompetency or recklessness shown to exist in the management, he may, upon publishing the facts in the case, permit such company to continue in charge of its business for one year: *Provided*, There is, in his opinion, reason to believe that the company may eventually be able to re-establish the legal net value of all its policies in force. At the end of the year named above, he may renew the permission, in case, on examination, he is satisfied that the company is likely to retrieve its affairs.

Eighth. Whenever the insurance commissioner shall have reason to believe that any insurance company of this State is insolvent, or fraudulently conducted, or that its assets are not sufficient for carrying on the business of the same, or during any non-compliance with the provisions of this act, he shall communicate the fact to the attorney general, whose duty it shall then become to apply to the Supreme Court or the District Court, or any Court of Common Pleas in this commonwealth, or in vacation, to any of the judges thereof, for any order requiring said company to show cause why their business should not be closed; and the court or judge, as the case may be, shall thereupon hear the allegations and proofs of the respective parties, or appoint some suitable person as examiner, to perform such duty, and report upon the facts to said court or judge; if it appears to the satisfaction of said court or judge, that such company is insolvent, or that the interests of the public so require, the said court or judge shall decree a dissolution of such corporation, and a distribution of its effects; but in case it shall appear to said court or judge, that said corporation is able to comply with the provisions of this act, and that it is not insolvent, a decree shall be entered annulling the act of the commissioner in the premises, and authorizing such company to resume business.

Ninth. The insurance commissioner shall publish the result of his examination of the affairs of any company, whenever he deems it for the interest of the public so to do, in one or more publications of this State; suspend the entire business of any company of this State, and the business within this State of any other company, during its non-compliance with any provision of this act, or whenever its assets appear to him insufficient to justify its continuance in business, by suspending or revoking the certificate granted by him; report to the attorney general any violation of law relative to insurance companies, their officers or agents; furnish to the companies the necessary blank forms for the statements required; preserve in a permanent form a full record of his proceedings, and concise statement of the condition of each company or agency visited or examined; at the request of any person, and on payment of the fee, to give certified copies of any record in his office, when he deems it not prejudicial to the public interest; report annually to the Legislature the receipts and expenses of his department for the year, his official acts, the condition of companies doing business in this State, and such other information as will exhibit the affairs of his department; adopt and renew, from time to time, with the approval of the governor, a seal of office, an impression of which shall be filed in the office of the secretary of the commonwealth; and it shall be his duty to see that no company is permitted to enter into new contract to insure lives in this State, who continue to do fire, marine or inland insurance business.

Tenth. The insurance commissioner, for the purposes of examination authorized by this act, is hereby empowered, either in person or by one or more examiners by him commissioned in writing, to require free access to all books and papers within this State of any insurance company, or the agents thereof, doing business within this State; to summon and examine any person being within this State, under oath, which he or any examiner may administer, relative to the affairs and condition of any company; for probable cause to visit at its principal office, wherever it may be, any insurance company not of a State in which the substantial provisions of this act shall be enacted, and doing business in this State, for the purpose of investigating its affairs and condition, and to revoke its certificate in this State, granted as hereinafter described, if it does not permit an examination; to revoke or modify any certificate of authority, when any conditions prescribed by law for granting it no longer exist. The insurance commissioner is hereby empowered to institute suits and prosecutions, either by the attorney general or such other attorney as the commisioner may designate, for any violation of this act; and the commissioner shall be made a party to any proceedings instituted for the purpose of closing up the affairs of any company, when the same shall not be in the name of the commonwealth.

SECT. 6. The commissioner may employ an actuary to make the valuation of life policies, at the compensation of not exceeding three cents for each thousand dollars of insurance, to be paid by the company for which the valuation is made; and there shall be paid by every company to which this act applies, the following fees towards defraying the expenses of enforcing its provisions: For filing certified copy of charter, twenty-five dollars; for filing the annual statement or certificate in lieu thereof, twenty dollars; for each certificate of authority and certified copy thereof, two dollars; for every copy of any paper filed in the department, the sum of twenty cents per folio, and for affixing the official seal to such copy and certifying the same, one dollar; for official examinations of companies under this act, the actual expenses incurred.

SECT. 7. The insurance commissioner shall, on or before the tenth day of each month, make report to the auditor general, showing the entire amount of fees received by him during the month preceding, and pay over the same to the State treasurer; and in case the necessary expenses of said department exceed the amount of fees collected under this act, exclusive of the tax upon premiums, the excess of such expense shall be annually assessed by the commissioner, in just proportion, upon all the insurance companies doing business in this State, and the commissioner is empowered to collect such assessments and pay the same into the State treasury; and all the necessary expenses of the commissioner in the execution of this act shall be paid by the State treasurer upon his certificate and the warrant of auditor general, out of the fund thus created.

SECT. 8. Within ninety days after the first Monday of May next, it shall be the duty of every insurance company of this State to file with the commissioner a certified copy of its charter, together with a certificate, stating the time of its organization, the location of its principal place of business, and the names and residence of its officers; and the commissioner shall proceed, as soon as practicable thereafter, to institute an examination into its affairs, in accordance with the provisions of this act; and any company failing to comply with the requirements of this section, shall be subject to a fine of one hundred dollars for each month's delay, to be collected as other fines and penalties under this act.

SECT. 9. It shall be unlawful for any person, company or corporation, to negotiate or solicit within this State any contract of insurance, or to effect an insurance or insurances, or pretend to effect the same, or to receive and transmit any offer or offers of insurance, or receive or deliver a policy or policies of insurance, or in any manner to aid in the transaction of the business of insurance without complying fully with the provisions of this act.

SECT. 10. No person shall act as agent or solicitor in this State, of any insurance company of another State, or foreign government, in any manner whatever relating to risks, until the provisions of this act have been complied with on the part of the company or association, and there has been granted to said company or association, by the commissioner, a certificate of authority showing that the company or association is authorized to transact business in this State; and it shall be the duty of every such company or association, authorized to transact business in this State, to make report to the commissioner in the month of January of each year, under oath of the president or secretary thereof, showing the entire amount of premiums of every character and description received by the said company or association in this State, during the year or fraction of a year, ending with the thirty-first day of December preceding, whether said premiums were received in money, or in the form of notes, credits or any other substitute for money and pay into the State treasury a tax of three per centum upon said premiums; and the commissioner shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the State treasury.

SECT. 11. Companies to which certificates of authority are issued, as provided in the preceding section, shall, from time to time, certify to the commissioner the names of the agents appointed by them to solicit risks in this State; and no such agent shall transact business until he has procured from the commissioner a certificate, showing that the company has complied with the requirements of this act, and that the person named in said certificate has been duly appointed its agent.

SECT. 12. Every insurance company, including individuals, partnerships, joint stock associations and corporations conducting any branch of insurance business in this State, must transmit to the insurance commissioner a statement of its condition and business, for the year ending on the preceding thirty-first day of December, which statement shall be rendered on the first day of January following, or within sixty days thereafter, except that foreign companies shall transmit their statement of business, other than that done in the United States, prior to the following first day of July, which statements must be in form, and state the particulars required by the blanks prescribed by the commissioner; and the insurance commissioner may require, at any time, statements from any company doing business within this State, or from any of its officers or agents, on such points as he deems necessary and proper to elicit a full exhibit of its buiness and standing, all of which statements herein required must be verified by the signatures and oaths of the president or vice president, with those of the secretary or actuary. No company having neglected to file a statement required of it within the time and manner prescribed, shall do any new business, after notification by the insurance commissioner, while such neglect continues; and any company or association neglecting to make and transmit any statement required, shall forfeit one hundred dollars for each day's neglect.

SECT. 13. No insurance company not of this State, nor its agents, shall do business in this State until he has filed with the insurance commissioner of this State a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company served on the insurance commissioner, or the party designated by him, or the agent specified by said company to receive service of process for the said company, shall have the same effect as if served personally on the company within this State, and if such company should cease to maintain such agent in this State so designated, such process may thereafter be served on the insurance commissioner; but so long as any liability of the stipulating company to any resident of this State continues, such stipulation cannot be revoked or modified, except that a new one may be substituted, so as to require or dispense with the service at the office of said company within this State, and that such service of process according to this stipulation,

(*Continued on page* 159.)

LEGAL GAZETTE.

Friday, May 16, 1873.

JOHN H. CAMPBELL,
EDITOR.

THEODORE F. JENKINS,
ASSOCIATE EDITOR.

CHIEF JUSTICE CHASE.

A very large meeting of the bar of Philadelphia was held on Saturday, May 10th, in the United States Court room, for the purpose of paying respect to the memory of the late Chief Justice Chase. Assistant District Attorney Valentine called the meeting to order, and Hon. John Cadwalader, of the United States, Circuit Court, was selected as chairman.

Upon assuming the duties of the position, Judge Cadwalader said that the deceased had exhibited truly great intellectual power, capacity for organization, great administrative efficiency, and rigidly pure morality. The office of secretary of the treasury, is a most difficult and responsible one, under our complicated system of government, in the sunshine of peace and the calm of prosperity. What, then, are its difficulties and responsibilities in the whirlwind of civil war? In the storm of our country's career, the deceased chief justice held the rudder and saved the ship of State from wreck. We cannot consider the character of Mr. Chase's efforts, without considering results, and to him we are indebted for a currency which has the confidence of the people, and with which every one is satisfied. The judge spoke of the deceased as chief justice, and awarded him high praise for his course on the bench.

Hon. James R. Ludlow, was then called to act as secretary.

District Attorney William McMichael, offered the following resolutions:

Resolved, That the bar of Philadelphia has heard with profound regret, of the death of Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States.

Resolved, That in his career, we see the great opportunities offered to the citizen under our free institutions; and in the integrity and ability with which he discharged the various offices intrusted to him, we behold an example worthy of admiration.

Resolved, That he filled the high position of chief justice with great dignity, learning and impartiality, and was the worthy successor of the eminent jurists who preceded him.

Resolved, That the chairman appoint a committee of five to communicate the proceedings of this meeting to the family of the deceased.

Mr. McMichael made a few remarks respecting the deceased, in which he said:

It was my pleasure to meet Mr. Chase during the time he was secretary of the treasury. His personal appearance was then very impressive. Tall, stalwart, and with a face heightened by superior intelligence, there was that in his presence which indicated a leader of men. I saw him again two years ago upon the bench, and frequently since in the Supreme Court room at Washington. The change which had taken place in his appearance, was marked and affecting. Disease had laid its heavy hand upon him. His tall form was bent, his face furrowed, his step weakened by premature age, but his strong intellect overmastered his physical infirmities.

Hon. Benjamin Harris Brewster, said he had been requested to second the resolutions; the large assemblage, and the number of gentlemen whom he saw present, prepared to speak, forewarned him that what he should say must be brief. These occasions were eminently proper, and should be encouraged, because they admonished men that they were mortal, and that they must answer while they were here, and to the great hereafter, and those who were left behind them, for the purity and integrity of their private and public acts.

This gentleman had been connected with some of the most important epochs in the history of the country; he had graced many exalted positions as a statesman, and when he was promoted to the bench. In government, the judicial function was one that could not be supplied by any other, and sometimes it was called upon to supply all others, and hence men submit to it with reverence. It was the last which should be exposed to blame; its character was solemn; to be venerated and obeyed for the love of justice, which is the harmony of virtues.

This gentleman had been advanced to the highest place in this or any nation. His intellectual and moral qualities fitted him for it, and his labors while there, have justified the selection. He has left behind him, in his opinions, memorials which testify for him. He well knew he had been preceded by most illustrious men, John Marshall, who came from among those who surrounded Washington's administration; the great and upright Roger B. Taney, a man who in many of the traits of his character, resembled the good Sir Matthew Hale, and who, like him, had left for the benefit of mankind, the learning, labor and wisdom of a long judicial life.

Chief Justice Chase was not an old man when he died, but he had been long enough in his station to teach the country that he was equal to it. It was because of this, the Philadelphia bar were here to testify their respect for him as a lawyer and a man; to reverence his memory; to do honor to his fame, and to lament his loss.

Judge Peirce followed Mr. Brewster, traced the career of the late chief justice, from his boyhood's life in Washington, to his elevation to the supreme bench, through the important and responsible positions of governor of Ohio, senator of the United States, and secretary of the treasury, and said that he afforded—in the ability and integrity he had shown in all of them—a bright example to the youth of the country. The speaker attributed his success to the fact that he had put his trust in the Almighty, and had found in him a sure reliance. He had been placed, at a dark period of the country's history, in a position of extraordinary trial. Money was needed to carry on the government, and the bankers of New York turned their backs upon him; but he found a young man in Philadelphia for the emergency, and in the hands of this man the object was accomplished. It was to the honor of Mr. Chase and the wisdom of the banker, that success crowned the effort. As was said by one of the speakers at a bar meeting yesterday: "If death be an evil, it is a universal one." But it cannot be an evil, as it comes from God, and He can do no evil. Death comes to relieve us of the cares and responsibilities of life, and it had found a shining mark in the late chief justice.

Mr. Isaac Hazlehurst spoke of the singular fidelity which Mr. Chase had shown in all the positions he had filled.

Addresses were also made by William L. Hirst, Judge M. Russell Thayer, General Horatio Hubbell, and ex-Chief Justice Thompson.

The resolutions were adopted, and, on motion of H. C. Townsend, copies were directed to be sent to the Supreme Court of the United States, and to the Federal courts of this district.

The following committee was appointed: Chief Justice John M. Read, Ex-Chief Justice James Thompson, Judge J. I. Clark Hare, Judge Joseph Allison, Judge M. Russell Thayer, Judge William S. Peirce, William McMichael, Esq., Hon. Benjamin H. Brewster, William L. Hirst, Esq., Isaac Hazlehurst, Esq., George W. Harding, Esq., Daniel Dougherty, Esq., Horatio Hubbell, Esq., Aubrey H. Smith, Esq.

JUDGE KING.

A meeting of the Philadelphia Bar was held on Friday, May 9th, in the Supreme Court room, to do honor to the memory of Hon. Edward King, who for such a long period occupied the position of president judge of the Court of Common Pleas of this county.

The meeting was called to order by Hon. Benjamin Harris Brewster, who nominated Ex-chief Justice Thompson as chairman, and the nomination was ratified. David Webster, Esqr., was called to act as secretary.

The ex-chief justice said: We are again admonished of that unchangeable rule, that "It is appointed unto all men to die," and as certain as it comes, it is sure to carry sadness to many hearts.

It is a melancholy duty that we are assembled to perform, and yet it gives us an opportunity to commemorate the virtues, deeds and learning of the deceased.

I believe that the late judge was one of most eminent judges that ever was upon the bench; he could, with truth, be called the father of the equity system, and his opinions were always read with the force of authority. Nor was he less prominent in the administration of the criminal law, and in neither department—it is no discredit to any living representative of them—had he ever a superior. He has gone down to his grave without a whisper against his reputation; and, without enlarging, I can simply say, as the Graham said to his faithful follower: "Farewell to thee, O Fidelity! farewell, O Fidelity! to thee;" and so we can say to him "Farewell, O Fidelity! farewell to thee!"

William L. Hirst offered the following:

The Bar of Philadelphia assembles to day to express and record their profound respect for the memory of the distinguished jurist, the Hon. Edward King. He has been called away in the ripeness of age and the fulness of honors. For more than a quarter of a century his name was a household word. A pure and learned judge, an honorable man in private life, possessed of pre-eminent brilliancy of intellect, earnest and devoted in the discharge of his high judicial functions, holding the scales of justice with unfaltering impartiality, eminent in his own and other States as authority, respected and honored as one of the greatest of American judges, he has left behind him a name which will shine in the annals of the judiciary of America among the brightest and purest jurists of the age: therefore,

Resolved, That the Bar of Philadelphia on this solemn occasion desire to offer their testimony to the private and public virtues of the deceased, and to his eminent usefulness as one of the greatest and best of judges and citizens. Among the honored names that have given to Philadelphia her position among her sister cities, the name of Edward King stands high on the roll of honor. By the force and inherent powers of a mind, clear, profound, active, and looking only to the honest merits of a controversy, he attained distinction as a judge who ennobled and adorned the bench, elevated and organized the administration of justice, and secured the confidence and affection of the people.

Resolved, That a committee of nine be appointed by the chair to communicate to the relatives of the deceased, a copy of the foregoing preamble and resolutions.

Mr. Hirst supplemented the resolutions, after they had been received, by appropriate eulogistic remarks.

Mr. Hazlehurst desired to say a word upon the melancholy occasion which had convened this meeting. He had the good fortune to be acquainted with the late Judge King from his very earliest professional life. His first argument was made before him. In the relations of life he was kind and affectionate. Of very simple manners, his character was marked with manliness, integrity and honor. He was singularly free from ostentation or presumption, and, entirely free from guile; he honestly endeavored to fulfil the obligations which his high office imposed upon him. He has left in the reports of his day the proofs of his great learning and industry, and of his eminent qualifications for his exalted judicial position. His opinions upon almost every branch of the law are marked with wonderful clearness and force. He created the equity practice of his court. Should the junior members of the bar desire to know who Edward King was, they can find the question answered in the Judicial Reports of his day. From the case of the Commonwealth v. Grear, in 1826, to the case of Leach v. Leach, in 1851, they will find a rich field of judicial instruction.

As the author and compiler of the criminal code of this State, he has earned for himself the highest reputation, "It is a document of wisdom and industry." And now, said Mr. Hazlehurst, what more need be said? Events are rapidly succeeding each other. We are surrounded by realities. The chief justice of the American Union lies to-day dead in our commercial metropolis—our late president judge died yesterday in our midst. Two stars have sunk below the horizon. They moved in different spheres, but they were both par-

ticular and bright. These profound jurists, in addition to their great professional qualities, have left us the legacy of an unspotted personal character. There was a time when such a commendation would have been out of place. It is something now. Mr. Hazlehurst only desired to place upon the records of this meeting this his testimony.

Eli K. Price, Esq., said that his memory overreached all the judicial life of Judge King. All the most important acts in his profession had been performed by Judge King. When Judge King was appointed he had made no mark; he was undistinguished in the profession. He was well entitled to his position upon political grounds, which then ruled the governor. He was one of the three most prominent politicians when the Democracy was paramount over the city and the State, and the opponents thought to make capital out of the appointment, but he had not long been upon the bench before the public opinion was changed. There were none appointed upon the bench who possessed greater natural ability or greater integrity. No trace of political bias or partiality could be discerned in his judicial conduct. Mr. Price then continued at some length paying the highest tribute to the distinguished dead.

Judge Ludlow said:

Over forty-seven years ago, by an appointment of the governor, Judge King became the President of the Common Pleas.

For twenty-five years he sat in that court, and when it is remembered that the tribunal over which he presided is, and always has been, the constitutional court of this country, second to none in rank except the Supreme Court, with a jurisdiction of value beyond and above any other subordinate tribunal, a jurisdiction which embraces the whole range of causes, civil and criminal, it can at once be understood how vast was the responsibility imposed upon our late president.

How well the various duties devolving upon this magistrate were performed, is a matter of history, while the profession can point with a jealous and just pride to the record of Judge King's judicial decrees as contained in the reports. This great judge, more than any other single man, moulded the administration of equity and criminal courts, while in every department of the law within his jurisdiction, his published opinions will forever stand the proudest monuments of his keen appreciation of the most recondite principles of law, his practical sound sense, and of the strength, breadth and grasp of his judicial mind.

The voice of eulogy cannot reach him now; he has no lineal descendants to be gratified by words of praise, but he has successors upon the bench which he adorned, and they delight to do him honor, and will proclaim his fame with honest, earnest and just words.

Without fear of contradiction, it may be truly said that Judge King was fitted to fill the most exalted judicial station; his judicial character will compare favorably with that of any other jurist living or dead, while it is to be regretted that his powers, during the last twenty-one years of his life, were devoted rather to solitary literary pursuits than to the development and elucidation of legal principles as applied to the laws governing the municipality, the State, and the nation.

Other jurists will adorn the bench, or attain eminence at the bar. Most fortunate will that man be who, when he departs, shall leave behind him the reputation for integrity, learning, and ability which justly belongs to Edward King.

Mr. McCall said that Judge King was naturally qualified for the position which he so long and so ably filled. His mind was clear, capacious, and capable of taking broad and liberal views. He was, indeed, a great magistrate. Whether deciding upon matters of life or death, or of the ownership of large amounts of property, or whether moulding with plastic hand the system of equity, he showed the master mind. His opinions were so clear and broad, the principle of the case was so beautifully eliminated, that he stands to-day the model judge. As to the moral side of his character, what man has ever accused him with justice of want of integrity? While a strong party man off the bench, even the bitterest of his political opponents did not charge him with a jot or tittle of partiality to his party while on the bench. Outside of the profession he was a man of extensive and varied parts. After his retirement he did nothing of a public character except to create our criminal code, which is an enduring monument in itself of his genius and learning. He came forward again when sectional difficulties threatened the nation's life, and last when of late years he became an active member of the board of city trusts.

Hon. Benjamin Harris Brewster spoke substantially as follows:

Mr. Chairman and Gentlemen:—I had intended to abstain from speaking here, although requested to do so, for I was deputed to arrange and organize this meeting by those who are the personal representatives of the distinguished deceased. I was selected under circumstances which were painfully agreeable to me—selected because he was my earliest, firmest friend in life. When I first came to the bar I made his acquaintance, and the friendship which was then given by him when in the zenith of his power to me, an obscure boy, lasted through his long and useful life.

A very young man, obscure in his profession, and with prominence and notoriety as a politician only, he came to fill a place which had been filled by Judge Rush, a man of the most vigorous legal intellect and high character; a place which had been filled by Judge Hallowell, a trained lawyer, enjoying the confidence and respect of the people. The bar at that day was the most brilliant in the country, for among them stood out such men as Horace Binney, John and Thomas Sergeant, and Charles Chauncey, of the elder bar, and Joseph and Charles J. Ingersoll, John M. Lowber, Thomas Kittora, George M. Dallas and David Paul Brown, of the junior bar.

Judge King assumed that high obligation, and presented himself before such a bar unsheltered and unprotected by associates, for he stood alone, being the only lawyer on the bench, in the presence of this profession, many of the members of which were opposed to him politically, none of whom had confidence in his legal attainments, and thus unaided he solemnly resolved to do his duty, "so help me God," as he told me, with great impressiveness, soon after. And he kept his word, for that profession, so critical in its judgment, almost immediately after his elevation to the bench, bestowed on him the loudest praises, and continued to show him honor to the last.

His private life was not a happy one. He was a childless man. After the death of his first wife, he married a young and charming woman, who was the honor, the grace, and the joy of his life. I knew all these things, for he did me the honor to make me the familiar, the friend of his house. She died. The blow he thus received he carried through life. True, as his pursuits upon the bench became more onerous, his attention became distracted, but when he went to his home, and when he left the bench, the shadow settled down upon his life, and he bore it with him till he lay down to die.

At one time he was very near being chosen a judge of the Supreme Court of the United States. It would have been well for the country if he had been so chosen, for he would have left his mark on the jurisprudence of the whole country as he did in the more secluded spheres in which he moved, for he was such a man as was Robert Grier and John Bannister Gibson, those noble representatives of Pennsylvania.

Edward King was removed from that bench he had so worthily occupied by the act of the law, and when he came down from his position as a judge, truly he felt his occupation gone. He went to his dark and lonesome home, and sat down in solitude with his grief. But he was a thorough man, and he rallied, and with the zeal and earnestness of a boy took up the study of languages. He soon became a linguist, speaking all the modern tongues. Thus armed with a proper knowledge he travelled in England, on the Continent, and in other lands, and by this means sought to dispel the solemn cloud that made life to him a midnight of sorrow. But he returned home, and such melancholy settled upon him as made it painful for his friends to see him.

He was pure, upright, benevolent, a true friend, a just and fearless magistrate. And now, in closing, I can say nothing better of this dead judge than has been happily said by Francis Wharton in the preface to his American Law of Homicide. Mr. Wharton says in the preface to the work printed in 1855:

"I cannot, however, omit here to express the acknowledgments which I feel are due to a great master of criminal law, whose labors in that field, I fear, are now closed. Edward King was president of the Court of Common Pleas in Philadelphia from 1826 to 1852, during which period the entire criminal practice of that jurisdiction, with very few exceptions, passed under his supervision and was moulded by his hands. By him the accepted exposition of the statute discriminating murder into two degrees was first framed, and wherever in the numerous States in which that statute has been adopted, the learning of that branch of homicide is considered, it is upon his simple and yet most luminous commentary on that once vexed question that both counsel and courts finally repose. Of the same manly and just power of comprehension and perspicuousness of style, the charges and opinions at the close of the volume, on riotous homicide, may be taken as still more signal illustrations, and I am glad to have the opportunity of saying now what I was unwilling to say at the time of its publication, when Judge King was on the bench, and in the meridian of his intellectual faculties and reputation, that whatever credit the first edition of my work on criminal law is entitled to is due in part to his opinions, which were interspersed in its pages, but chiefly to the general tone of sentiment I gathered from him during a period of two years, in which I occupied an official position which brought me in constant intercourse with him while in the exercise of his judicial functions. Ten years have passed since then; many changes have taken place. In the vicissitudes of life, particularly of judicial life, new objects of official respect and personal admiration have arisen before the bar. Before another opportunity like the present would enable me to speak, death itself might come in to close the power of the one to hear, or the other to tender such a tribute as the present, and I am admonished, therefore, to take this moment of recording the acknowledgment, and as I conceive, those of all who are interested in the administration of penal justice, to a judge who, I think, has done more than any other living man to establish in our midst a wise, liberal and humane system of criminal jurisprudence." Mr. Brewster closed with: "It is to give expression to such sentiments as these that we have met here to-day."

After an address from Hon. William D. Kelley, and the appointment of Messrs. Wm. L. Hirst, Judge James R. Ludlow, Benj. Harris Brewster, Judge John Cadwalader, Eli K. Price, Wm. D. Kelley, Isaac Hazlehurst, and the officers of the meeting, as the committee provided for in the resolutions, the meeting adjourned.

In the Court of Common Pleas on Saturday morning, 10th inst., Judges Allison, Ludlow, Paxson and Finletter on the bench. Henry M. Phillips, Esq., in some appropriate remarks, announced to the court, the death of Judge King.

In response, Judge Allison said:

It is eminently proper that the death of Judge Edward King should not, in this court, be allowed to pass unnoticed. Judge King here began his career as a judicial officer, and here he continued to discharge the important duties of his high office for more than a quarter of a century. How well he performed those duties, and to what eminence he attained, let the imperishable record which he has left behind him, bear testimony.

It speaks for him now that he is dead, and will continue through advancing years to stand, as the monument of his intellectual greatness; the evidence of his industry and attainments as one of the most accomplished and most able lawyers of his age.

To say that Edward King was a great lawyer is to do for him no more than the simplest justice; and to add to it that this country has furnished to the profession of the law, but few indeed who could take their place by his side and claim to be his peers, is to keep within the bounds of strict truth. Had he chosen to seek for

posthumous fame in the same way in which Kent and Story have attained it, can any one who knew Edward King doubt how successfully he would have achieved it; his acute and comprehensive intellect, his broad views of law as a science, his profound learning and his great industry, would have made his name as much respected in Westminster Hall to-day, as are those of our countrymen, in whose transatlantic fame we take a just and honest pride. His mind was a wonder to those who in his strongest and better days were privileged to witness its operations; and in the combined qualities of activity and of comprehensive grasp, I think I have never known its equal. In every department of the law he was great. In the principles of the common law and in its adaptation to the varied conditions of his own day and country, he was perfectly at home.

In criminal jurisprudence how he towered above his compeers, and with what trust and confidence we turn to the solid basis upon which he rested and applied its great principles as the protection of the life and liberty of the citizen; and of him it may be said, with as much justice as Lord Campbell in his Lives of the Lord Chancellors of England, says of Finch, afterwards Earl of Nottingham, that he was not only a "consummate lawyer," but that he was the "Father of Equity." Who, but Edward King first dug up the foundation stones of the science of equity, arranged and placed them in their order, and constructed for us in Pennsylvania the solid and beautiful and important temple under whose shadows we now securely rest?

It is to the result of his labors in a great measure that we now turn, as to a strong tower—a sure defence for the protection of the sacred rights of property against the repeated and combined assaults of over-grown wealth and the lust of over-grown power. The legal profession owe to his memory the most profound respect, as well as a weight of obligation they can never repay, nor will the men of our State, of this or other generations ever fully know how much they are indebted to him for having settled upon an enduring basis, that system, once discarded but now of necessity adopted as a part and a most important part of the law of our commonwealth.

As a tribute to his greatness as a lawyer, because of the personal obligation I feel myself under to him for the help his labors have been to me, and because I regard him as a benefactor to the legal profession and to the public as well, I bear this willing tribute to his memory, and believing, as I do of him, I have thought it not only becoming but right, that from this judgment seat, where he so long and with such distinguished ability presided, and which he so greatly adorned, and following him, as his successor in office, but at a far-off distance from his greatness, that I should speak for him now that he cannot speak for himself, and express the hope that his name and fame, the profession of the law will not allow to pass into forgetfulness after we shall have laid him in his grave. As Philadelphians, as Pennsylvanians, as lawyers, we should bear his memory in grateful recollection.

In order to allow members of the bar and others to attend the funeral on Monday, the Courts of Common Pleas and Quarter Sessions were adjourned until Tuesday morning.

The Constitutional Convention have been engaged this week in further discussion of the report of the Judiciary Committee. The report has been materially modified, and we think for the better. The cumulative system of voting is applied to the election of judges, the number of Supreme Court judges is increased to seven, each county of 30,000 inhabitants or over, is made a separate judicial district, and the present aldermanic system of Philadelphia is abolished—all excellent and much needed reforms.

We have received from a member of the Philadelphia bar, some interesting sketches of the late Judge King, published as far back as 1844. We regret that, want of space compels us to crowd them out.

Troubat & Haly's Practice, vol. I, p. 296, treats of a "former discharge under the *insolent* laws of another State, meaning of course the insolvent laws."

PUBLICATIONS RECEIVED.

THE MEDICAL TIMES for April 26th, contains an interesting article, entitled "Who are Experts?" By Dr. John J. Reese, of the University of Pennsylvania.

REPORTS OF THE SEVERAL BANKS AND SAVING INSTITUTIONS OF PENNSYLVANIA, communicated by the Auditor General, to the Legislature, January 7th, 1873. Harrisburg, 1873.

GENERAL LAWS passed by the Legislature of the State of Pennsylvania, during the session of 1873.

DEFENCE OF INSANITY IN CRIMINAL CASES. Argument of Henry L. Clinton, delivered April 15th, 1873, at Albany, before the Judiciary Committee of the Senate, 8vo., pp. 41. New York, Baker & Godwin, 1873.

THE LEGAL EXCHANGE for March and April, 1873, Des Moines, Iowa. John Golding, Managing Editor.

This is another of the numerous legal periodicals that are springing up all over the country. It contains a large amount of information, useful to practitioners, especially to those of the North Western Bar. We wish it every possible success.

Recent Decisions.

UNITED STATES COURTS.

[Head notes of cases reported in 1st Sawyer's United States Reports, 9th (California) Circuit—Received from the Publishers, A. L. Bancroft & Co., San Francisco.]

BANKRUPTCY.

Where a creditor has attempted to obtain a preference over other creditors, by fraudulently increasing the amount of his claim, the whole claim will be rejected. In re Elder, 73.

The District Courts of the United States, sitting in bankruptcy, have power to restrain by injunction, the sheriff of a State court, from proceeding to sell the property of a voluntary bankrupt, under an execution issued out of a State court, upon a judgment obtained before the commencement of proceedings in bankruptcy. In re Mallory, 88.

It has also the power to declare the lien of a judgment of a State court void as against the general creditors, if such lien is an unlawful preference under the bankrupt act. Id.

The ordinary tribunals are not deprived, by a mere force of an adjudication in bankruptcy, of jurisdiction over suits against the bankrupt. The proceedings in such suits may be arrested or controlled by the Bankruptcy Court, when necessary for the purposes of justice; but in the absence of such interference, the jurisdiction of the ordinary tribunals remains unimpaired, and their judgments are valid. In re Davis, 260.

Where a petition in bankruptcy is filed in the name and on behalf of a corporation, without proper authority, the register acquires no jurisdiction to adjudge the corporation a bankrupt. In re Lady Bryan & Co., 349.

Under the provisions of the thirty-seventh section of the bankrupt act, the filing of a petition on behalf of a corporation, can only be "duly authorized by a vote of the majority of the corporators, at any legal meeting called for the purpose." Id.

A "corporator," within the meaning of the act, is one of the constituents or stockholders of the corporation. Id.

A surviving partner will be adjudged bankrupt on an act of bankruptcy committed by him in the course of the administration of the assets of the dissolved partnership, notwithstanding that the separate estate of the deceased is sufficient to pay all his debts, joint and separate. In re Stevens, 390.

COMMON CARRIER.

Although the bill of lading states that a package was received in good order, the carrier may, nevertheless, show that it was secretly defective or insufficient. The Oriflamnae, 176.

A common carrier is not, under all circumstances, entitled to know the contents of packages tendered for carriage, and a mere failure to ascertain whether the package contains anything dangerous, there being no reasonable ground for suspicion, does not, of itself, constitute negligence. Parrott v. Barney, 423.

CONSTITUTIONAL LAW.

Under the fifteenth amendment to the Constitution, and the act of May 31st, 1870 (16 Stat. 140), to enforce it, all persons declared citizens of the United States by the fourteenth amendment, are entitled to vote in the States where they reside, at all elections by the people, without distinction of race, color or previous condition of servitude; but the several States, notwithstanding the amendment, have the power to deny the right of suffrage to any citizen of the United States on account of age, sex, place of birth, vocation, want of property or intelligence, neglect of civic duties, crime or other cause not specified in the amendment. McKay v. Campbell, 374.

CONTRACT.

When a vendor of grain, bound by the contract to deliver, from time to time, upon requisitions made by the purchaser, refuses to deliver upon requisitions made in pursuance of the contract, and notifies the purchaser that he regards the contract as rescinded, and that he will deliver no more grain under it, the purchaser may treat the contract as wholly broken, and sue for and recover the damages upon the entire contract, without making further requisitions. United States v. Robinson, 19.

CORPORATIONS.

A stockholder or creditor of a corporation, cannot maintain a suit for an injury to the corporate rights, unless it appears from the bill that the corporation refused to take proper measures to protect or redress the same. Newby v. Oregon Central R. R. Co., 64.

COVENANT.

No covenant is implied from the use of the words in a deed, "bargain, sell and quit claim." Lamb v. Kamm, 238.

CRIMINAL PROCEDURE.

Misdemeanors may be prosecuted in the National courts by information. United States v. Waller, 701.

DAMAGES.

The actual damage sustained, directly resulting from the infringement of a patent, is the amount to be recovered. Carter v. Baker, 512.

The plaintiff is entitled to recover the profits realized by the wrong doer from the infringement of a patent, as a part of the damages. Id.

EXPERTS.

The testimony of experts is to be considered like any other testimony; is to be tried by the same tests, and receive just so much weight and credit as the jury may deem it entitled to, when viewed in connection with all the circumstances. Carter v. Baker, 512.

JURISDICTION.

There must be an actual seizure before any judicial proceedings are instituted, to condemn a vessel for violation of the navigation laws of the United States. United States v. The Fideliter, 153.

If seizure is not alleged in the libel, the objection may be taken for the first time in the Appellate Court. Ib.

LANDLORD AND TENANT.

In the absence of some agreement to the contrary, the tenant is responsible for all waste, however or by whomsoever committed, except it be occasioned by act of God, the public enemy, or the act of the reversioner himself. Parrott v. Barney, 423.

A covenant in a lease, to surrender the premises at the expiration of the term, in as good condition as the reasonable wear thereof will permit, damages by the elements excepted, does not protect the tenant from liability for waste, resulting from accidents occurring without his fault. Id.

A covenant in a lease, requiring the tenant to occupy the premises for a specific purpose, as an express office, does not impose on the landlord and exempt the tenant from all the risks incident to such business, not resulting from the wrongful acts or negligence of the tenant. Id.

MARRIAGE.

The laws of California (Hit. Dig. 4, 466) and of Oregon (Or. Code, 783, 785), require that the consent of the parties to become husband and wife, must be declared in presence of a person authorized by such laws to solemnize marriage, and two witnesses, and without the observance of these formalities, the marriage relation cannot be created or entered into, in either of such States. Holmes v. Holmes, 99.

Where citizens of a State purposely go beyond its jurisdiction, and not within the jurisdiction of another State—*as at sea*—and there contract marriage otherwise than in accordance with the laws of such State, the transaction is a fraudulent eva-

sion of the laws to which the parties owe obedience, and, therefore, void. Id.

MORTGAGE.

A mortgage of personal property, accompanied by an oral agreement or understanding between the parties thereto, that the property should remain in the possession of the mortgagor, and be disposed of by him in the course of his business, and the proceeds thereof applied to his own use, is a conveyance or assignment of such property in trust for the person making the same, and, therefore, void as against the creditors existing or subsequent of such mortgagor (Or. Code, 655). Catlin v. Currier, 7.

PATENT.

An infringement involves substantial identity. If the invention of the patentee is a machine, or an improvement on a machine, the patent will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of its mechanism, which performs the same service or produces the same effect, in the same, or substantially the same way. Carter v. Baker, 512.

PROMISSORY NOTE.

The mere delivery and receipt of the promissory note of the debtor or a third person, does not constitute payment, but it must also appear that the creditor *expressly* agreed to take such note as payment. In re Ouimette, 48.

RECEIPT.

The word "demand" on a receipt, ordinarily relates only to claims arising *ex-contractu*, and not to those arising *ex-delicto*. Hanson v. Fowle, 539.

TENANT IN COMMON.

A deed by a tenant in common, for his interest in a particular part of the land held in common, although void as against his co-tenant, is good against himself and those claiming under him. Lamb v. Wakefield, 251.

WATER.

Plaintiff, in excavating a tunnel in a mountain to its mining claim, on the public land of the United States, struck a subterranean flow of water, which it appropriated and enjoyed for several years. Defendants ran a tunnel from a distant point into the mountain, to a point some thirty feet in altitude, directly below the point where the plaintiff obtained the said water; and, thereupon, the water, which before flowed through plaintiff's tunnel was intercepted, and discharged through defendants' tunnel, and by them appropriated to their own use: *Held*, That diversion and appropriation of the water was wrongful, and that complainant was entitled to an injunction. Cole S. M. Co. v. V. & G. H. W. Co., 470.

WIFE.

A chose in action accruing to a woman during converture, survives to her, unless the husband reduce it to his exclusive possession during his lifetime; therefore, when a legacy was given to the wife, and she and her husband joined in a power of attorney, authorizing O. to collect and receive the same for her use and benefit, the receipt of the money by O., during the life of the husband, was not the possession of the latter, except for the use of the wife, and the right to recover the same from O., survived to her. Chappelle v. Olney, 401.

WITNESS.

Under the act of February 25th, 1868 (15 Stat. 37), a person may be compelled in a judicial proceeding to testify to matters tending to criminate himself, but no use can be made of such testimony against the witness in a criminal proceeding. United States v. Brown, 531.

(*Continued from page* 155.)

shall be sufficient personal service on the company. The term process includes any writ of summons, subpœna, or order, whereby any action, suit or proceedings shall be commenced, or which shall be issued in or upon any action, suit or proceedings brought in any court of this commonwealth having jurisdiction of the subject matter.

SECT. 14. That any person or persons, or corporation, receiving premiums, or forwarding applications, or in any other way transacting business for any insurance company or association not of this State, without having received authority agreeably to the provisions of this act, shall forfeit and pay to the commonwealth the sum of five hundred dollars for each month or fraction thereof during which such illegal business was transacted, and any company not of this State doing business without authority, shall forfeit a like sum for every month or fraction thereof, and be prohibited from doing business in this State until such fines are fully paid.

SECT. 15. The taxes, fines and penalties provided in this act shall, in case of non-payment, after notice from the commissioner, be collected as taxes upon corporations or individuals are now collected by law, and for this purpose the insurance commissioner shall have all the powers now conferred by law upon the auditor general in the settlement of accounts, subject, however, to the approval of the State treasurer, and to the right of appeal as in other cases.

SECT. 16. The provisions of this act shall not be applicable to insurance companies incorporated by other States, or by the United States, or by foreign governments, until from and after the first day of January, Anno Domini one thousand eight hundred and seventy-four; nor shall it apply, excepting the eighth section of this act, to fire insurance companies of this State organized and conducted on the purely mutual plan, with premium notes as the basis of security, and without capital stock, guaranty capital or accumulated reserve in lieu of capital stock, but the mutual companies aforesaid shall, at all times, be required to answer such interrogatories as the insurance commissioner may require, in order to ascertain their true character and condition, and for this purpose he may, at any time, institute an examination into their affairs, as in the case of companies subject to the general provisions of this act.

SECT. 17. That it shall not be lawful for any city, county or municipality to impose or collect any license fee or tax upon insurance companies or their agents, authorized to transact business under this act.

SECT. 18. That an act to revise, amend and consolidate the several laws regulating the licensing of foreign insurance companies, approved April eleventh, Anno Domini one thousand eight hundred and sixty-eight, is hereby repealed, said repeal to date from the first day of January, Anno Domini one thousand eight hundred and seventy-four, saving, however, to the commonwealth the right to collect all taxes and fees accrued under said act.

Approved April 4th, 1873.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested:

Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in May, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

Mar. 28, John B. Wagner et al., Executors of MARIA WAGNER, dec'd.
" 29, Peter Martin, Administrator of WILLIAM B. SMITH, dec'd.
" 29, William Badger, Executor of EDWARD R. BADGER, dec'd.
" 31, John Markle et al., Executor of GEO. MARKLE, dec'd.
April 2, Abraham D. Harley, Administrator of WASHINGTON RUMMEL, dec'd.
" 3, J. P. Robinett et al., Executors of G. HERMAN ROBINETT, dec'd.
" 3, Samuel White et al., Executors of LAETITIA G. RYAN, dec'd.
" 3, John McCormick, Guardian of MARY and FRANCIS McCORMICK, Minors.
" 4, Bridget T. O'Keefe, Administratrix of PATRICK O'KEEFE, dec'd.
" 5, Marmaduke C. Cope, Administrator of SARAH W. COPE, dec'd.
" 5, David T. Trites, Executor of NICHOLAS CONNELL, dec'd.
" 5, James S. Watson, Administrator of HENRIETTA RUSSELL, dec'd.
" 7, Jos. W. Mathers, Executor of EMMA BOCKIUS, dec'd.
" 8, Ed. Waln et al., Executors of S. MORRIS WALN, dec'd.
" 8, Ann Hoffner, Administratrix of SARAH HUNTLEY, dec'd.
" 9, Elias T. Hall, Administrator of JOHN B. EDWARDS, dec'd.
" 9, Wm. McKnight, Administrator of ELEANOR ANDREWS dec'd.
" 10, Henry P. Borie et al., Executors of MARIA LEECH, dec'd.
" 10, Daniel McShane, Administrator of CORMICK GALLAGHER, dec'd.
" 14, Eliza S. Dingee et al., Executors of CHARLES DINGEE, dec'd.
" 14, Sarah McCartney, Administratrix of PETER McCARTNEY, dec'd.
" 14, James Campbell et al., Executors of HUGH O'DONNELL, dec'd.
" 16, Penns. Ins. on Lives, &c., Executors and Trustees under the will of D. C. FULTON, dec'd.
" 17, Jacob Apple, Administrator of ELIZA APPLE, dec'd.
" 18, James E. Brown, Administrator of JANE BROWN STEWART, dec'd.
" 18, James H. Heverin, Administrator d. b. n. c. t. a. of THOMAS RYAN, dec'd.
" 19, John D. Engle, Executor of RACHEL ENGLE, dec'd.
" 19, Louisa Enger, Administratrix of WILLIAM ENGER, dec'd.
" 21, Margaret Stewart, Administratrix of GEORGE STEWART, dec'd.
" 21, William C. Stevenson, Administrator c. t. a. of ROBERT D. CLIFTON, deceased.
" 22, Mary C. Halderman, Administratrix of ELIZA JANE HOWARD, dec'd.
" 23, Charles W. Geesmyer, Guardian of MARGARET L. SCHNIDER, late Minor.
" 23, Henry C. Kellog, Executor of CONRAD KNIPE, dec'd.
" 23, J. Lowber Welsh et al., Executors of AUGUSTINE CASAMAJIR DE TRENARD, dec'd.
" 23, T. Frank Cooper, Administrator of JOSEPH COOPER, dec'd.
" 23, Christiana B. Sorber et al., Executors of MARY A. SORBER, dec'd.
" 23, John T. Fenton, Executor of MARGARET R. ROBB, dec'd.
" 23, Mary A. Barton, Administratrix c. t. a. of JOSEPH BARTON, dec'd.
" 23, Wm. Nuenemann, Administrator of CAROLINE ELIZABETH KRAEMER, dec'd.
" 23, William Morgan, Executor and Trustee of MARGARET D. SCHRYER, deceased.
" 23, Isaac F. Baker et al., Executors, and Isaac F. Baker, Trustee, under the last will of ANN MARIA ELLIOT, dec'd.
" 24, Ann B. West et al., Executors of JOHN H. WELSH, dec'd.
" 24, J. Ringgold Wilmer, Adm'r d. b. n. of J. C. A. MARLOT, dec'd.
April 24, Frank M. Naglee, Adm'r d. b. n. of ELLEN NAGLEE, dec'd.
" 24, Frank M. Naglee, Executor of ANN E. ROOD, dec'd.
" 24, Anna Teufel, Admin'x of JOSEPH TEUFEL, dec'd.
" 24, Jos. S. Riley, Adm'r of BENJAMIN S. RILEY, dec'd.
" 24, Kitty M Pepper et al., Executors of GEO. PEPPER, M. D., dec'd.
" 24, Jane P. Fales, Administratrix of OLIVER FALES, dec'd.
" 24, J. Granville Leach, Adm'r d. b. n. of OLIVER FALES, dec'd.
" 24, Horatio Gates Jones, Exec'r of REV. JOHN S. JENKINS, dec'd.
" 24, Horatio Gates Jones, Executor of HETTY ANN JONES, dec'd.
" 24, W. Henry Sutton, Administrator of NELLIE A. SMITH, dec'd.
" 24, W. Henry Sutton, Administrator of CHARLES J. SMITH, dec'd.
" 24, Israel H. Johnson et al., Executors of THOS. P. HOOPES, dec'd.
" 24, Solomon Rothschild, Guardian of ARNOLD'S Minors.

WILLIAM M. BUNN,
apr 25-4t Register.

CHARLES H. T. COLLIS, ATTORNEY AT LAW, 208 W. Washington Square, NOTARY PUBLIC AND COMMISSIONER OF DEEDS for the States of Vermont, New Hampshire, Maine, Massachusetts, Ohio, Illinois, Connecticut, Texas, Wisconsin, West Virginia, Rhode Island, Maryland, Virginia, Louisiana, Missouri, North Carolina, Georgia, New Jersey, Kentucky, Michigan, Iowa, Tennessee, Mississippi, Minnesota, California, Indiana. jul14-tf

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JOHN H. CAMPBELL, ATTORNEY AT LAW, 738 SANSOM STREET, PHILADELPHIA.

Special attention paid to the Settlement of Estates, Probate of Wills, Obtaining Letters of Administration, Filing Accounts and Orphans' Court practice generally. sep 8-tf

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JAS. F. MILLIKEN, ATTORNEY AT LAW, Hollidaysburg, Pa.

Prompt attention given to the collection of claims in Blair, Bedford, Cambria, Huntingdon, Centre and Clearfield counties. *Refers to* MORGAN, BUSH & Co., Genl. C. H. T. COLLIS JOHN CAMPBELL, Esq. nov 24-1y

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M. THOMAS & SONS, AUCTIONEERS.

Nos. 139 and 141, late 67 and 69 S. Fourth St.

REAL ESTATE SALE, MAY 20th,

Will include—

The Jewish Hospital, Fifty-sixth street, Haverford road and Westminster avenue—Three-story Stone (Mastic) Building, Stone Stable and One-story Brick House and Large Lot, 1 square from the Market Street Passenger Railway.

Oak Lane, 22d Ward, near Oak Lane Station, on the North Pennsylvania Railroad—Very Elegant Country Seat, known as "Northwood," Superior Mansion, 30 Acres. Orphans' Court Sale—Estate of George S. Repplier, dec'd.

Market and Seventh, N. W. Corner—Old Established Business Stand—Three-story Brick Store, 21 feet 8 inches front. Orphans' Court Peremptory Sale—Estate of Richard McCunny, dec'd.

Market, No. 3649—Very Valuable Business Stand—Three-story Brick Hotel and Dwelling, with Side Yard, known as Capt. Harry Conner's Saloon—36 feet front,

Main, Riverton, Burlington County, N. J.—Very Desirable Cottage-Built Residence. Executors' Sale—Estate of John W. Rulon, dec'd.

Green, S. W. of Johnson, Germantown—Modern Double Two-story Stone Residence, with Stable and Coach House. Same Estate.

Green and Johnson, S. W. Corner, adjoining the above—Very Desirable Lot. Same Estate.

Spruce, No. 2217—Modern Three-story Brick Residence. Has the modern conveniences. Immediate possession. Same Estate.

Tenth, (North,) No. 1924—Modern Three-story Brick Dwelling.

Columbia avenue, No. 1917—Modern Three-story Brick Dwelling.

Twenty-fourth and Wood, S. E. Corner—Large and Valuable Foundry, Machine Shop, Forge, Office, Store, Drawing Room, Stable, Sheds and Large Lot, 89½ feet front, 232½ feet deep—3 fronts.

Spring Avenue, Chelten Hills, Cheltenham Township, Montgomery Co., Pa., near Old York Road Station, on the North Pennsylvania Railroad—Very Elegant Country Seat and Mansion, 20 Acres, Residence of John Baird, Esq.

Spring and Whitewood Avenues, adjoining the above—Very Desirable Lot.

Spruce, Nos. 1527 and 1529—To Hotel and Boarding House Keepers—Large and Valuable Four-story Brick Residence, known as the "Chegaray Institute," 44 feet front, 240 feet deep.

Myrtle, West of Twelfth—Three-story Brick Dwelling. Orphans' Court Sale—Estate of Elizabeth Haines, dec'd.

Bank, No. 15, between Market and Chestnut, and Second and Third—Very Valuable Business Stand—Four-story Iron Front Store.

Elm, Nos. 1110 and 1112—2 Three-story Brick Dwellings. Orphans' Court Sale—Estate of Jacob Schledt, dec'd.

Montgomery avenue, No. 1518—Three-story Brick Dwelling. Same Estate.

Spring Garden, No. 1208 Modern Three-story Brick Residence. Has all the modern conveniences. Executors' Sale Estate of Joseph Fox, dec'd.

Spruce, No. 4407—Handsome Modern Three-Story Brown Stone Residence, with Side Yard. Has all the modern conveniences. Immediate possession. Executor's Sale—Estate of Elizabeth A. Evans, dec'd.

Noble, East of Sixth—Very Valuable Two story Brick Building. By Order of Overseers of Public Schools.

Sansom, East of Thirty-six—Lot. Orphans' Court Sale—Estate of Richard Simpson, dec'd.

Broad, North of Wharton—Large and Valuable Lot, 100 feet front, 200 feet deep to Watts street.

Radnor Station, on the Central Pennsylvania Railroad—Beautiful Country Seat and Farm, several splendid building Sites, Commodious Stone Mansion House, numerous and complete Outbuildings.

Bainbridge, Nos. 630, 632 and 634—3 Three-story Brick Stores and Dwellings, with 4 Three-story Brick Dwellings adjoining in the rear, forming a court, and 3 Three-story Brick Dwellings in the rear, fronting on Dorsey street.

Thirty-sixth, (North,) No. 17—Genteel Three-story Brick Dwelling.

Washington Avenue, No. 133—Two-story Frame Dwelling and Lot of Ground. Sale Absolute,

Front, North of Morris—Desirable Building Lot. Sale Absolute.

Otsego, North of Moore—Desirable Building Lot. Sale Absolute.

3 Well-secured Irredeemable Ground Rents, each $20 a year, silver.

Well-secured Irredeemable Ground Rent, $80 a year, silver.

Marshall, No. 513—Modern Three-story Brick Residence, with Side Yard. Executor's Sale—Estate of Peter K. Gorgas, dec'd.

Callowhill, No. 507—Business Stand—Three story Brick Lager Beer Saloon. Same Estate.

Moyamensing Avenue, No. 1229—Two-story Brick Dwelling.

Rose, No. 1324, Corner of White's Court—Three-story Brick Dwelling. Executor's Peremptory Sale—Estate of Nathaniel White, dec'd.

White's Court, South of Rose—6 Three-story Brick Dwellings. Same Estate.

Front, (South,) No. 706—Three-story Brick Store and Dwelling, with 3 Three-story Brick, and 2 Frame Dwellings in the rear, forming a court.

Mead, Nos. 110 and 112—2 Two-and-a-half-story Brick Dwellings.

West Walnut Lane, sixth house West of Adams, Germantown—Modern Three-story Stone Residence, 40 feet front, 331 feet deep.

Morris, No. 142—Genteel Three-story Brick Dwelling.

Well-secured ground rent, $40 a year.

Bradford, No. 317, North of Pine—Three-story Brick Dwelling. Executor's Peremptory Sale—Estate of John Heffron, dec'd.

REAL ESTATE SALE, MAY 27th,

Will include—

"Woolton Hall"—Very Elegant Country Seat and Farm, known as "Woolton Hall," Mansion, Farm and Tenant Houses, 50 Acres, Philadelphia and Wilmington Turnpike, Brandywine Hundred, New Castle Co., Del. Residence of C. R. Griggs, Esq. Sale Absolute.

Crown, No. 334—Genteel Three-story Brick Dwelling. Executor's Peremptory Sale—Estate of George Knorr dec'd.

Vine, No. 1607—Modern Three-story Brick Residence. Immediate possession—Administratrix's Sale—Estate of Dr. A. H. Fish, dec'd.

Thompson, West of Palmer—Three-story Brick Dwelling. Orphan's Court Peremptory Sale—Estate of Margaret Benner, dec'd.

Green and Harvey, N. E. Corner, Germantown—2 Modern Three-story Stone Residences. Immediate possession.

Eleventh, (North,) No. 1333—Business Stand—Three-story Brick Store and Dwelling. Thompson, Mercer and Division—Large Lot—3 fronts. Administrator's Sale—Estate of Thomas G. Cogill, dec'd.

River Delaware, extending through to the River Road, about half a mile below Beverly, N. J.—Valuable Farm, 23 Acres, late the property of F. Daguerenne, Esq. Immediate possession.

JAMES A. FREEMAN & CO., AUCTIONEERS.

No. 422 WALNUT STREET.

REAL ESTATE SALE AT THE EXCHANGE, MAY 28, 1873.

On Wednesday, at 12 o'clock noon.

Orphans' Court Absolute Sale.—2228 Callowhill street. Business Stand. Large modern Three-story Brick Store and Dwelling, with Back Buildings, and 2 Three-story Brick Houses on Carlton street. Lot 20 x 104½ feet. Estate of Neal McCully, deceased.

Orphans' Court Absolute Sale.—2126 Callowhill Street Business Stand. Three-story Brick Lager Beer Saloon and Dwelling, with Stable on Carlton street. Lot 17 x 109 feet. Estate of Alexander Reed, deceased.

Orphans' Court Absolute Sale.—1204 Canby Street. Four-story Brick Dwelling, above 12th and Locust streets, 8th Ward. Lot 18 x 50 feet. Estate of Frederick Herschberg, dec'd.

Orphans' Court Absolute Sale.—Montgomery Avenue. Desirable Building Lot, East of Tulip, 18th Ward, 18 x 114 feet to Cook street, 2 fronts. Estate of Elizabeth Sheets, dec'd.

Orphans' Court Absolute Sale.—937 Ogden street. Neat Three-story Brick Dwelling, 13th Ward. Lot 12 x 39 feet. Estate of Elizabeth Morgan, deceased.

Orphans' Court Sale.—Braddock street. Two-story Brick House, above Huntingdon street, 19th Ward. Lot 13 x 78 feet. Estate of Thomas Beaver, deceased.

Orphans' Court Sale.—1241 South 5th street. Neat Three-story Brick Dwelling, above Wharton street. Lot 14 x 42 feet. Subject to $27 ground rent., Estate of Robert Getty, dec'd.

Assignees' Absolute Sale.—1523 Marshall street. Modern Three-story Brick Dwelling, with Back Buildings, above Jefferson street. Lot 23 x 74 feet.

Assignees' Absolute Sale.—2016 Howard street. Genteel Three-story Brick Dwelling, above Norris street, 19th Ward. Lot 18 x 108 feet.

Assignees' Absolute Sale.—2018 and 2020 Howard street. 2 Genteel Three-story Brick Dwellings, with Back Buildings, above Norris street. Each Lot 18 x 108 feet.

Assignees' Absolute Sale.—1935 North 2d street. Business Location. Three-story Brick Store and Dwelling, above Berks street. Lot 18 x 68 feet.

Assignees' Absolute Sale.—Palethorp street. Neat Brick Dwelling, above Berks street, in the rear of above. Lot 15 x 41 feet.

Assignees' Absolute Sale. Belgrade street, formerly West street. Building Lot, south of Lehigh Avenue, 34 feet front x 65 feet deep, 19th Ward.

Assignees' Absolute Sale.—1239 Warnock street. Brick Carpenter Shop, below Thompson street, 29th Ward. Lot 17 x 91 feet, to Alder street.

2306 Spruce street.—Elegant Modern Four-story Brown Stone Residence, with Back Buildings and every convenience, and finished in hard woods and in the very best manner. Lot 20 x 110 feet, to an alley. Possession with the deed. $10,500 may remain.

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Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, MAY 23, 1873. No. 21.

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Supreme Court of Pennsylv'a.

PHILADELPHIA LIBRARY COMPANY v. HENRY J. WILLIAMS.

1. The taking by a court from the hands of a testamentary trustee, the execution of a power submitted to his sole discretion, would violate the right of private property and the spirit and purpose of the bill of rights, and could not be justified except upon the clearest evidence of his fraud or incapacity.

2. To hold that by reason of his promise to the testator, the mind of a trustee of admitted integrity, was under a constraint of which he was unconscious, and which made him incapable of exercising his judgment, notwithstanding he swears that he did act upon his own judgment, and because it accorded with his promise, would be to deny the power of self-knowledge and the capability of self-examination, upon which rests the doctrine of man's accountability for his thoughts and purposes.

3. Though a verbal direction of a testator in conflict with a power contained in his will, cannot alter the written terms of the power, yet a court of equity may compel a trustee to comply with a promise to follow a verbal direction and act of the testator, in the line of the power.

4. A chancellor will so control a trustee that he shall not disappoint the true intent and purpose of the donor, as gathered from the instrument containing the power; and an innocent motive will not save the exercise of the power if it violate the true purpose of the trust: broader than this there can be no conception of chancery power in Pennsylvania.

5. By the terms of a will, a trustee was to act under a broad and thoughtful foresight in the selection of a lot whereon to erect a building for a public library. The testator prior to his death, engaged the trustee upon his solemn promise to select a certain lot. The trustee, a man of admitted integrity, did select that lot. Upon a bill in equity filed against him, he both in his answer and whilst under examination, declared that he selected the lot because he thought it the best for the purpose that could be obtained, and assigned good reasons therefor. *Held*, that he had properly exercised the power.

Certificate from Nisi Prius.

Opinion by AGNEW, J. Delivered May 19th, 1873.

This is not an ordinary proceeding. It is an endeavor to set aside a man's solemn act, done in the exercise of his right of property, in his life-time, when he had absolute power over his own estate. It is an effort also to declare his friend, the chosen agent to execute his purpose, invested with absolute discretion to this end, disqualified to perform his will, because at his earnest request this friend has adopted and followed the testator's act. As a consequence, the bill seeks, on the ground of entire disqualification, to take the actual execution of the will into the hands of the court, and to declare how much of the *corpus* of the estate shall be used for that purpose. As a further consequence, the will must be executed by a stranger—a master acting under decrees procured from time to time by plaintiffs; for, by the total disqualification of the executor, the testator is no longer represented. This is the frame and purpose of this bill. Such a proceeding violates the right of private property and the spirit and purpose of the bill of rights, and cannot be justified except upon the clearest evidence of the incapacity of the executor, or that he is acting in fraud of his powers.

The case, briefly stated, is this: Dr. Jas. Rush, a gentleman of education and fortune, though somewhat peculiar, conceived the thought of founding a noble charity, at once a public benefit to his native city, Philadelphia, and a monument to those from whom he derived his wealth. He pondered on the subject and then made his will. At first he restricted the site of the building to certain central limits; but the rapid progress of the city during the eventful period of 1860 to 1867, altered his views of location. Fearful, if his charities were placed near the centre of the city, where property was rising rapidly, that the building might be swept away by the tide of speculation, he made a codicil, revoked the restriction, and enabled his executor to go beyond the limits stated in his will. Still reflecting upon his scheme for about two years more, and anxious to locate his charity to suit his own thoughts, he had careful examinations made by his friend and executor, and finding no other site suitable, either from price or size, he finally chose a spacious square on the great central avenue of the city, a few squares south of the original limit, and bought it at a cost of $130,000, or about one eighth of his entire estate. Upon this ground he directed his executor to build, and, to secure his co-operation, obtained his promise to do so. This promise was given, the executor swears most positively, not only out of regard to the testator's wishes, but because the lot and site were approved by his own judgment, founded on a previous examination of all the known eligible sites. Within a month after the death of Dr. Rush, Henry J. Williams, the executor, consulted eminent counsel as to the obligation of the contract of purchase upon the estate and upon his own duties in making the selection, and was advised by Judge Strong that the purchase was binding, that his power of selection was absolute, and was to be exercised upon his own judgment.

Dr. Rush died on the 26th of May, 1869. Mr. Williams made the selection under the will, and communicated it to the library company on the 29th of June, 1869, having previously stated it to individual members. Mr. Williams, the executor, a member himself of the library company, having no selfish or hostile interest, an old and skilful lawyer, well informed of his duties, a gentleman of intelligence and refinement, one whose integrity and purity of character are conceded by the plaintiffs to the fullest extent, is admitted to have acted in perfect good faith, and he, on his oath, attests that he acted upon his own judgment. It is alleged that the selection of the site at Broad and Christian streets, chosen and purchased by the testator, and adopted by the executor, must be set aside, not because of any intent to disappoint the trust, or of the slightest *mala fides*, but because the mind of the trustee, was, by reason of a promise to the testator, under a constraint, of which he was unconscious, when he made the selection, which made him incapable of exercising his judgment, notwithstanding he swears that he did act upon his own judgment, and because it accorded with his promise. The proposition, instead of being so plain and clearly established that a court of equity can act upon it to set aside the testator's choice and oust his trustee, is simply incredible, and is destructive of the right of private property. It denies the power of self-knowledge and the capability of self-examination, upon which the doctrine of accountability for the thoughts and purposes of the heart rests. It asserts a want of power to introspect our consciousness and motives of action under the responsibility of an oath, and our ability to distinguish between the obligation of a promise and the determination of the judgment in doing an act of importance pondered for weeks. The case is brought directly to this point, for the positive, distinct and reiterated assertions of Mr. Williams, in his answer and his testimony, that he did act upon his own judgment, compel us to decide either that he does not know the operations of his own mind, or that he is foresworn. The latter alternative is conceded on all hands to be untrue. Can it be possible that a court, in such a case and on such ground, will depose the executor, cast the property purchased by the testator back upon the estate, wrest the power from his hands, and place it in the hands of others? There is no such case to be found in the books here or elsewhere; and if any can be found abroad, it cannot be imported into this free State. Before examining the law let me state the bearing of the facts.

Was the selection in the line of Dr. Rush's written will? The will is dated in 1860. Dr. Rush devises to Mr. Williams all his estate, in trust, to select a lot not less than 150 feet square, between Fourth and Fifteenth, and Spruce and Race streets; and to erect a fire-proof building sufficiently large, not only for the present wants of the library company; but for future extension, according to his own plans and directions; and if he should have none, then according to Dr. Williams' best judgment and to the views he had confessed to him.

Thus, by the terms of the will, the testator reserved to himself the right to leave written instructions; and if he did not, that the executor should act upon his *verbal* directions. His verbal instructions to his executor are therefore within the very line of the written will. It is a matter of history that the war of the rebellion changed the whole surface of affairs in this city as well as elsewhere, by the inflation of the currency, the rise of prices, and increase of business.

These had a strong influence on Dr. Rush's mind. Let the language of the first codicil express his own thought. Paragraph 26—"Events and circumstances occurring within the last six years have obliged me to make several changes in my will." Then he proceeds to state the risk of making a new will, lest his death within thirty days afterwards might void it. "To void the possibility of such a result (he proceeds), I must let it stand as it is, and add other provisions as they may occur to me."

The codicil is dated May 16th, 1866. No better exposition of the testator's thoughts can be made than thus given to us in his own words, to exhibit the state of his mind when he made the second codicil, of the 18th of April, 1867. Remembering this, the testator's change of views since 1860, when the original will was made, is clearly expressed in the language of the second codicil.

SECT. 2. "I have in my will *limited the* extent of the lot to be purchased for the library building, as *well as its localities*; but as I desire that it shall have not only strength, durability and accommodation, but also be of *sufficient magnitude for any future or contingent*, but not ambitious or competing increase of the library, *in order to prevent*, if possible, it being torn down in twenty years, *and the lot sold at a speculative profit to suit the hyperbole of the times.* I authorize and allow my executor under a broad and thoughtful foresight to *increase the size of the lot*, and select *any* situation *he may deem* most expedient, *without regard to any* provisions of my will or codicils." I have italicized the language to bring out its meaning.

Now what was the testator's own idea as contained in this very provision (the power in question) of a *broad and thoughtful foresight?*

He tells us himself to *increase the size of the lot*, and to go out of the original limit to select *anywhere*. In a broad and thoughtful foresight he foresaw that the centre of the city would not suit his purpose or his means. He said to his executor, go out and choose elsewhere, so that

the magnitude of the building will suit all future time, and that the edifice itself shall not be swept away by the irresistible tide of speculation, to suit, as he termed it, the hyperbole of the times; a figure to express the superalative fancy and spirit of an inordinate inflation of prices.

In the next place, did the testator follow the line of his own thought, as expressed in the will itself? The proof of this is very clear, and is not contradicted. He made inquiries for eligible lots—new examinations made were both within the original limits and without. Mr. Williams himself explored, but found nothing suited to Dr. Rush's purpose. Finally, the lot at Broad and Christian streets presented itself, and here the testator found a site suited to his thought—a large, open square, on the main great avenue of the city, 299½ feet on Broad street, and running back 527 feet on Christian; containabout three acres and a half; at a price of $130,000—a large sum, indeed, but still leaving enough, as he believed, to put up the extensive building which filled his thought, as expressed in the codicil itself. In view of the rapid extension of the city within the last thirteen years, what right have we to say this selection was not made under a broad and thoughtful foresight, and does not meet the views and purposes expressed in the written will and codicils? The views and wishes of the library committee are outside of the true question, which must be decided upon the will itself.

Next, what were the grounds on which Mr. Williams exercised his discretion. These are best stated in his own words in his answer and sworn testimony.

"I have chosen this site for these, among other reasons:

"1. It is on the finest street of our city.

"2. It is, so far as I know, the only lot on that street sufficiently large for the building I must erect, which I can obtain at a reasonable cost.

"3. If compelled to purchase a lot elsewhere, I will not be able to erect the building ordered by the testator.

"4. I know of no suitable lot on any other street which can be had at the same cost.

"5. It is but a little distance from the centre of the city, and is within easy reach, by car, of all portions of it.

"6. It will not be necessary to have the library building torn down in twenty years, and the lot sold because of its limited dimensions.

"7. Its size insures for all time light, air, retirement, quiet, and safety from external dangers.

"8. It already belongs to the estate.

"9. It is exactly suited to the kind of library Dr. Rush proposed to endow—not a reading-room, nor one containing the light and ephemeral literature of the day, but one for readers and students of a higher grade.

"10. It will carry out the cardinal intent of the testator, as he understood it, because it is the one he selected himself.

"I adhere to this choice and to my determination to build thereon, notwithstanding the opposition which has been raised, because it was to my judgment, and not that of others, Dr. Rush confided the performance of his testamentary dispositions."

Certainly these are good reasons, and aside from all other evidence, vindicate Mr. Williams' assertion that he acted on his own judgment, for they are processes of thought, or steps which lead to his conclusion. Now, let us see what he says on oath as to the exercise of his own judgment; and first in his answer in direct response to the bill: "I selected the Broad and Christian street lot when I had assumed the executorship, after calm, careful and deliberate consideration, having thought of it in every shape, favorable and unfavorable, in which it had been presented, because it was in my judgment, the best I could obtain for the object and purposes of Dr. Rush's will, and because it combined adequate dimensions with cheapness and position." In regard to his promise to Dr. Rush—the alleged ground of disqualification—after stating his efforts to find a suitable lot, he says: "It was after this that the promise stated in my letter of the 30th December, 1870, was made to him. This was given with a knowledge of almost every circumstance which lead subsequently to my decision, when, as his executor, it became my duty to determine the site of the library." Again: "I aver that at the time I made said promise I thought it the best lot for the purpose which could be obtained, and I aver that after careful reflection and subsequent examination I still entertain this opinion." There is much more in the answer to the same effect.

His testimony is given as strong as his answer. When asked whether his judgment was not influenced by his promise, he replied: "Not that I am conscious of at all. I believe if I had made no promise, and had not known the wishes of Dr. Rush, my judgment would have been the same." Again he said: "If my promise to Dr. Rush, and my oath as executor had been at all in conflict, I would have resigned my executorship at once, and left some other person to put up the building."

Much more he said to the point, but this will suffice to know the strong and positive convictions of his mind. In these assertions he is also strongly corroborated by the testimony of many witnesses as to what took place just before Dr. Rush's death, and the communication of the selection of the lot to Mr. Wharton, Mr. Biddle and others. He consulted counsel, as proved by Judge Strong's letter of the 15th of June, 1869, before the meeting of the library company, on the 29th of June, when his selection was formally made known. A committee of conference was appointed at this meeting. To Mr. Fraley, one of the committee, who suggested other lots, he replied that they had all been examined, and that the prices were so high they did not suit Dr. Rush, and that the lot at Broad and Christian streets had been selected because, in the judgment of both Dr. Rush and *himself*, it combined all the advantages which he wished to secure. He again consulted Judge Strong, who replied July 19th, 1869, saying: "As executor, you are guided by the written will. In the exercise of the discretion reposed in you by that instrument, you may regard Dr. Rush's views and wishes orally expressed; but after all *your* judgment, however it may be made up, must be your guide in matters left to your discretion." Again urged by Mr. Fraley to change the selection on the 6th of August, 1869, he replied: "*I deem* that situation (the Broad and Christian lot) most expedient under all the circumstances of the case, for I *consider* its distance from the centre of the city as far outweighed by its other advantages, and I have the consolation of knowing that this decision is in entire accordance with the wishes of the testator, who selected and purchased this lot for this very purpose in his lifetime." The library company themselves knew he had exercised his own judgment in the matter. A meeting was called for the 19th of October, 1869, to vote on the acceptance or rejection of the provisions of Dr. Rush's will. Committees were raised *pro* and *con* to influence the opinions of the members when the meeting should take place, and circulars were issued.

On one side it was said: "But the executor of Dr. Rush, both from the expressed wishes of the testator during his life, as well as from *his own judgment of the suitableness* of the selected site, is indisposed to change it." The other side said: "The will gives to the executor the *absolute right* to select the location, and to construct the building, and *this discretion has been exercised* by selecting Broad and Christian streets as *the most suitable spot* in the city for the purpose." Against this overwhelming evidence, the positive oath of Mr. Williams, the contemporary circumstances, and the understanding of the library company, how can the conclusion be drawn that Mr. Williams did not exercise his own judgment?

It was after all these things had occurred, and nineteen months after the death of Dr. Rush, the letter of December 30th, 1870, was written, the stronghold and fortress of the plaintiff's bill. The object and purpose of this letter are made obvious by the circumstances which have evoked it. Controversy had arisen, and the library company had made several efforts to induce Mr. Williams to revoke his selection, and finally, at a meeting of the company, on the 10th of December, 1870, resolutions were passed, one of which expressed the "earnest hope and *request* that Mr. Williams would *reconsider* his intention to build on the site chosen." Dr. Willing, Judge Hare and Mr. Lea, were appointed a committee to confer with Mr. Williams, and a correspondence ensued, in which Mr. Williams adhered to his selection. The letter of December 30th, 1870, was then written, at the invitation of Dr. Willing, as a *formal* expression of Mr. Williams' intentions. He restates his convictions, and expresses his surprise that he should be again asked to change his intentions, and proceeds to defend himself against censure for refusing to change his mind. Then he pleads the sacred character of his promise. He cannot yield his judgment, but pressed hard to do so, he appeals to the well known sensibility of the gentlemen composing the committee, to all honorable engagements, if the case were their own. He repeats, also, what he has always said, that to change would be in opposition to *his own deliberate judgment;* and "*I mean this* (he adds) *in its fullest sense.*" This letter, written at the close of the year 1870, long after the controversy had existed, in defence of his motives and his reputation, evoked by the direct action of the library company, instead of proving that Mr. Williams acted without judgment, and from unconscious restraint, proves the convictions of a mind thoroughly convinced, and a heart that was fixed upon a just purpose. Admit that he was also influenced by his promise to his friend. So he ought to be, when, as he swears, it was an approving judgment. This is a proper influence, and does not show a man void of discretion, and so bound by conscience that his judgment is lost in the obligation of a foolish pledge.

How far, then, will a court of equity go in regarding a promise to a testator, as in fraud of his written will? Here I think the plaintiffs do not discriminate well. That a verbal direction of a testator in conflict with a power contained in his will, cannot alter the written terms of the power, is beyond contradiction, and to this extent this argument may fairly go.

But that a court of equity can pronounce the verbal direction, and, still stronger, the *act* of this testator, in the very line of his own power, and a promise to conform to it, *ipso facto*, a fraud on the power, is contrary to reason and the plainest principles of equity. The reverse is true, for it is the province of equity to follow the mind of the testator. So clear is this principle, that a court of equity will sometimes convert the devisee, even of an absolute estate into a trustee, in order to compel him to perform a solemn promise given to his testator to dispose of the property according to his verbal direction. In doing this the written will is struck down to reach the equity that lies in the verbal direction. Such was the case of Hoge v. Hoge, 1 Watts, 163, where the testator devised an estate to his brother absolutely, under a verbal direction that it should be for the benefit of his illegitimate son. Chief Justice Gibson cites in his opinion a number of cases where the verbal direction was sustained against the text of the will—one, for instance, where a testator having devised his lands to a nephew, desired his heir-at-law not to disturb the nephew in possession of certain lands acquired after the execution of the will, and it was so decreed. Now if a court of equity, to prevent a fraud upon the testator's actual intention, will disregard the written text, how much more consonant to equity is it to regard the solemn act of a testator who has involved his estate in the obligation of a contract in the line of a will, and to carry out its very intent; and how can it regard the promise of the executor to follow the wishes of the testator in this respect, as *ipso facto*, a fraud upon the testator's power.

On what principle of sound reason, conscience, or equity can the selection of this lot by the executor be pronounced a fraud on the power, or a disappointment of the power, or as an undue and improper execution of the purpose of the testator as contained in his written will? How has the promise to the testator vitiated the selection? What provision of the will does it offend? How can we say the selection is not made with a broad and thoughtful foresight? On the contrary, it conforms both to the will and the purpose of the testator. In following the testator's own act of purchase, nothing but the clearest evidence of incapacity in the testator to

select, or of folly in the selection, and of blind and unreasonable obedience in the executor, can set it aside. I am willing to concede the authority of all the cases cited for the plaintiff, including Duke of Portland's case. They may be summed up in a single view—that a chancellor will so control a trustee that he shall not disappoint the true intent and purpose of the donor, as gathered from the instrument containing the power. To execute it otherwise is a fraud on the power. Hence, it is said, "he must execute it *bona fide for the end designed.*" It may be a corollary, also, that an innocent motive will not save the exercise of the power, if it violate the true purpose of the trust. Broader than this there can be no conception of chancery power in Pennsylvania, where the citizen is secured by the constitution in his rights of property. When a testator, to fulfil his own purpose, confers an absolute discretion as to his property, it is *his* right to have the boon executed by his own trustees; and no court can without clear and adequate cause displace the trustee without violating the right of property.

This is well expressed in the letter of advice of 15th June, 1869, from Judge Strong, under which Mr. Williams acted. "A court of equity does not interfere with a discretion reposed, except in cases of *clear* abuse, when the court *can* conclude that the donee of a power is *acting in fraud of it.* But when, as in your case, the trustee acts in accordance with his own best judgment, and in so doing, follows the positive directions of his testator, it would be altogether *unprecedented for a court to interfere and substitute* its discretion for that invoked by the will. In this statement he is most distinctly supported by two recent cases decided by this court. Pulpress v. African Church, 12 Wright, 204, and Nagle's Estate, 2 P. F. Smith, 154. To these may be added a few citations from elementary writers. In the recent work of Mr. Perry on Trusts, the modern decisions are brought up. On page 455, section 508, he says, when the discretion to be exercised is a matter of personal judgment—"the trustees alone can exercise these powers, and courts cannot generally interfere to control mere personal judgments in personal matters." For this, numerous cases are cited. Again, on page 457, section 511, —"If the trustees exercise their discretionary power in *good faith*, and without fraud or collusion, the court cannot review or control their discretion." For this, twenty-four cases are cited. "Nor will a bill be entertained to compel the execution of a mere discretionary power." Ibid. Mr. Hill, in his work on Trustees, ed. 1846, p. 482, says, "as a court of equity will not, in general, assume the exercise of a discretionary power vested in trustees, so it will not interfere to control the trustees acting *bona fide* in the exercise of their discretion." He cites many cases for this statement.

In conclusion, there is no ground in fact or in law, on which the prayers of this bill can be supported.

The decree of the Court at Nisi Prius is, therefore, reversed, and the bill is ordered to be dismissed at the cost of the plaintiffs.

READ, C.J., and MERCUR, J., dissenting.

Acts of Assembly—1873.

A supplement to an act entitled "An act prescribing the fees for the office of the secretary of the commonwealth," approved April twenty-seventh, Anno Domini one thousand eight hundred and seventy-one, providing for the increase of certain fees therein specified.

SECT. 1. Be it enacted, &c., That from and after the passage of this act, the fees of the secretary of the commonwealth, to be received for the use of the common, wealth for the services hereinafter recited shall be as follows:

Filing description of bottles under act of Assembly, five dollars.

Letters patent, or instrument incorporating any company or association, twenty-five dollars.

Filing acceptance of provisions of act of Assembly, five dollars.

Filing evidence of change of corporate name, five dollars.

Filing papers creating corporation under general or special act of Assembly, twenty-five dollars.

Filing evidence of increase or decrease of capital stock and recording same, twenty-five dollars.

Filing articles of association for railroad companies and recording same, fifty dollars.

Filing agreements of merger and consolidation, fifty dollars.

Filing amendments to or confirmation of charter, ten dollars.

And so much of the act to which this is a supplement, as conflicts herewith, shall be and the same is hereby repealed.

Approved March 28th, A. D. 1873.

An act defining what days shall constitute legal holidays.

SECT. 1. Be it enacted, &c., That the following days, namely: First day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, and any day appointed or recommended by the governor of this State or the President of the United States, as a day of fasting or thanksgiving, or for the general cessation of business, shall be regarded as legal holidays, and shall, for all purposes whatsoever, as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks, drafts, and promissory notes, made after the passage of this act, be treated and considered as is the first day of the week, commonly called Sunday.

SECT. 2. Whenever the first day of January, twenty-second day of February, the fourth day of July, or the twenty-fifth day of December shall either of them occur on Sunday, the following day, Monday, shall be deemed and declared a public holiday, and all bills of exchange, bank checks, drafts, or promissory notes falling due on either of the Mondays so observed as a holiday, shall be due and payable on the Saturday preceding such holidays; and such Mondays, so observed, shall, for all purposes whatever, as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks, drafts and promissory notes, made after the passage of this act, be treated and considered as is the first day of the week, commonly called Sunday.

SECT. 3. Nothing in this act shall prevent the making or demand of any promissory note, draft, checks and bills of exchange falling due on said Mondays thus observed as holidays, on the day upon which such bills of exchange, drafts, checks and promissory notes shall be due.

Approved April 2d, A. D. 1873.

A further supplement to an act relating to corporations for mechanical, manufacturing, mining and quarrying purposes, approved the eighteenth day of July, Anno Domini one thousand eight hundred and sixty-three, extending the provisions of the same to the building or erection of piers for wharves, bridges, etc., and for other submarine operations,

SECT. 1. Be it enacted, &c., That the provisions of an act relating to corporations for mechanical, mining and quarrying purposes, approved the eighteenth day of July, one thousand eight hundred and sixty-three, and of the supplements thereto, are hereby extended to and shall include the building or erection of piers for wharves, bridges, etc., under water and for other submarine operations.

Approved March 27th, A. D. 1873.

A further supplement to an act relating to orphans' courts, approved March twenty-fourth, one thousand eight hundred and thirty-two.

SECT. 1. Be it enacted, &c., That the provisions of the fourteenth section of an act entitled "An act relating to orphans' courts," approved March twenty-ninth, one thousand eight hundred and thirty-two, be and they are hereby extended, so as to include the bonds which the Pennsylvania Railroad Company may issue from time to time, under and by authority of an act entitled "A further supplement to the act incorporating the Pennsylvania Railroad Company, authorizing an increase of its capital stock, the issue of bonds, and the securing of the same by mortgage," approved the eighteenth day of February, Anno Domini one thousand eight hundred and seventy-three.

Approved April 4th, A. D. 1873.

An act authorizing the Supreme Court of Pennsylvania and the various courts in and for the city and county of Philadelphia, to appoint stenographers as commissioners to administer oaths and take depositions.

SECT. 1. Be it enacted, &c., That the judges of the Supreme Court of Pennsylvania, and the judges of the District Court, Court of Common Pleas, Orphans' Court, and Register's Court, and the judges of the Court of Oyer and Terminer and Quarter Sessions of the Peace, for the city and county of Philadelphia, Pennsylvania, be and the same are hereby authorized and empowered to appoint one or more stenographers, as commissioners to administer oaths and take depositions to be read in the trial of causes in the said courts, and upon motions, rules, petitions, and other matters that may be brought before the said courts: *Provided*, That the said commissioner or commissioners so appointed as aforesaid, shall be duly sworn by the president judge of the respective courts, to make true and faithful reports of the testimony taken before them as such commissioners: *And provided further*, That the judges of the said courts shall not appoint any stenographer as a commissioner under this act, who shall not produce a certificate, signed by at least ten members of the Philadelphia bar, in good standing, that said applicant for appointment is duly qualified to perform the duties of said office.

Approved March 26th, A. D. 1873.

An act repealing the third section of the act approved June second, one thousand eight hundred and seventy-one, entitled "An act for the further regulation of boroughs."

SECT. 1. Be it enacted &c., That so much of the third section of the act approved the second day of June, Anno Domini one thousand eight hundred and seventy-one, entitled "An act for the further regulation of boroughs," as authorizes each voter to bestow his votes for town council, singly upon six candidates, or cumulate them upon a less number, be and the same is hereby repealed,

Approved March 28th, A. D. 1873.

An act regulating the sale of lumber upon the Ohio river and its tributaries within this State.

SECT. 1. Be it enacted, &c., That from and after the passage of this act it shall be lawful for all persons having timber, boards or other lumber upon the Ohio river, or any of its tributaries in this State, to sell the same under any measurement they may agree upon, or under measurements which may be made by any person or persons whom they and their vendees, under contract, may select, any local law, usage or ordinance to the contrary notwithstanding: *Provided*, That square timber shall be measured with the usual five inch hook, unless the parties shall otherwise contract.

Approved March 25th, A. D. 1873.

A supplement to the act of June sixteenth, one thousand eight hundred and thirty-six, entitled "An act relating to executions."

SECT. 1. Be it enacted, &c., That the stay of execution upon judgments allowed by the third section of the act of June sixteenth, Anno Domini one thousand eight hundred and thirty-six, entitled "An act relating to executions," be computed from the return day of the writ by which such action was commenced.

Approved April 3d, A. D. 1873.

An act to further provide for the enforcement of decrees in the Orphans' Court

SECT. 1. Be it enacted, &c., That wherever any person against whom a decree for the payment of money has been made by the Orphans' Court of any county, is possessed of or entitled to any stock, deposits, or debts due him, or to any legacy or interest in the estate of a decedent, the same may be levied on or attached in satisfaction of such decree, by the same process and in the same manner as is provided by the act of June sixteenth, eighteen hundred and thirty-six, entitled "An act relating to executions," and by the tenth section of the act of April thirteenth, Anno Domini eighteen hundred and forty-three, entitled "An act to convey certain real estate and for other purposes," a writ of attachment for said purpose may be allowed by said court or any judge thereof, as writs of *fieri facias* in said court are now allowed, and may be served out of the county in which the same may be issued, but service on the party against whom such decree was made, shall not be required if he be not found in said county.

Approved March 27th, A. D. 1873.

LEGAL GAZETTE.

Friday, May 23, 1873.

JOHN H. CAMPBELL,
EDITOR.

THEODORE F. JENKINS,
ASSOCIATE EDITOR.

THE CHIEF JUSTICESHIP — MR. JUSTICE MILLER.

MESSRS. EDITORS:—The death of Chief Justice Chase leaves vacant the highest seat of honor in the judiciary of our land. It seems to be understood that the President has concluded to make no appointment till the next term of the Supreme Court of the United States in October, or perhaps, till the meeting of the Senate in December. This will give time to consider calmly the merits of those whose names may be presented for the Chief Justiceship; and, perhaps, enable the professional mind of the country to indicate whom it prefers for this exalted station. And, surely, exalted it is, whether we consider the nature of the tribunal, the various and far reaching jurisdiction it possesses, or the distinguished men who have presided in this great Hall of Justice. Any country might well be proud of such an illustrious galaxy of names as Jay, Ellsworth, Marshall, Taney, and Chase.

In most cases, when a vacancy happens in the place of the chief or presiding justice of a court, the eye is apt to scan the bench to perceive whether there is not, among the associates, one eminently fitted by his learning, his ability, and his manners (for all are important), to occupy the vacated seat. In the present instance, why should it not be so? As one who has been in the habit of reading carefully the reported decisions of the Supreme Court of the United States, and has had occasion to notice the conduct of most of the justices of that tribunal on the bench, I venture to suggest to the consideration of the profession, the desirability of securing the nomination of MR. JUSTICE MILLER for promotion to the head of that tribunal, of which he has so long been an ornament.

Among the earliest of President Lincoln's appointees to the Supreme Bench, Mr. Justice MILLER came to the court almost unknown to his eastern brethren. He had no national reputation; he had never been engaged in politics; he had never held a political office; he was known in the West as a learned, laborious, careful lawyer. Born in Kentucky, in the days when she gave orators and statesmen to the public service, he grew up and was educated in the school which furnished such lawyers as Bibb and Crittenden; and migrating in early manhood to the new State of Iowa, his mind grew with the greatness of the mighty West; and when the circuit of his residence came for the first time to be represented on the Supreme Bench, the attention of the profession in the States comprising it, was at once fixed on Samuel F. Miller. Taking his seat on the Bench of the Supreme Court at Washington, in 1862, when questions growing out of the civil war were constantly arising, it very soon became apparent to the Bar that his was a master mind, capable of grappling with the most intricate questions of the law in all its varied departments and countless ramifications. His opinions bear evidence to his industry and ability, and are remarkable for clearness of statement, purity of diction, and evident mastery of any subject which they touch. *Quod non tetigit, quod non ornavit.* It is unnecessary to specify the opinions, to be found in all the volumes of Wallace's Reports, which attest his ability and skill in the law; but his dissenting opinion in Cummings v. The State of Missouri (4 Wall. 382), his dissenting opinion in Hepburn v. Griswold (8 Wall. 626), his great opinion in Watson v. Jones (13 Wall. 713), which will be the guide of American lawyers hereafter on questions of church property law, and his recent opinion in the Louisiana cases, involving the construction of the 13th and 14th articles of amendment to the Federal Constitution, will forever remain as imperishable landmarks in the history of our jurisprudence.

To those who have had the pleasure of seeing Mr. Justice Miller on the Bench, it need not be said that his manner is the combination of the *suaviter in modo* with the *fortiter in re;* and all those who know him in the private relations of life, will be satisfied that, as Chief Justice, he would be exactly the right man in the right place, and that the ermine worn by Marshall and by Taney would be borne aloft with an integrity which would receive no stain from him, but would be handed over to his successor pure and unsullied as he received it. The Supreme Court has been, throughout all our history as a nation, presided over by men of such great ability, purity, and learning, as to command respect, not only at home, but abroad. Let the profession on this occasion indicate whom they think best fitted to maintain for it this high standard; and, as a contribution to the formation of this opinion, I have ventured to suggest the name of Mr. Justice MILLER, who was on the ocean with his brother Strong, when the late Chief Justice was called away, on his way to minister to the sufferings of an invalid wife on the other continent; and who would deprecate, if he knew it, any attempt to present anything like a claim in his behalf. But in such a matter the interest of the Republic is alone to be consulted. M.

We would desire to call attention to the able opinion of Judge Agnew, in the Rush Will Case, published on our first page. The doctrine there announced of the power of courts of equity in interfering with the administration of decedents' estates, though perhaps not satisfactory to disappointed devisees, is surely most accordant to common sense and justice.

Recent Decisions.

PENNSYLVANIA.

The Court of Common Pleas of the Berks county district, on the 12th inst., decided in the case of the Philads. & Reading R. R. Co. v. Berks County R. R. Co., that the legislative grant of a right to build railroads along a certain street of a city, is not a contract to authorize the railroad company to occupy the whole of the street, to the exclusion of other railroad companies, or of individuals. Opinion by WOODWARD, P. J.

EASTERN DISTRICT.

Supreme Court of Pennsylv'a.

LAWRENCE CONNERY v. GEORGE G. BROOKE.

1. Whether a gate is an obstruction to the free use of a passage-way, is a question of fact for the jury.
2. The maxim *contemporanea expositio* applied in the construction of the grant of a right of way.

Error to the District Court of Philadelphia.

Opinion by WILLIAMS, J. Delivered May 17th, 1873.

We are of the opinion that the court below erred in holding, that by "the free use, right and privilege of a passage-way," we can only understand a way unimpeded by any means whatever; and, that, as a necessary consequence, a gate, hung across such way at its intersection with the turnpike, is a wrongful obstruction, for which an action will lie. Undoubtedly, as a general rule, the words of a grant are to be understood in their ordinary and natural sense, and if there is any doubt as to their meaning, they are to be taken most strongly against the grantor. But they are to receive a reasonable construction, and one that will accord with the intention of the parties; and in order to ascertain their intention, the court must look at the circumstances under which the grant was made; Cox v. Freedly, 9 Casey, 124. At the time of the grant in this case, February 26th, 1858, there was a gate across the passage-way at its intersection with the turnpike, and it continued there with the exception of the short interval it was out of repair, until the institution of this action in September, 1869. What, then, was the intention of the parties, and what did they mean by "the free use, right and privilege of a passage-way ten feet in width?" Did they mean that it should be an open passage-way into the turnpike, without any gate at its intersection? If so, why was not the gate removed as soon as the grant was made? Why was it allowed to remain? The fact that the gate was there at the date of the grant, and that it was allowed to remain, cannot change the plain meaning of the words of the grant, but it may help us to ascertain the intention of the parties, if there be any doubt as to their meaning. *Contemporanea expositio est optima et fortissima in lege.* Undoubtedly, the plaintiff was entitled to the free use, right and privilege of a passage-way ten feet in width, with free ingress and egress at all times, for this is the language of the grant. But what is meant by the free use of a passage-way? Does it necessarily mean that there shall be no gate or door hung across it, or if there is, that it shall always be kept open? Has not the owner of a passage-way its free use, if he hangs a gate across it at its intersection with the street? If I grant the free use, right and privilege of the hall of my house, with free ingress and egress at all times, must I take off the door leading into it, or keep it wide open in order that the grantee may have the free use of it? Or can he not have its free use, if he can enter it by opening the door whenever he chooses? Without doubt, I cannot unreasonably obstruct his use of it, but if the door amounts practically to little or no inconvenience, it seems to me that it is not necessarily a wrongful obstruction. Free is a relative term when applied to the use of a thing. It does not follow that I have not the free use of a room, because I have to open a door in order to get into it; nor does it follow that I have not the free use of an alley, because I have to open a gate to go in and out of it. A gate may be so placed as to be a practical and unreasonable obstruction to the free use of a passage-way; and it may be so constructed and placed as not to amount to any practical obstruction to its use.

Whether the gate in this case amounted to a wrongful obstruction, was, therefore, a question of fact for the jury. If it was not a practical hindrance, and, under the circumstances, an unreasonable obstruction to the plaintiff's use of the passage-way, then it was not a wrongful or illegal obstruction, for which an action will lie.

But the court was right in holding, that the judgment in the action of trespass, brought by the defendant against the plaintiff, for tearing down and breaking the gate, is no bar to the present action. It was for a different course of action, and did not necessarily involve the defendant's right to keep up the gate. The plaintiff may have been guilty of trespass in breaking it down, though it is an obstruction to his free use of the passage-way.

Judgment reversed, and a *venire fac as de novo* awarded.

HENRY C. HAWKINS v. THE COMMONWEALTH OF PENNSYLVANIA ex rel.

1. The act of January 29th, 1873, providing *inter alia* that no member of the present councils of Philadelphia, should be removed by reason of his holding at the same time the office of notary public, is constitutional.
2. It simply deals with a part of the charter of a municipal corporation over which the Legislature has entire control, and does not interfere with any vested right of any individual.
3. It can be pleaded to an action instituted before it was enacted.

Error to Common Pleas of Philadelphia county.

Per Curiam. Delivered May 19th, 1873.

To the suggestion filed by the two private relators, that the defendant being a notary public, holding office under the State, was not eligible to the common council, the defendant, on the 18th of February, 1873, pleaded an act of Assembly of the 29th January, 1873, entitled "An act relating to the office of notary public in the city of Philadelphia," in which it was declared, that the true intent and meaning of the act of Assembly, entitled "An act to incorporate the city of Philadelphia," approved the 2d day of February, 1854, is not to prevent any member of the select and common councils of the city of Philadelphia from holding at the same time the office of notary public, and which further enacted, that the holding of the office of notary public shall not be incompatible with holding at the same time the office of member of either branch of the councils of the city of Philadelphia; and no member of the present councils of said city shall be held to be disqualified on account of the holding or having held at the same time the

office of notary public, nor shall he be removed from the office of member of councils by reason of any such disqualification.

To this plea the relators demurred, assigning among other causes of demurrer, that the said act was unconstitutional, and on the 5th April, 1873, the court sustained the demurrer, and the court entered judgment of ouster against the defendant.

In this, we think the learned judge was clearly in error, for the act of 29th January, 1873, was a perfectly constitutional law, and if the attorney general had been the relator, he would have discontinued the suit as soon as the act was brought to his notice, as would have been his duty.

This act deals simply with a part of the charter of a municipal corporation, over which the Legislature had entire control, and did not interfere with any vested right of any individual, and certainly not of the two relators. It was a matter concerning the public, and was strictly within the province of the Legislature, and was not an interference with the proper functions of the court, and did not "override the judiciary."

Judgment of ouster reversed, and judgment for the defendant.

District Court of Philad'a.

LORENZ v. LEHIGH NAV. CO.

A treasurer of a corporation cannot under a subpœna *duces tecum* be compelled to produce, before a commissioner to take depositions, the books and papers of the corporation, even though he have the actual custody of them.

Saturday, May 17th, 1873.

This was an action of trover and conversion for five certificates of stock in defendants' company, belonging to plaintiff. After issue, but before trial, a rule was entered to take depositions of witnesses under section 35, rule 10, of District Court (court rule p. 29). The treasurer of defendants was served with a subpœna *duces tecum* to appear before the commissioner and bring with him certain books and papers, among which were the certificates of stock in question, and an alleged power of attorney of plaintiff to transfer said certificates. On the hearing before the commissioner, the witness attended and was examined. From his testimony it appeared that he was the officer of the company who had charge and actual custody of the books and papers called for, which he declined to produce before the commissioner. Plaintiff filed an affidavit that the alleged power of attorney was a forgery, and that an inspection of it was necessary to enable him to prove this fact. A rule was then taken for an attachment on witness for disobeying the subpœna.

R. H. McGrath and *John Samuel, Esqs.*, for the rule.

As to plaintiff's right to inspect before trial—It was his alleged deed, of which he had no copy. It was material to enable him to maintain his action. Black v. Gompertz, 7 Exch. 67; Tebbutt v. Ambler, 7 Dowl. 674; Doe dem. Child v. Roe, 1 Ell. & Bl. 279; Scott v. Walker, 2 Ell. & Bl. 555; London Gas Light Co. v. Vestry of Chelsea, 6 C. B., N. S.; Pennark Harbor Dock Co. v. Cardiff Water Works, 7 C. B., N. S.

The witness was bound to produce the papers; act of 1865 had made parties witnesses. Corsen v. Dubois, 1 Holt, 239; Arndy v. Long, 9 East. 473; 1 Camp, 14.

The act of 1789 did not apply, this being a tort; Morgan v. Watson, 2 Wh. 10; and the object being inspection before trial.

Charles Gibbons, Esq., contra: Witness being a servant of the company, could not, without their authority, produce their books and papers. 1 Gr. 453; Rose v. King, 5 S. & R. 241. A subpœna *duces tecum* will not go against officers of a company to produce its books. 5 Cowen, 27-419. He argued as to the opportunity for abuse, which the practice sought to be enforced would allow.

Rule discharged, per HARE, P. J., LYND, and BRIGGS, JJ.

THAYER and MITCHELL, JJ., dissenting.

Orphans' Court of Philad'a.

ESTATE OF WILLIAM J. MOORE, a minor.

The court revoked an order for the sale of the real estate of a minor, upon the ground that a serious question of title might be raised, which would deter bidders.

Opinion by PAXSON, J. Delivered May 17th, 1873.

This was a citation upon the guardian to show cause why he should not be dismissed, and why the order of sale heretofore granted should not be revoked. The dismissal of the guardian was not pressed at the argument, and may be regarded as abandoned. We are asked to revoke the order of sale upon the ground that the interest of said minor in the real estate described in said petition, is contingent upon his arriving at 21 years of age. The devise to said minor is in the following words, viz.:

"I give and bequeath unto my wife Maria, all the property which I may die possessed of (except the articles hereinafter mentioned), so long as she shall remain my widow, and upon her decease or marriage, whichever may first happen, then I give and bequeath my said property to my son, William James Moore, his heirs and assigns forever, and if he, my son William James Moore, should depart this life before he is 21 years of age, the said property I give and bequeath to my brother W. J. Moore's son, Alexander Moore, his heirs and assigns forever."

The widow died December 24th, 1872. The person now objecting to the sale is Alexander Moore, guardian of Alexander Moore, Jr., a minor, and devisee above named.

It is clear that under this will, William takes an estate in fee. Is it absolute, or is it contingent upon his arriving at 21 years of age, with an executory devise to Alexander? "By executory devise, a fee, or other less estate may be limited after a fee, and this happens when a devisor devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises land to A. and his heirs, but if he dies before the age of twenty-one, then to B. and his heirs; this remainder, though void in a deed, is good by way of executory devise." Black. Com., Book 2, 173. I am not aware that this rule so clearly laid down by Blackstone, has been modified in Pennsylvania. Justice Sharswood, in his very full and complete notes to the last edition, does not refer to any change. It was urged by the learned counsel for the guardian, that by reason of the death of the first taker (the widow) before the arrival of William at full age, the estate vested in the latter absolutely; and Parker's Appeal, 10 P. F. S. 141, was cited in support of this view. No such question arose in that case. The point was whether under the will, Joseph Rex took an estate in fee or in tail. Here the question is whether William took a vested estate in fee, subject to be divested, in case of his death before 21 years of age. This will manifestly limits a fee after a fee, which can only be done by executory devise. The doctrine of executory devises, as existing in Pennsylvania, is recognized in Dunwoodie v. Reed, 3 S. & R. 441, and a number of subsequent cases.

I do not now propose to decide more than is necessary for the purposes of this motion. No judgment of this court upon this proceeding would be conclusive upon the question of title. It would settle no one's right. It is enough to say that it would be unwise to sell the real estate of a minor in a case where a serious question of title may be raised. It might deter bidders, and result in a sacrifice of the property. We think there is such doubt as to this title, and, therefore, revoke the order of sale.

Court of Common Pleas of Philadelphia County.

THE CITY OF PHILADELPHIA v. KEYSER.

1. **An objection to discovery of a fraud on the mere ground that it might be indictable, will not hold. It is necessary that an indictment be actually pending, or at all events a reasonable probability that one will be preferred.**
2. **The register of water rents for the city of Philadelphia can be compelled by bill to make discovery of frauds committed by him.**
3. **He is within section 116 of the act of March 31st, 1860, and cannot therefore set up that his answer will criminate him.**
4. **A court of equity having acquired jurisdiction for the purpose of discovery, will entertain it for the purpose of relief, in most cases of fraud, account, accident and mistake.**

Opinion by ALLISON, P. J. Delivered May 17th, 1873.

The defendant was register of water rents for the city of Philadelphia, from February 28th, 1867, to February 1st, 1872. The plaintiff charges that, during all of this period he neglected to pay in daily to the city treasury, as required by ordinance, all moneys received by him for water rents, and did not make daily returns, under oath, of all moneys so received, to the controller of the city.

It is further charged that during all the time he was in office, the defendant deposited the moneys of the city in his own name, with individuals and with certain banking institutions, and received interest upon the same, for his own use and benefit, and that he has never paid the said interest or profit to the city.

The plaintiff prays for discovery by defendant of the several matters charged against him, and that he be compelled to account for and pay over to the city all interest or profit on moneys received in violation of his obligation and duty of office which in any way accrued to him from detention and use of the moneys of the city.

There is also a prayer for general relief.

The defendant demurs generally to the bill, and specially to the prayers for discovery and release.

The chief ground of demurrer is, that if compelled to make answer of the matters mentioned in the bill, the answers might be evidence tending to subject the defendant to punishment, penalties and disabilities, under the laws of Pennsylvania.

It is an elementary principle of equity jurisprudence, that no man need discover matters tending to criminate himself, or to expose him to a penalty or forfeiture. He may refuse to answer not only the leading fact, but as to every incidental fact which may form a link in the chain of evidence, if any person should choose to indict him. Adams Eq., section 3, and authorities cited in note. In Story's Eq. Juris., section 1494, it is laid down that discovery will not be enforced in aid of a criminal prosecution, or of a penal action, no one being compelled to accuse himself. Wigram's Law of Discovery, 82. It has also been held that a married woman will not be compelled to answer a bill which would subject her husband to a charge of felony. 8th Vesey, 405. Same principle sustained by this court, in Bank v. Biddle, 2 Parsons, 58. The protection thus afforded to a defendant, against being compelled to prove himself guilty of a criminal act, is subject to modification, in respect to frauds; but objection to discovery of a fraud will not hold, on the mere ground that it might be indictable; it is necessary that an indictment shall be actually pending, or, at all events, a reasonable probability that one will be preferred. Adams, section 4, 8th Conn. 528; 3 Barb. Ch. Rep. 358. In O'Connor v. Tack et al., 3 Brew. 407, the majority of this court held that where a bill charged fraud, and the possession by defendants of memoranda relating to the transaction, and the defendants' answer denying the fraud, and referring to the memoranda, that they could not object to an order for their production, on the ground that an indictment was pending against them. Judge Ludlow dissented, and supported his dissent upon the general principle that no one can be compelled to criminate himself so as to subject him to prosecution, and that under the 9th article of the constitution of this State, section 9, "no citizen can be compelled to give evidence against himself." He also held that the 123d section of the act of the 31st of March, 1860, did not cover the case of the defendant. It is asserted by the defendant in this suit, that it is equally inapplicable to his case, as a protection to him; that the use of the moneys of the city by an officer of the corporation for his own personal gain, is made punishable by fine and imprisonment. The section referred to is as follows: "No such trustee, merchant, attorney, broker, agent, director, officer, or member, *as aforesaid*, shall be enabled

or entitled to refuse to make a complete discovery, by answer, to any bill in equity, or to answer any question or interrogatory, in any civil proceeding, in any court of law or equity. But no such answer to any such bill, question, or interrogatory, shall be admissible in evidence against such person charged with any such misdemeanors." An examination of the preceding sections to which the 123d section refers, will show that trustees are mentioned in 113; bankers, brokers, attorneys, merchants and agents, in the 114th section; and in the 116th it is made an offence for an officer, director, or member of any bank, or *other body corporate*, or public company, to fraudulently take, convert, or apply to his own use, or to the use of any other person, any money, or other property of such bank, body corporate or company.

This, it seems to us, covers the case of the defendant; he was an officer of the city of Philadelphia, and therefore an officer of a body corporate, and is within the letter of the clause of section 123, which requires answer to be made by an officer of a corporation, other than an officer of a bank. The 116th section, it will be seen, treats the very subject matter mentioned in the bill, the fraudulent use and application of the moneys of a body corporate. The defendant is within the protection of the 123d section, and for this reason he cannot successfully plead the general principle, so well established, and which might otherwise enable him to avoid making the discovery sought to be reached by the bill.

It is further set out as a ground of demurrer, that the plaintiff has a full, adequate and complete remedy at law for the alleged wrongs, and is therefore not entitled to the discovery and relief prayed for.

But this general principle has its qualifications, and to some extent its exceptions; there are cases in which the jurisdiction of courts of law and equity may be said to be concurrent. It has been successfully maintained in many instances, that where a party has a just title to come into equity for discovery, and obtains it, the court will go on and give him the proper relief, and not turn him round to the expense and inconvenience of a double suit at law.

The jurisdiction having once rightfully attached, it can be made effectual for the purposes of complete relief. Story's Eq., section 64. The court having acquired jurisdiction of the suit for the purpose of discovery, will entertain it for the purpose of relief, in most cases of fraud, account, accident and mistake. 1 Fonb. Eq., B. 1, ch. 1, section 3. Coop. Eq., introduction, page 31, and Middletown Bank v. Russ, 3 Conn. R. 135. The exercise of this jurisdiction is rested in Fonblanque mainly on the ground of preventing multiplicity of suits. In Aldey v. Whitstable Company, 17 Ves. 329, Lord Eldon says, there is no mode of ascertaining what is due, except by an account in a court of equity. But it is said the party may have discovery, and then go to law. The answer to that is, that the right to the discovery carries with it the right to relief in equity. In Ryle v. Haggie, 1. Jac. & Walk. 236, it is said when it is admitted that a party comes properly into equity for discovery, the court is never disposed to occasion a multiplicity of suits by making him go to the court of law for relief; and in Makenzie v. Johnson, 4 Madd. 373, Sir John Lech says, speaking of the case before him, the plaintiff can only learn from this discovery of the defendants, how they have acted in the execution of their agency, and it would be most unreasonable that he should pay them if it turned out that they had abused his confidence, yet such must be the case if a bill for relief will not lie. There was here a cautious admission of the right to relief, in special cases, by Sir John Leech, founded on the right to discovery, as there was also by Vice Chancellor Wigram, in Pearce v. Creswick, 2 Hare, 293. But Judge Story remarks, at section 65, Eq. Jurisp., that the guarded language used is "in most cases," although he says it is certainly difficult to perceive any solid ground why jurisdiction should not extend to all cases embraced by the general principle.

So also in cases of account there is a distinct ground upon which the jurisdiction for discovery should incidentally carry the jurisdiction for relief. The several reasons upon which this principle is maintained are stated in Story's Equity, section 67: In inadequate remedy at law; discovery in most cases obtained only by reference to a master; compelling production of vouchers and documents, and suppressing multiplicity of suits.

We think the present case is clearly within the rule, upon the grounds of fraud and account, and is not affected by the fact of defendant having given an official bond to the city. A suit may be maintained without regard to the bond; for the claim of the plaintiff may far exceed the penalty of the bond. The demurrers are overruled, and the defendant is directed to make answer to the bill.

Lewis C. Cassidy and *J. H. Heverin, Esqs.*, for the demurrers.

Robt. N. Wilson, Esq., contra.

Acts of Assembly—1873.

An act to provide for a permanent centennial exposition building for the people of the commonwealth, in the city of Philadelphia.

SECT. 1. Be it enacted &c., That the sum of one million dollars be and the same is hereby appropriated for the erection of a permanent centennial exposition building for the people of this commonwealth, and for the use of the centennial anniversary of American Independence, under the direction of the United States centennial board of finance, incorporated by act of Congress, to be paid, however, only as hereinafter provided. No larger sum than shall be received into the State treasury on account of the centennial anniversary fund hereinafter provided for, shall be paid by the State treasurer on account of the permanent centennial exposition building, during the present year, and not exceeding three hundred thousand dollars, shall be paid of the amount hereby appropriated during the year Anno Domini one thousand eight hundred and seventy-four, and not more than three hundred thousand dollars, during the year Anno Domini one thousand eight hundred and seventy-five, and the residue of one million dollars shall be paid on or before the fourth day of July, Anno Domini one thousand eight hundred and seventy-six: *Provided*, That the moneys herein appropriated, are in no event to be drawn from or out of the revenue of the commonwealth, which under the constitution and laws of the State, are set apart for payment of the State debt; and if, from any cause, the revenue especially provided as a centennial anniversary fund, by the fifth section of this act, shall be insufficient to provide the whole moneys hereinbefore appropriated, no more money than the sum of two hundred and fifty thousand dollars shall be paid from the State treasury to the purposes aforesaid.

SECT. 2. Before any part of the money hereby appropriated shall be paid, satisfactory evidence shall be furnished to the State centennial supervisors hereinafter named, that at least one million dollars of *bona fide* responsible private subscriptions shall have been made, within the city of Philadelphia, to the capital stock of the said United States centennial board of finance, which shall be officially certified to the governor by the said supervisors, and a sum not less than five hundred thousand dollars shall have been appropriated by the municipal authorities of the city of Philadelphia, to be applied to the erection of the permanent centennial exposition building hereinafter provided for and a contract shall have been executed by the said centennial board of finance, and the centennial board of finance incorporated by act of Congress, with the State centennial supervisors hereinafter named, the commissioners of Fairmount Park, and the representatives of the city of Philadelphia, as the authorities of said city shall appoint for the purpose, stipulating that a permanent fire-proof building shall be erected in Fairmount Park, as part of the centennial exposition buildings, to cost not less than one million five hundred thousand dollars, which building shall remain in Fairmount Park perpetually, as the property of the people of this commonwealth, for the preservation and exhibition of national and State relics and works of art, industry, mechanism and products of the soil, mines, etc., of this State, and that it shall be kept open perpetually after the year Anno Domini one thousand eight hundred and seventy-six, for the improvement and enjoyment of the people of this commonwealth, under such regulations as the Fairmount Park commissioners and the State centennial supervisors, and the proper representatives of the city of Philadelphia, shall from time to time prescribe, but such regulations shall at all times afford equal facilities and privileges to all the people of this commonwealth, without regard to locality, condition or race, which contract shall be approved by the governor of the State before it shall be deemed valid; after the centennial anniversary exposition shall have closed, the said park commissioners and State supervisors, and the proper representatives of the city of Philadelphia, may admit into said building the works of art, products of industry, etc., from any other State or government, under such regulations as may be deemed just and proper, but there shall be no discrimination between the several States of this Union nor between the governments of the world.

SECT. 3. Alexander Henry, J. Gillingham Fell, and John O. James, of the city of Philadelphia, William M. Lyon and John H. Shoenberger, of the county of Allegheny, George R. Messersmith, of Franklin county, William Bigler, of the county of Clearfield, Ario Pardee, Sr., of the county of Luzerne, and John H. Ewing, of the county of Washington, be and they are hereby appointed State centennial supervisors, who shall, in addition to the powers and duties hereinbefore prescribed, formally approve the design, plans, and specifications for said permanent centennial exposition building, and report the same, with their approval, to the governor, and they shall formally approve any contract or contracts for the erection of said building, and for materials for the same, and also report such contract or contracts, with their approval, to the governor; and no part of the money hereby appropriated shall be paid until such designs, plans, specifications and contract or contracts shall have been officially approved by said supervisors, and so certified to and approved by the governor. When said supervisors shall certify to the governor that the labor done and materials furnished for said building amount to the sum of one hundred thousand dollars, the governor shall draw his warrant on the State treasurer, in favor of the treasurer of the centennial board of finance, for fifty thousand dollars, and thereafter whenever the said supervisors shall certify to the governor that the additional work done and materials furnished amount to the sum of one hundred thousand dollars, and that the money previously paid has been fully and properly applied, he shall draw his warrant in like manner for fifty thousand dollars, if so much shall remain unpaid, in accordance with the stipulation for the annual payments contained in the first section of this act; and when said supervisors shall certify that said centennial exposition building is complete, that the full sum of one million five hundred thousand dollars has been expended on the same, and that the previous payments have been fully and properly applied, the residue of one million dollars shall be paid as hereinbefore directed, but no larger amount shall be paid during any one year than is provided in the first section of this act.

SECT. 4. Said board of State centennial supervisors shall elect one of their number as president, and shall appoint a secretary, who shall keep a record of the proceedings of the board, and file a duplicate of the same with the governor at the close of each year; any vacancy occurring in the board shall be filled by the said board, but no person shall be chosen to fill any such vacancy without receiving five votes, and any of said supervisors may be removed at any time by the governor on address of a majority of both branches of the Legislature; said board shall not exercise any authority or control over the centennial exposition building during the centennial anniversary exposition, but said permanent building shall, during such exposition, be under the same control and direction of the United States centennial commission as the other buildings erected by said centennial board of finance.

SECT. 5. That in order to provide revenue to enable the State to meet the appropriation hereinbefore made, on or before the first day of July, Anno Domini one thousand eight hundred and seventy-three, all street passenger railway compa-

nies now incorporated in the city of Philadelphia shall make return to the State treasurer under oath of the proper officers, stating the gross receipts of each of said companies from the passage of this act until said return is made, and like quarterly returns shall be made by said companies, thereafter, until the first day of April, Anno Domini one thousand eight hundred and seventy-seven inclusive; and with each report there shall be paid by said street passenger railway companies to the State treasurer three per centum of such gross receipts, which revenue shall be placed by the State treasurer to the credit of the centennial anniversary fund; and all moneys paid by said State treasurer, on acccount of the appropriations hereinbefore made, shall be paid out of said centennial anniversary fund until the same is exhausted, and the residue, if any, required to be paid during any one year, shall be paid out of any moneys in the treasury not otherwise appropriated. On the first day of April, Annno Domini one thousand eight hundred and seventy-seven, the tax upon the gross receipts of said railroad companies shall cease and determine. Any of said street passenger railway companies which shall, within thirty days after the passage of this act, file with the State treasurer an official acceptance of its provisions, shall thereupon, each and every of them, be released from any penalty or penalties to which they or any of them might be liable under any proceeding in law or equity for any violation of the provisions of their charters respectively, prior to the passage of this act, and the faith of the State is hereby pledged to such accepting companies, that the legal rate of fares said companies are now authorized to collect shall not be reduced by legislative enactment, before the first day of April, Anno Domini one thousand eight hundred and seventy-seven. Any street passenger railway companies incorporated after the passage of this act, shall also report their gross receipts, and pay the tax on the same from and after they commence to carry passengers, as hereinbefore provided.

Approved March 27th, A. D. 1873.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested:

Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in May, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

Mar. 28, John B. Wagner et al., Executors of MARIA WAGNER, dec'd.
" 29, Peter Martin, Administrator of WILLIAM B. SMITH, dec'd.
" 29, William Badger, Executor of EDWARD R. BADGER, dec'd.
" 31, John Markle et al., Executor of GEO. MARKLE, dec'd.
April 3, Abraham D. Harley, Administrator of WASHINGTON RUMMEL, dec'd.
" 3, J. P. Robinett et al., Executors of G. HERMAN ROBINETT, dec'd.
" 3, Samuel White et al., Executors of LAETITIA G. RYAN, dec'd.
" 3, John McCormick, Guardian of MARY and FRANCIS McCORMICK, Minors.
" 4, Bridget T. O'Keefe, Administratrix of PATRICK O'KEEFE, dec'd.
" 5, Marmaduke C. Cope, Administrator of SARAH W. COPE, dec'd.
" 5, David T. Trites, Executor of NICHOLAS CONNELL, dec'd.
" 5, James S. Watson, Administrator of HENRIETTA RUSSELL, dec'd.
" 7, Jos. W. Mathers, Executor of EMMA BOCKIUS, dec'd.
" 8, Ed. Waln et al., Executors of S. MORRIS WALN, dec'd.
" 8, Ann Hoffner, Administratrix of SARAH HUNTLEY, dec'd.
" 9, Elias T. Hall, Administrator of JOHN B. EDWARDS, dec'd.
" 9, Wm. McKnight, Administrator of ELEANOR ANDREWS dec'd.
" 10, Henry P. Borie et al., Executors of MARIA LEECH, dec'd.
" 10, Daniel McShane, Administrator of CORMICK GALLAGHER, dec'd.
" 14, Eliza S. Dingee et al., Executors of CHARLES DINGEE, dec'd.
" 14, Sarah McCartney, Administratrix of PETER McCARTNEY, dec'd.
" 14, James Campbell et al., Executors of HUGH O'DONNELL, dec'd.
" 16, Penna. Ins. on Lives, &c., Executors and Trustees under the will of D. C. FULTON, dec'd.
" 17, Jacob Apple, Administrator of ELIZA APPLE, dec'd.
" 18, James E. Brown, Administrator of JANE BROWN STEWART, dec'd.
" 18, James H. Heverin, Administrator d. b. n. c. t. a. of THOMAS RYAN, dec'd.
" 19, John D. Fngle, Executor of RACHEL ENGLE, dec'd.
" 19, Louisa Enger, Administratrix of WILLIAM ENGER, dec'd.
" 21, Margaret Stewart, Administratrix of GEORGE STEWART, dec'd.
" 21, William C. Stevenson, Administrator c. t. a. of ROBERT D. CLIFTON, deceased.
" 22, Mary C. Halderman, Administratrix of ELIZA JANE HOWARD, dec'd.
" 23, Charles W. Gesemyer, Guardian of MARGARET L. SCHNIDER, late Minor.
" 23, Henry C. Kellog, Executor of CONRAD KNIPE, dec'd.
" 23, J. Lowber Welsh et al., Executors of AUGUSTINE CASAMAJIR DE TRENARD, dec'd.
" 23, T. Frank Cooper, Administrator of JOSEPH COOPER, dec'd.
" 23, Christiana B. Sorber et al., Executors of MARY A. SORBER, dec'd.
" 23, John T. Fenton, Executor of MARGARET R. ROBB, dec'd.
" 23, Mary A. Barton, Administratrix c. t. a. of JOSEPH BARTON, dec'd.
" 23, Wm. Nuenemann, Administrator of CAROLINE ELIZABETH KRAEMER, dec'd.
" 23, William Morgan, Executor and Trustee of MARGARET D. SCHRYER, deceased.
" 23, Isaac F. Baker et al., Executors, and Isaac F. Baker, Trustee, under the last will of ANN MARIA ELLIOT, dec'd.
" 24, Ann B. West et al., Executors of JOHN H. WELSH, dec'd.
" 24, J. Ringgold Wilmer, Adm'r d. b. n. of J. C. A. MARLOT, dec'd.
April 24, Frank M. Naglee, Adm'r d. b. n. of ELLEN NAGLEE, dec'd.
" 24, Frank M. Naglee, Executor of ANN E. ROOD, dec'd.
" 24, Anna Teufel, Admin'x of JOSEPH TEUFEL, dec'd.
" 24, Jos. S. Riley, Adm'r of BENJAMIN S. RILEY, dec'd.
" 24, Kitty M Pepper et al., Executors of GEO. PEPPER, M. D., dec'd.
" 24, Jane P. Fales, Administratrix of OLIVER FALES, dec'd.
" 24, J. Granville Leach, Adm'r d. b. n. of OLIVER FALES, dec'd.
" 24, Horatio Gates Jones, Exec'r of REV. JOHN S. JENKINS, dec'd.
" 24, Horatio Gates Jones, Executor of HETTY ANN JONES, dec'd.
" 24, W. Henry Sutton, Administrator of NELLIE A. SMITH, dec'd.
" 24, W. Henry Sutton, Administrator of CHARLES J. SMITH, dec'd.
" 24, Israel H. Johnson et al., Executors of THOS. P. HOOPES, dec'd.
" 24, Solomon Rothschild, Guardian of ARNOLD'S Minors.

WILLIAM M. BUNN,
apr 25-4t Register.

CHARLES H. T. COLLIS, ATTORNEY AT LAW, 208 W. Washington Square, NOTARY PUBLIC AND COMMISSIONER OF DEEDS for the States of Vermont, New Hampshire, Maine, Massachusetts, Ohio, Illinois, Connecticut, Texas, Wisconsin, West Virginia, Rhode Island, Maryland, Virginia, Louisiana, Missouri, North Carolina, Georgia, New Jersey, Kentucky, Michigan, Iowa, Tennessee, Mississippi, Minnesota, California, Indiana. Jul14-tf

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Prompt attention given to the collection of claims in Blair, Bedford, Cambria, Huntingdon, Centre and Clearfield counties. *Refers to* MORGAN, BUSH & Co., Genl. C. H. T. COLLIS JOHN CAMPBELL, Esq. nov 24-1y

M. THOMAS & SONS, AUCTIONEERS.

Nos. 139 and 141, late 67 and 69 S. Fourth St.

REAL ESTATE SALE, MAY 27th,

Will include—

"Woolton Hall"—Very Elegant Country Seat and Farm, known as "Woolton Hall," Mansion, Farm and Tenant Houses, 50 Acres, Philadelphia and Wilmington Turnpike, Brandywine Hundred, New Castle Co., Del. Residence of C. R. Griggs, Esq. Sale Absolute.

Crown, No. 334—Genteel Three-story Brick Dwelling. Executor's Peremptory Sale—Estate of George Knorr dec'd.

Thompson, West of Palmer—Three-story Brick Dwelling. Orphan's Court Peremptory Sale—Estate of Margaret Benner, dec'd.

Green and Harvey, N. E. Corner, Germantown—2 Modern Three-story Stone Residences. Immediate possession.

Eleventh, (North,) No. 1333—Business Stand—Three-story Brick Store and Dwelling.

Thompson, Mercer and Division—Large Lot—3 fronts.

River Delaware, extending through to the River Road, about half a mile below Beverly, N. J.—Valuable Farm, 23 Acres, late the property of P. Laguerenne, Esq. Immediate possession.

Market, Nos. 4043 and 4045, and Antoinette, Nos. 2, 4, 6 and 8—Very Valuable Business Stand—Three-story Brick Building, Store.

Forty-third, 7th house West of Haverford avenue—Modern Three-story Brick Residence, with Side Yard. Lot 50 feet front.

Locust, Nos. 622 and 624—2 Large and Valuable Three-story Brick Residences—Trustee's Sale.

Market, No. 114, and Letitia, Nos. 5 and 7—Very Valuable Business Stand—Four-story Brick Store, 23½ feet front. Executor's Peremptory Sale—Estate of W. S. Hansell, dec'd.

Arch, No. 1410—Very Elegant Four-story Brick Residence, 24 feet 9 inches front. Immediate possession. Same Estate.

Front, Nos. 3 and 7, and Water, Nos. 4 and 8—2 Very Valuable Business Stands—Five-story Brick Stores. Same Estate.

Nanticoke Hundred, Sussex County, Del., about 3 miles from Farmington Station, on the Delaware and Lewistown Railroad, and about 7 miles from Milford—Valuable Peach Farm, 133 Acres.

Pine, No. 519—Modern Three-story Brick Residence.

Susquehanna avenue, No. 213—Genteel Three-story Brick Dwelling.

Delaware avenue, (South,) Nos. 500 and 502—Very Valuable Business Stands—2 Three-story Brick Stores.

Brown, No. 1123—Genteel Three-story Brick Dwelling.

Leithgow, between York and Dauphin—10 Two-stary Brick Dwellings.

Fourth, in the rear of the above—4 Two-story Brick Dwellings.

Cherry, No. 2046—Modern Three-story Brick Residence.

Twelfth, (North,) No. 527—Modern Three story Brick Residence.

Sixth, (North,) No. 602—Modern Three-story Brick Residence. Executor's Peremptory Sale.

Mount Vernon, No. 2026—Modern Three-story Brick Residence. Same Estate.

Chestnut, Nos. 1731 and 1733—Elegant Four-story Brown Stone Residence, with Side Lot—41 feet front. Has the modern conveniences.

Fourth, (North,) No. 331—Large and Valuable Four-story Brick Building, known as the "United States Engine House," with a Brick Stable adjoining, and a Three-story Brick Dwelling in the rear on Dillwyn street.

Pine, No. 814—Very Elegant Brown Stone Residence, with Side Yard, 44 feet front, 162 feet deep to Kemle street. Has all the modern conveniences. Executor's Sale—Estate of John Eisenbrey, Esq., dec'd.

Sixth, (North,) No. 602—Modern Three-story Brick Residence. Has the modern conveniences. Executor's Sale.

Mount Vernon, No. 2026—Modern Three-story Brick Residence. Has the modern conveniences. Same Estate.

Christian, Nos. 1335 and 1337—2 Three-story Brick Dwellings with 2 Three-story Brick Dwellings in the rear on Kates street, Nos. 1334 and 1336.

Coane, East of Forty-eighth, adjoining Fairmount Park—Lot. Executor's Sale—Estate of Matthew Hastings, dec'd.

Hamilton, Nos. 425 and 427, Camden, N. J.—2 Genteel Three-story Brick Dwellings.

Williams, N. W. of Amber—Two-story Brick Dwelling.

Charlotte, No. 949—Two-story Frame Dwelling, with a Frame Stable in the rear. Executor's Sale—Estate of Rebecca Bunn, dec'd.

Susquehanna avenue, first house West of Hancock—Modern Three story Brick Dwelling.

Dauphin and Fairhill, S. W. Corner—Business Stand—Three-story Brick Tavern and Dwelling.

Well-secured Ground Rent, $60 a year.

Front, South of Diamond—Lot. Sale Absolute.

REAL ESTATE SALE, JUNE 3d.

Will include—

Race, No. 716—Valuable Business Stand—Three-story Brick Store and Dwelling. Orphans' Court Peremptory Sale—Estate of Frederick Schaeffer, dec'd.

Seventh, (North,) No. 839—Modern Three-story Brick Residence. Executor's Peremptory Sale—Estate of Newlin Schofield, dec'd.

Marshall and Columbia avenue, N. E. Corner—Business Stand—Modern Three-story Brick Store and Dwelling. Same Estate.

Columbia avenue, Nos. 611, 613, 615, 617 and 619, adjoining the above—5 Two-story Brick Cottages. Same Estate.

Marshall, No. 1410—Three-story Brick Cottage. Same Estate.

Tilghman and Antoinette, S. E. Corner—Large and Valuable Lot, 168 feet front, 180 feet deep, to a street. Peremptory Sale—By Order of William S. Stokley, Esq., Mayor.

Gratz, No. 1711—Three-story Brick Dwelling. Orphans' Court Peremptory Sale—Estate of Bayard Robinson, dec'd.

Lingo, No. 1044—Two-story Brick Dwelling. Orphans' Court Sale—Estate of James D. Howley, dec'd.

Elm, East of Linden, 24th Ward—Lot. Orphans' Court Sale—Estate of John Poulson, dec'd.

Front, (North,) No. 235—Business Stand—Three-story Brick Store—2 fronts—Sale by Order of Heirs.

Jackson, Cape May, N. J.—Very Valuable Business Stand—Three-story Frame Hotel, known as "Mirabella's," 57½ feet front.

Thirteenth and Chestnut, N. E. Corner—Very Valuable Business Stand—Three-story Brick Store and Dwelling.

Thirteenth, (North,) No. 1529—Modern Three-story Brick Residence

Coates, No. 1627—Genteel Three-story Brick Dwelling, with a Three-story Brick Dwelling in the rear on Fenimore street. Sale by Order of Heirs.

Eleventh, (North,) No. 605—Modern Three-story Brick Residence. Executor's Peremptory Sale—Estate of Samuel Bacon, dec'd.

Brown and Wellington, N. W. Corner—Large Lot, 197 by 97 feet.

Marshall, No. 865—Modern Three-story Brick Residence.

JAMES A. FREEMAN & AUCTIONEERS

No. 422 WALNUT STREET.

REAL ESTATE SALE AT THE EXCHA
MAY 28, 1873.

On Wednesday, at 12 o'clock noon.

Orphans' Court Absolute Sale.—2228 lowhill street. Business Stand. Large ern Three-story Brick Store and Dwe with Back Buildings, and 2 Three-story Houses on Carlton street. Lot 20 x 104½ Estate of Neal McCully, deceased.

Orphans' Court Absolute Sale.—2126 lowhill Street Business Stand. Three-Brick Lager Beer Saloon and Dwelling, Stable on Carlton street. Lot 17 x 109 Estate of Alexander Reed, deceased.

Orphans' Court Absolute Sale.—1204 C Street. Four-story Brick Dwelling, above and Locust streets, 8th Ward. Lot 18 feet. Estate of Frederick Herschberg, de

Orphans' Court Absolute Sale.—Mont ery Avenue. Desirable Building Lot, Ea Tulip, 18th Ward, 18 x 114 feet to Cook st 2 fronts. Estate of Elizabeth Sheets, dec

Orphans' Court Absolute Sale.—937 O street. Neat Three-story Brick Dwelling. Ward. Lot 12 x 39 feet. Estate of Eliza Morgan, deceased.

Orphans' Court Sale.—Braddock st Two-story Brick House, above Huntin street, 19th Ward. Lot 12 x 78 feet. E of Thomas Beaver, deceased.

Assignees' Absolute Sale.—1532 Mar street. Modern Three-story Brick Dwel With Back Buildings, above Jefferson st Lot 23 x 74 feet.

Assignees' Absolute Sale.—2016 Hov street. Genteel Three-story Brick Dwell above Norris street, 19th Ward. Lot 18 x

Assignees' Absolute Sale.—2018 and Howard street. 2 Genteel Three-story B Dwellings, with Back Buildings, above N street. Each Lot 18 x 108 feet.

Assignees' Absolute Sale.—1935 North street. Business Location. Three-story B Store and Dwelling, above Berks street. 18 x 68 feet.

Assignees' Absolute Sale.—Palethorp st Neat Brick Dwelling, above Berks street the rear of above. Lot 15 x 41 feet.

Assignees' Absolute Sale. Belgrade str formerly West street. Building Lot, sout Lehigh Avenue, 34 feet front x 65 feet d 19th Ward.

Assignees' Absolute Sale.—1239 Warn street. Brick Carpenter Shop, below Tho son street, 29th Ward. Lot 17 x 91 feet Alder street.

Executors' Absolute Sale.—$99 Ground R Well secured and promptly paid. Estate Mary Lukens, deceased.

Peremptory Sale.—No. 18 Ashland Str Neat 2 Two-story Brick House and Lot 1 42 feet, above Wharton street and west Tenth street. 26th Ward.

Peremptory Sale.—Ashland street. S'x N Two-story Brick Houses adjoining the abo Nos. 20, 22, 24, 26, 28 and 30, each Lot 14 : feet. Sold separately.

2306 Spruce street.—Handsome Mod Three-story Brown Stone Residence, with ev convenience, and finished in hard woods. 20 x 110 feet. It has never been occup Possession with the deed. May be exami every day.

10 North Twenty-first street. Three-st Brick Dwelling, above Market street. Lot 1 58 feet. Rents for $30 a month. Sale posit

Sale on account of whom it may concern

No. 327 Walnut street.—Lithograp Stones, Chromos, &c. On Thursday morni May 29th, at 10 o'clock, will be sold at 327 Walnut street, for costs and charges Lewis N. Rosenthal.

Also at the same time for other accou the entire Stock of a Lithographer, comp ing Presses, Stones, &c.

FOR SALE.—Elegant Private R dence, 408 South Ninth street, be Pine, four minutes' walk from Chestnut str Conveniently situated for any one in busi near the centre of the city. House in t ough repair every way, with every mod convenience—Large Saloon, Drawing Ro Stationary Wash Stands in every cham good Heaters—Fine large kitchen, Station Stone Wash Tubs, Baths and Water clo on 2d and 3d floors.—House in thoro order. Can be bought low, if applied soon, on terms to accommodate. Apply t C. F. GUMMEY,
mar 1 No. 733 Walnut stree

JUST PUBLISHED. CASE OF CHR Church, Germantown, Philadelp Being a Report of the proceedings before Board of Presbyters in reference to the ap cation of a majority of the Vestry of Church for a dissolution of the pastoral c nection.

Paper cover, price, $1. Cloth, $1.50.
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Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, MAY 30, 1873. No. 22.

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ONE COPY FOR ONE YEAR, THREE DOLLARS.

EASTERN DISTRICT.

Supreme Court of Pennsylv'a.

HESS v. HERRINGTON.

1. An omission by an assessor to return a valuation of unseated lands, is a mere irregularity, and does not invalidate a tax assessed upon them by the commissioners.
2. The act of 1842 makes the record of the county commissioners evidence of an assessment in fact, and the act of 1815, to support the title of the purchaser, cures all irregularities in it.
3. In an ejectment for land purchased at a tax sale, there must be evidence to identify the tract assessed, with that sold and described in the writ.

Error to the Court of Common Pleas of Lycoming county.

Opinion by SHARSWOOD, J. Delivered May 17th, 1873.

The twelve assignments of error may be disposed of by the consideration of three questions.

The first relates to the assessment of the tax upon which the land alleged to be that described in the writ, was sold by the treasurer to the county commissioners, and conveyed by deed dated November 10th, 1860. The plaintiff in error contends that valuation is essential to an assessment; and that the only officers competent by law to make a valuation are the assessors. It appearing that the tract in question was not returned by the assessors for the year, for the taxes for which it was sold, the commissioners, it is said, had no right to put a valuation upon it, and that as a consequence there was in law no assessment, and the sale by the treasurer was invalid. It seems that there is a usage of long standing in Lycoming county, to put a uniform valuation of one dollar per acre upon all unseated lands, in consequence of which the assessors have fallen into the practice of making no return of valuation in such cases. It is certainly *malus usus et abolendus*. How the assessors can reconcile it with the terms of their official oaths, it is not easy to comprehend. But because they have failed in the performance of their duties, it does not follow that the land was not subject to taxation, and the title of the commissioners, by the treasurer's sale, a perfectly good one. The learned judge below instructed the jury that "the return of the assessor without a valuation, or his omission to return them at all, should not exempt the lands from taxation, and cannot, in our judgment, render invalid a lawful tax, assessed upon them by the commissioners. It is, at most, a mere irregularity, which falls within the curative provisions of the act of 1815." In this instruction we think that he was entirely right.

There was evidence by a record from the office of the county commissioner that the taxes in question were assessed by them. The twenty-first section of the act of April 12th, 1842, Pamph. L. 266, enacts that "all records of the county commissioner charging lands as unseated with arrears of taxes, shall be evidence of an assessment." By the fourth section of the act of March 13th, 1815, 6 Smith, 301, it is declared that "no alleged irregularity in the assessment, or in the process, or otherwise, shall be construed or taken to affect the title of the purchaser; but the same shall be declared to be good and legal." The act of 1842 makes the record of the county commissioners evidence of an assessment in fact, and the act of 1815, to support the title of the purchaser, cures all irregularities in it. The county commissioners were the officers competent to assess the tax. That no valuation was made or returned, was a mere irregularity. The county commissioners are the board of revision, with power to revise, correct and equalize the valuation of all property taxable by law. Act of July 27th, 1842, Pamph. L. 445; Act of April 29th, 1844, Pamph. L. 501. It would be no violent presumption, if it were necessary to resort to it, that the valuation upon which the assessment was made, was settled by them in their capacity as a board of revision. But it is not necessary. In Hubley v. Keyser, 2 Penna. R. 502, Mr. Justice Huston, speaking of the act of 1815, says: "The object was to make the sale and deed confer a title, without proof of any one prerequisite, except that the land was unseated, and that a tax was charged by the commissioners, regularly or irregularly; that this tax was unpaid, and the land sold and not redeemed within two years." In that case, the objection to the sale was that there was proof that the assessors had not valued or returned the land as unseated for assessment. It was argued there as here that the valuation by the commissioners was unauthorized, and the assessment a nullity; but it was held otherwise by the court. Indeed, in citing this case afterwards, in Fager v. Campbell, 5 Watts, 288, Chief Justice Gibson said: "The tax book was an official document, and according to Hubley v. Keyser, it was both competent and sufficient to show that the land had been assessed." Both these cases were prior to the act of 1842. It was, indeed, expressly decided in Devinney v. Reynolds, 1 W. & S. 328, that a tract of unseated land may be sold by the treasurer, for the non-payment of taxes upon an assessment made by the commissioners, without the intervention of the assessors. "The assessors," said Mr. Justice Rogers, "*valued* the lands, but the commissioners make the assessment; from which it follows that you cannot avoid a sale for taxes, merely because you are unable to prove that the *assessors* has performed this ministerial duty."

The second question is, as to the validity of the commissioner's sale. It has been decided that the curative provisions of the act of 1815, does not apply to these sales. Jenks v. Wright, 11 P. F. Smith, 410. It is objected to the validity of the commissioner's sale in this case, that they did not follow the provisions of the fifth section of the act of March 13th, 1815, 6 Smith, 301, which declares that "it shall be the duty of the commissioners to provide a book, wherein shall be entered the name of the person as whose estate the same shall have been sold, the quantity of land, and the amount of taxes it was sold for, and every such tract of land shall not thereafter, so long as the same shall remain the property of the county, be charged in the duplicate of the proper collector; but for five years next following such sale, if it shall so long remain unredeemed, the commissioners shall in separate columns in the same book, charge every such tract of land with reasonable county and road tax, according to the quality of the said land, not exceeding in any case the sum of six dollars for every hundred acres," without stopping to inquire whether a failure on the part of the commissioners to observe these directions, ought to invalidate the sale, as it forms no part of the process, but is a mere direction as to bookkeeping. We are of opinion with the learned judge below, that "the account, if kept as testified by the clerk of the commissioners, was substantially as required by law." The clerk stated: "This assessment book is kept the same after a sale to the commissioners as before, the assessments are continued against the lands after the sale just as before, and there is no book for keeping such account other than this. After a sale to the commissioners, it is noted in this book after the warrantee's name, by the word "commissioners." The entry denotes that the tract thus marked, is sold to the commissioners." The act does not in terms require that the book shall be a separate book, containing no other entries. It is enough if there is a record of the entries as required by the act made in some book.

The remaining question is, whether the case was properly submitted to the jury as to the identity of the tract assessed and sold with that described in the writ of ejectment. The plaintiff in ejectment must show at least a *prima facie* title—by prior possession or papers—in himself, for the land described in the writ, whether the claim be a tax sale or otherwise; whether against a mere intruder, or one setting up some right of possession. No man can be lawfully ejected from lands by less than this. In this case, on the assessment books of the commissioners of unseated lands, there were three separate tracts assessed in the warrantee name of J. Coleman, one of sixty, and two of forty acres each. One of these tracts of forty acres was that assessed and sold and conveyed in the treasurer's deed by the general and vague description, "a tract of land containing forty acres, situate in the township of Clinton, in the county of Lycoming, surveyed to J. Coleman." The title from the commonwealth produced by the plaintiff, showed a warrant to John Coleman, for one hundred acres, and a return of survey for one hundred and eleven and three-quarter acres and allowance. We may assume that the three assessed tracts made up this survey, though they overrun it in quantity. How the whole tract came to be divided into three parcels did not appear. There were, indeed, some pencil marks on the assessment that two of the tracts were seated, by whom or when made was unknown, except that they were not there at the time of the commissioner's sale. They were therefore properly disregarded. Had there been evidence that the other two tracts were seated at the time of the sale, it would certainly have been sufficient to have identified the remaining one as the subject of the sale. There was no evidence whatever to show which of the two tracts was the one assessed and sold, nor of their relative position, nor any other part which could possibly lead to identification. The learned judge then left the question of identity to the jury without evidence, which, we think, was an error. He accompanied it, however, with an instruction which throws light upon the ground upon which he made this submission. "Under such circumstances we think, the plaintiff would be entitled to recover the possession of any forty acres, part of John Coleman, in Clinton township, which was unseated, and upon which the taxes were unpaid for either of the years for which it was sold."

It is contended that this instruction of the learned judge may be sustained by the ruling of this court in Coxe v. Blanden, 1 Watts, 533, in which it was held that a treasurer's sale for taxes of part of a tract, and a conveyance of that part designating the quantity but not the locality, is good; and an unrestricted choice of locality to the purchaser, is a necessary incident of the sale and a consequence of a reasonable interpretation of the statute. But in that case there was an assessment upon an entire tract of four hundred and thirty-seven acres, and a sale of three hundred and eighteen acres of it for a sum suffi-

cient to pay the taxes and costs on the whole. It is clearly distinguishable from this case. There was no doubt there that the assessment upon which the sale was made fastened upon every part of the tract, and a foundation for the sale of every part existed. But not so here, where the parts were severally assessed. This case abundantlyshows that there must be evidence to identify the tract assessed with that sold and described in the writ. Russell v. Werntz, 12 Harris, 337; City of Philadelphia v. Miller, 13 Wright, 440; Lyman v. City of Philadelphia, 6 P. F. Smith, 488; Glass v. Gilbert, 8 Ibid, 266; Brotherline v. Hammond, 19 Ibid, 128.

Judgment reversed, and *venire facias de novo* awarded.

SAEGER AND WIFE v. KISTLER.

1. A parol agreement made by a purchaser at a sheriff's sale to reconvey the property to the defendant in the execution, is within the statute of frauds, and cannot be enforced.
2. The breach of such an agreement will not make the purchaser a trustee *ex maleficio*.

Appeal from the decree of the Court of Common Pleas of Lehigh county.

Opinion of the court by AGNEW, J. Delivered May 17th, 1873.

The finding of the master, who had also been the examiner in this case, was against the plaintiffs upon every material fact alleged in their bill, and his clear conclusion was that there was no trust on part of the defendant, on any ground. Exceptions being taken to these findings of fact, the court below rejecting the report, found the facts for themselves. The opinion of the judge, evinces a mind favorably impressed by the evidence in behalf of the plaintiffs. His statement may be regarded, therefore, as exhibiting the entire strength of their case. It is as follows: "That in December, 1858, the real estate in question was to be sold at sheriff's sale; that Joseph Saeger, a deaf mute, one of the defendants in the execution, and now one of the plaintiffs to this bill, was desirous, prior to the sale, to secure the purchase of it, so that it might eventually enure to the benefit of his wife; and in order to effectuate his desire, he called on Mr. German, Christian Pretz and Samuel J. Kistler, and that as the result of his conferences, it was understood that the defendant would so purchase, and that Mrs. John Saeger, an aunt of the plaintiff to this bill, would also assist by furnishing some money. German attended the sale, fully believing that an arrangement existed by which Kistler was to buy; but not finding Kistler at the sheriff's sale, he bought for the benefit of the plaintiffs, and so informed A. L. Ruke, who was also bidding on the property. German became the purchaser, and signed the conditions of sale; but before the down money was paid, at the instance of Joseph Saeger, Kistler was substituted, by an agreement between him and German, at the sheriff's office, by which Kistler should take and hold the property for the plaintiffs, so that they should have a home; that if Kistler had not agreed to hold for the plaintiffs' use, German would not have allowed him to succeed to his purchase; that the property brought its market value at the sheriff's sale, and has since greatly appreciated; and that after Kistler received the deed, Joseph Saeger and wife continued in the possession of the property, and made important repairs and alterations; that the property was assessed in the name of Maria Saeger, and continued to be assessed in her name until 1864, and that the taxes were paid by the plaintiffs, and that interest on the amount of the purchase money paid by Kistler, and the interest on the liens were paid by the plaintiffs until the year 1862, which, in some receipts, is called rent, and the others, interest; that about January, 1864, the plaintiff, Joseph Saeger, was notified by Kistler to leave the premises, there having been served a landlord's notice to quit. The plaintiff surrendered the possession, and subsequently made several demands, by presentation of bills to the defendant, as a compensation for repairs made. "These facts (says the judge), clearly establish a resulting trust, and the defendant, Samuel J. Kistler, will be treated as a trustee *ex maleficio* of the plaintiffs. We cannot assent to this conclusion. These facts establish only a judicial sale *in invitum* as to Saeger, struck down to German, who paid no money, and that Kistler stepped into his place, paid the bid, and took the deed upon a parol agreement to hold the property for the benefit of the plaintiffs, so that they might have a home. It is wholly unlike those cases where one receives a conveyance, without consideration or purchase, in confidence that he will hold it for another. A sheriff's sale is made against the will of the defendant, and he has no control over the direction the title is to take. If no fraud at the sale be practiced by the bidder, the defendant in the writ can obtain a restoration of his title only by a contract of repurchase. That such an agreement to repurchase or to redeem, as is found by the judge, is within the statute of frauds and perjuries, and could not be enforced even before the passage of the act of 22d April, 1856, is attested by abundant authority. The case of Fox v. Heffner, 1 W. & S. 372, is a counterpart of this in every respect, if, indeed, it is not stronger, as Morris, who took the place of Patterson at the sheriff's sale, repeatedly acknowledged the right of Heffner to redeem his land on payment of the money. "The plaintiff below (said Judge Sergeant) claims the land under a parol agreement between him and Morris, one of the defendants, made at the time when the sheriff's deed conveyed the land to Morris." After stating that such an agreement is within the statute of frauds and perjuries of 1772, he says: "It is now settled by repeated decisions of this court, that if one buys the defendant's property at sheriff's sale, and verbally agrees to hold it in trust for the defendant, with a right of redemption in the defendant within a limited period, it is a contract resting in parol merely, and not transferring any title in the land. In Kisler v. Kisler, 2 Watts, 327, and Robertson v. Robertson, 9 Watts, 42, it was determined that unless there is in the transaction more than is implied from the mere violation of a parol agreement, equity will not decree the purchaser to be a trustee. In Haines v. O'Connor, 10 Watts, 320, these cases are recognized, and it is laid down, that a purchaser at sheriff's sale, who has paid his own money, can only be held a trustee *ex maleficio* on account of the existence of fraud, and when that is the case, he is a trustee for the creditors and the debtor also, unless the debtor be *particeps criminis*. In the case before us, there is no evidence of any collusion or act of fraud on the part of Morris, in the purchase of the property, which could make him a trustee *ex maleficio*, and the fraud which may be alleged to exist in the mere violation of an agreement, is no more than that which attends every violation of an agreement." This language is so applicable to the case of Kistler, I have transcribed it in lieu of my own. Here Kistler was not present at the sheriff's sale, and committed no act of fraud, but merely took German's place at the instance of Saeger, and paid his own money upon an agreement to suffer Saeger to redeem. The following cases are to the same effect. Leshey v. Gardner, 3 Watts & S. 314; Jackman v. Ringland, 4 W. & S. 149; Sample v. Coulson, 9 W. & S. 62. The case is made still stronger against the plaintiffs by the act of 22d April, 1856, the 4th section of which provides that "all declarations or creations of trust or confidences of any lands, tenements or hereditaments, and all grants and assignments thereof, shall be manifested by writing, signed by the party holding the title thereof, or by his last will in writing, or be void." This case is ruled by Barnet v. Dougherty, 8 Casey, 371, and Kellum v. Smith, 9 Casey, 158. Both in the court below and here, it has been said the trust arose *ex maleficio*, though nothing of the kind is found in the evidence; yet, as this has led to an inquiry into the conduct of German, who bid off the property at the sale, it will be proper to refer to this aspect of the case. But how can that question arise? The bill is filed against Kistler alone, and is founded wholly on his agreement to hold the property for the plaintiffs. No averment is made of fraud in the purchase at sheriff's sale, by German or Kistler, or that the property was bought at an undervalue. Neither the judge below, nor the solicitors of the plaintiffs, in their statements of the case, place it on the ground of fraud in the sale. The facts as proved disclose no fraud. German was under no promise to buy for Saeger, and did not go to the sale for that purpose. He went as a lien creditor, to protect his own interests, but finding neither Kistler, nor Saeger or his friends there, he bid himself, with the intention of securing the property for Saeger, an intention communicated to Saeger immediately after the sale, and fairly carried out. Ruke, a bidder, also, asked him when bidding, whether he wanted the property for himself. He replied, he wanted it for Joseph Saeger. Then, said Ruke, I won't bid any more. This is German's own account of the matter. Elisha Forest testifies, that before the property was knocked down, German said he was bidding, and wanted to buy the property for the benefit of Joseph Saeger. This was all he said. No unfairness is imputed to German, and none is alleged against the sale, or is found by the master or the court. The evidence shows, and the court found as one of the facts, that the property brought its market value at the sheriff's sale. There is nothing in the case, therefore, which would authorize us to shift the position the plaintiffs have assumed in their bill, and to treat this as a trust *ex maleficio*, arising out of German's conduct. Clearly, no fraud was intended; his purpose was fair; and no injury was done either to creditors or to the defendant. Whatever supposed benefit he might have derived from the sale, he suffered to pass over to Kistler without consideration, and for Saeger's benefit. The evidence to establish a resulting trust, especially one arising *ex maleficio*, which is an imputation of fraud, should be clear, explicit and unequivocal. McGinity v. McGinity, 13 P. F. Smith, 38; Nixon's Appeal, Ibid, 279; Lingenfelter v. Richey, 12 P. F. Smith, 123.

Nor is there anything in the conduct of Joseph Saeger, which invokes equity in his behalf. He admits he was insolvent at the time of the sale, and unable to refund the money, and has so continued. Mrs. John Saeger, who was to have assisted him, soon after the sale refused to do so, and Kistler was obliged to give his own bond, with surety, to pay off her mortgage. Joseph Saeger occupied the property for years, and failed to pay all his rent. When notified by Kistler, as his landlord, to quit possession, he did so, and then presented to him a large bill for repairs, materials and taxes, and finally, did not file this bill for more than three years after he had surrendered possession, and more than nine years after the sheriff's sale.

Upon a full review of the case, we can discover no equity to support the plaintiffs' bill. The decree of the Court of Common Pleas is, therefore, reversed, and the bill of the plaintiffs is dismissed, and they are ordered to pay the costs.

PATRICK CANNON v. JOHN BOYD.

In the absence of an express reservation or agreement, the purchaser of real estate, at private or judicial sale, takes it subject to a continuous and apparent easement.

Error to the District Court of Philadelphia.

Opinion by WILLIAMS, J. Delivered May 17th, 1873.

Where a continuous and apparent easement or servitude is imposed by the owner on one portion of his real estate, for the benefit of another, the law is well settled, that a purchaser at private or judicial sale, in the absence of an express reservation or agreement on the subject, takes the property subject to the easement or servitude. Seibert v. Levan, 8 Barr, 183; Vancleeve v. Updegraff, 19 P. F. Smith, 110, and cases there cited. The sheriff sold and conveyed the lots to the parties in this case, without reference to the existence of the alley on the lots purchased by the defendant; but the evidence shows that the alley was open and apparent at the time of the sale, and that there was a gate leading into it from the lot purchased by the plaintiff, clearly indicating that it was used in common by the tenants of both lots. It also appears from the evidence, that the alley was laid out and opened by McCabe, the former owner of the lots, and that it was used in common by the occupants thereof for a period of more than ten years prior to the sheriff's sale. The court below was, therefore, clearly right in declining to charge that the sheriff's sale and deed vested the soil of the alleged alley in the defendant, clear

of the easement claimed by the plaintiff; and in charging that the only question in the case is, what was the condition of these two properties at the time of the sheriff's sale? If the condition of the properties at the sheriff's sale, was such as to indicate that the occupants of the property now owned by the plaintiff, used the alley in question, and had a right to do so, the verdict should be for the plaintiff.

There was no error in refusing leave to ask the plaintiff's agent whether he purchased the property, expecting or believing that he got a title to the alley. The expectation or belief of the agent could not affect the plaintiff's title.

Judgment affirmed.

JOHN KAUL et al. v. J. J. LAWRENCE, et al.

1. The plaintiffs below offered in evidence the record in the prothonotary's docket, of the acknowledgment of a lost treasurer's deed, to prove its existence and contents, they having first proved a diligent and fruitless search for the deed. The court admitted the record in evidence. *Held*, not to be error.
2. The plaintiffs brought ejectment for the whole of a tract of land as an entirety. Upon discovering that the title to one undivided part was in another person, they moved to amend by adding the other person's name. The court allowed the amendment. *Held*, not to be error.

Error to the Court of Common Pleas of Elk county.

Opinion of the court by AGNEW, J. Delivered May 17th, 1873.

After having given evidence of a treasurer's sale and laid the usual ground by proof of a diligent and fruitless search for the treasurer's deed, the plaintiffs offered the record in the prothonotary's docket, of the acknowledgment of the deed, to prove its existence and contents. To this the defendants excepted, but we think without sufficient reason. This is the usual and proper mode of proving the existence of the deed, and identity of the land sold and conveyed by the treasurer. The case has been argued in this court, on the question of the delivery of the deed, but this was a fact to be submitted to the jury. The defendants made no point on the delivery. Doubtless the court would have submitted this question with proper instructions, had a request been made. There was evidence of a strongly presumptive kind to go to the jury. The sale was made and acknowledgment of the deed entered of record in 1842, a period of thirty years before the trial. A claim of title has since been made under the sale, and sales and conveyances made accordingly. These facts, together with the act of 13th March, 1817, requiring the purchasers at treasurer's sale, so soon as the property is struck down, to pay the purchase money, or so much thereof as shall be necessary to pay the taxes and costs, and also one dollar, the fee of the prothonotary for entering the acknowledgment of the deed, in connection with the fact that the acknowledgment was so entered, were ample evidence from which the jury might have inferred a delivery of the deed. We discover no error in this bill of exception. Nor do we think the court erred in permitting the name of Alfred L. Tyler to be added as a plaintiff, and part owner of the land. The plaintiffs brought their ejectment for the whole tract of 500 acres, as an entirety. They did not claim an undivided interest. On discovering that the title to one undivided twentieth was in Tyler, the motion to amend was made on the ground of an omission of his name. The Legislature has gone far to prevent the loss of a trial and delay, by allowing amendments, even to the form of action, and the courts have seconded the effort to reach the merits of the cases and prevent a failure of justice through technicalities. Trego v. Lewis, 8 P. F. Smith, 46; Heidelberg School District v. Hunt, 12 P. F. Smith, 307; Election Cases, 15 P. F. Smith, 35; Leonard and Wife v. Parker et al., Pittsburgh Legal Journal, 18th December, 1872, p. 65; In doing this, it is our duty, however, to see that amendments are not made in a manner to deprive the opposite party of any valuable right. As remarked in Trego v. Lewis, *supra*, the court will not permit a party to shift his ground or enlarge its surface, by introducing an entirely new and different cause of action, especially, when by reason of the statute of limitations, or an award of arbitrators, or from other good reason, it would work an injury to the opposite party. It is claimed in this case, that at the time Tyler's name was added to the record, his title was barred by the statute of limitations. But it is very evident that when it concerns title to real estate, a defence under the statute of limitations must necessarily go to the jury. Such a defence is affected by such a variety of circumstances, as to the extent and nature of the possession, condition of the parties, length of time, &c., it must be left to the jury on all the facts. It is the right of the parties to have proper instructions to the jury, and the defendants in this case might have asked the court to say, that if Tyler's title was barred by the statutes when his name was added, there could be no recovery in the action of his proportion of the land. Substantially, all these questions were determined in Leonard and Wife v. Parker et al., *supra*. It was right, therefore, to allow the amendment, leaving the defendants to their prayer for proper instructions, according to the nature of the case, as developed in the evidence.

In regard to the question of estoppel, we think the state of the case is not different from that which was presented when it was here before, and is governed by the opinion then delivered. See 15th P. F. Smith, 236. The mistake of Payne, as a surveyor, in locating tract No. 4886 on tract No. 4883, was an innocent act. This is evident from the testimony, and also from the fact that when he bought 4883 afterwards, he located it north of its true location, and adjoining No. 4886. He also sold 4883, according to this mistaken location, to Matson, a non-resident, and, like himself, ignorant of the mistake. In buying 4883, there was no want of good faith to the owners of 4886, either on Payne's part or Matson's. It was long after Matson bought 4883 from Payne before he, or his vendees, became aware of the fact that the true location of 4883 was that occupied by the owners of 4886. It was impossible, therefore, when Matson bought 4883, that he could make inquiries of the occupants of the tract, supposed to be 4886, to know by what title they held the land they were thus occupying. It was then unknown that there was a conflict of title. The same mistake which misled the vendors of the defendants, misled Matson, and he was equally innocent with them. Each claimed a different tract, as known by the original number, and held by a different title. The common presumption applicable to every owner that he knows the identity of his own land, applied equally to each, and yet each was innocently mistaken, and neither was the cause of the mistake in the other.

If he was bound to know the location of 4883 on the ground, so were they to know where 4886 lay. If they were misled by Payne, he was likewise. Payne, though the innocent cause of the mistake, might be estopped when he became the owner of No. 4883, from claiming it from those whom his mistake had injured; on the principle, that as between insolvent persons, one of whom must suffer a loss, he shall bear it who was the cause of it. Matson, however, is not only an innocent party, but was not instrumental in causing the loss, and was incapable of avoiding the position he fell into, by any inquiry he could be led to make. The subsequent discovery of the error of location not only shifts them, but also shifts him. He has the title to 4886; they have not; both are equally innocent, and therefore he must prevail. The argument so strongly pressed upon us, and the authority cited upon the notice which actual possession furnishes, and the duty to follow up the challenge it gives, fails in this case, owing to its peculiar circumstances.

Judgment affirmed.

GREEN v. BRENNESHOLTZ.

1. It need not be shown that an executor has no authority as such to convey land. He must have express power by the will or by an order of the Orphans' Court, before he can sell.
2. The rule that a right, arising prior to a patent from the commonwealth, cannot be affected by a recital in such patent, is true also as to a liability incurred prior to it.

Error to the Court of Common Pleas of Warren county.

Opinion by SHARSWOOD, J. Delivered May 17th, 1873.

Admitting the application to this case of the rule, that the recitals of title in a patent are *prima facie* evidence, not only against one claiming by subsequent grant from the commonwealth, but also against one who relies on possession alone, and shows no title, the learned judge was not warranted by the recital itself in the position that at the time of the alleged conversion, the plaintiff below was the owner of the land. In his answer to the second point of the defendant, he referred to his general charge, and in that he had instructed the jury that the patent recited substantially *inter alia*, that Robert McNair was dead, and Robert M. McNair was his executor, with power to sell, but there was not a word in the recital about any power to sell. It recites merely a conveyance by Robert M. McNair, executor of Robert McNair, deceased. It requires no authority to show that an executor has no authority as such to convey land. He must have power by the will, or by an order of the Orphans' Court. Such a power surely is not to be inferred by the mere fact of a conveyance by the executor. There was error, therefore, in the answer, that the plaintiff had shown sufficient title to enable him to recover.

But we are of opinion that the rule in regard to recitals in patents from the commonwealth, as we have just stated, had no application in this case. It was an action of trover for timber trees, cut and taken off by the defendant's intestate, Joseph Green, from land which the plaintiff claimed to own. It was undoubtedly necessary that the plaintiff should show that he was the owner of the land at the time of the conversion, which was when the trees were cut and taken off in the winter of 1867–8. Act of March 29th, 1824, 8. Smith, 283. That was prior to the date of the patent to plaintiff. The liability of defendant's intestate was fixed at the time of the conversion to the then owner. If at that time the plaintiff had tried his action, he must have produced the title from the warrantees. The patent was not then in existence. If Joseph Green had then a right originating by warrant or settlement at that time, it is agreed that the recital in the subsequent patent would not be admissible in evidence against him to prove the warrant or its devolution to the patentees. Penrose v. Griffith, 4 Binn. 231; Gingrich v. Folts, 7 Harris, 38. If then, a right arising prior to a patent, cannot be affected by a recital in such patent, surely it is a logical consequence, that neither can a liability. When the controversy relates either to a right or a liability, which are in their nature correlative, we must adjudge it by evidence then existing, not by evidence subsequently created; unless, indeed, it be the judgment of a competent court. Brennesholtz certainly would not subsequently make evidence for himself, neither were the officers of the land office a competent tribunal to pronounce judgment upon his title, so as to affect the liability of Green to an action for trespasses, prior in date to the patent. If the heirs or devisees of Robert McNair had brought an action, claiming to have been owners of the land at the time of the conversion, Green certainly could not have availed himself of the recital in the patent, to show that their title had passed to Brennesholtz, neither ought Brennesholtz to be allowed to do so.

Judgment reversed, and *venire facias de novo* awarded.

LEGAL GAZETTE.

Friday, May 30, 1873.

JOHN H. CAMPBELL, EDITOR.

THEODORE F. JENKINS, ASSOCIATE EDITOR.

EASTERN DISTRICT.
Supreme Court of Pennsylv'a.

ESTATE OF JAMES DUNDAS, dec'd.

1. The Orphans' Court in a proceeding to distribute an estate among legatees, next of kin, and heirs, has ample power to inquire into and determine all questions standing directly in the way of a distribution to the parties.
2. Every legatee has a personal remedy in the Orphans' Court for the recovery of his own legacy.
3. The court has power, in a distribution proceeding, to determine the title of contesting claimants to the same fund, as an incident to distribution.

Appeal of Wm. Oswald Dundas from the decree of the Orphans' Court of Philadelphia.

Opinion of the court by AGNEW, J. Delivered May 17th, 1873.

The decision of the Orphans' Court in this case, was against its own jurisdiction, and in this there was error. It was said by Black, C. J., in Whiteside v. Whiteside, 8 Harris, 473: "If there be anything besides death, which is not to be doubted, it is that the Orphans' Court alone has authority to ascertain the amount of a decedent's property, and order its distribution among those entitled to it." The exclusiveness of this jurisdiction is sustained by numerous modern decisions, to a few of which I may refer. Shollenberger's Appeal, 9 Harris, 341; Ashford v. Ewing, 1 Casey, 213; Black's Ex'r v. Black's Ex'r, 10 Casey, 354; Musselman's Appeal, 15 P. F. Smith, 480. The contest between the courts and the egislature, spoken of by Lewis, C. J., in Bell's Appeal, 12 Harris, 286, as to the extent of this jurisdiction, was settled by the act of 13th April, 1840. Brightly's Purdon, 300, pl. 167. That act authorized the Orphans' Court to appoint auditors, on the application of creditors, as well as of executors and administrators, and on the application of *legatees*, heirs or other persons interested to make distribution of the estate in the hands of executors and administrators, to and among the persons entitled to the same. In Kittelar's Estate, 5 Harris, 416, it was said this embraced creditors, next of kin, and *legatees*. "The right of each (says Judge Lewis) to be heard in support of his claim, *and in opposition to every claimant who interferes with it*, is necessarily involved in the right to demand payment," Further on he says: "The power to decide *all questions necessary to a proper distribution of the fund*, follows the power of distribution, and vests in the Orphans' Court *as a necessary incident* to the jurisdiction. That court is as competent as the Common Pleas, to determine all questions of *law*, as the judges of both courts are the same, and the Orphans' Court has ample authority to send an issue to the Common Pleas for the trial of facts by a jury." Sec. 45, act 29th March, 1832; Brightly's Purdon, p. 768, pl. 44. This language is repeated with emphasis in Ball's Appeal, *supra*; and in Black's Ex'r v. Black's Ex'r, *supra*; Thompson, J., repeats the remark of Woodward, J., in Shollenberger's Appeal, *supra*, that the jurisdiction of the Orphans' Court, "within its appointed orbit, is exclusive, and therefore necessarily as *co-extensive as the demands of justice*." It is very clear therefore that the Orphans' Court, in a proceeding to distribute an estate among legatees, next of kin, and heirs, has ample power to inquire into and determine all questions standing directly in the way of a distribution to these parties.

The specific remedy given to a legatee to recover his legacy, comes in here to strengthen the general jurisdiction, and puts an end to all questions. It is said in a very excellent treatise on the intestate system of Pennsylvania, by E. G. Scott, Esq., page 450, that the Orphans' Court has no jurisdiction for the recovery of a legacy, unless the same is charged upon, or is payable out of real estate. But the learned author has overlooked laws directly conferring jurisdiction. The 47th section of the act of 24th February, 1834, relating to executors and administrators, provides that, "Executors, after one year elapsed from the granting of administration of the estate, upon the *requisition* of any *legatee*, or any other person interested, shall pay and deliver, *under the direction of the Orphans' Court*, having jurisdiction of their accounts, all such legacies as are due and payable by them, &c., &c., and if there shall be a residue distributable under the intestate laws of this commonwealth, they shall also distribute the same; and the proceedings in *any such case* shall in *all* respects, whether of security or otherwise, be the same as hereinbefore provided in the cases of distribution by administrators of the estates of decedent's intestate, so far as the nature of the case will admit." Vide sections 39, 40, 41, act 24th, February 1834; Purdon, by Brightly, 302, pl. 176, 177, 178. This act is followed by the act of 16th June, 1836, relating to the jurisdictions and powers of the courts which in the 7th clause of the 19th section confers upon the Orphans' Court express jurisdiction in "Proceedings for the recovering of legacies." Bright. Purd., p. 765. The jurisdiction being thus beyond doubt, the manner of proceeding is equally clear; and is specifically set forth in the 57th section of the act of 29th March, 1832. Bright. Purd., 766, pl. 17, 18, *et seq.* This is by the petition of *any person interested*, whether such interest be immediate or *remote*, setting forth *facts necessary to give the court jurisdiction*, the specific cause of complaint, and the relief desired; and supported by oath or affirmation. The acts cited were reported by the commissioners to revise the laws, and are to be viewed together as constituting a harmonious system for the settlement of the estates of decedents, and the government of the Orphans' Court.

Thus, it is very clear that every legatee has a personal remedy in the Orphans' Court for the recovery of his own legacy, and the act of 29th March, 1832, also furnishes ample means of reaping the fruit of a recovery by execution, attachment and sequestration. Upon this petition, if necessary, the Orphans' Court would be bound to appoint one or more auditors under the act of 13th April, 1840, *supra*, to make distribution, or if a proceeding is already in progress, a decree upon the incoming petition of the legatee would await the report. Each legatee or distributee is entitled to proceed for the recovery of his own legacy or share. It is true that legatees have an additional remedy by action of debt, detinue, account render, or on the case, against executors having sufficient assets to pay the debts and legacies. Act 24th February, 1834, s. 50. But the common law form of action is inconvenient, and carries the remedy into a court having no jurisdiction to settle the executor's account, and hence the act provides that on a plea of a want of assets the action must be suspended, until an amount is settled in the Orphans' Court, and the amount of the legacy or its *pro rata* ascertained. Sect. 53, Purdon, by Brightly, 303, pl. 188.

It remains now to inquire whether this petition conforms to the 57th section of the act of 29th March, 1832, by setting forth facts necessary to give the Orphans' Court jurisdiction. It plainly does. It sets forth the will of the late James Dundas, duly proved and registered, the bequest to the children of W. H. Dundas in equal shares, their number, and that the petitioner is one of them, and his proportional share; the issuing of letters testamentary to the executors, the filing of an inventory, and settlement of two accounts, showing large assets, to a share of which the petitioner is entitled; and prays that the surviving executors shall pay over to the petitioner the full amount of his share and interest in the estate, as soon as the same shall be ascertained, after allowing for, and deducting all sums of money that the petitioner has received. These facts give jurisdiction to the Orphans' Court to compel distribution by the executors, and payment of the petitioner's share to him. Had the petition set forth nothing more, the consequence would have been plain. The executors, to protect themselves, would have set forth the assignment in their answer, and cited the assignee to defend *pro inter esse suo*. This would have brought from the petitioner a replication of fraud and deceit in procuring the assignment. The paper thus standing in the way of distribution, there being two claimants to the same legacy or share of it, the jurisdiction of the Orphans' Court necessarily attached, in order to remove the barrier to the payment of the legacy. The language of Judge Lewis in Ketterlar's Estate directly applies; that each one must be heard in support of his claim and in opposition to every claimant who interferes with it, and that the power to decide all questions essential to distribution follows the power to distribute.

The Orphans' Court having power to determine whether the petitioner or his alleged assignee is entitled to payment of the legacy, it is evident the court is not deprived of its jurisdiction, by the setting forth of the alleged fraudulent assignment in the first instance, followed by appropriate prayers to have it set aside, and for a citation to the assignee. Indeed, the proceeding in this form is better adapted to decide the controversy at once, preliminary to final distribution. The parties are all brought in at once, and the decree will finally dispose of the whole controversy, leaving the executors free from doubt as to the person to receive payment. Nor are we wanting in authority as to the power of a court in a distribution proceeding, to determine the title of contesting claimants to the same fund, as an incident of the distribution. In Souder's Appeal, 7 P. F. Smith, 498, it was held that the auditor making distribution of money arising from a sheriff's sale, had power to determine the ownership of a "judgment between contesting claimants, and that the defeated claimant, under the act of 1836, relating to execution, was entitled to demand an issue. See the cases cited therein. The petition in this case, is unnecessarily prolix, and sets forth matters of evidence merely. But substantial facts are set forth, sufficient to give the court jurisdiction to determine the ownership of the legacy, and decree payment to the plaintiff, if he be entitled to it. The decree of the Orphans' Court sustaining the demurrer is therefore reversed, the demurrer overruled, and a *procedendo* awarded; and the defendants are ordered to pay the costs of this appeal, the costs below to abide the event of the proceeding.

THE SEVENTH NATIONAL BANK v. DAVID COOK.

1. Where the servant of one to whose order a check was drawn, endorsed it without authority in his master's name, obtained the money therefor, and the bank charged the drawer therewith on the settlement of his bank book: *Held*, the payee could recover from the bank the amount of the check.
2. When a bank charges a drawer of a check with the amount thereof, it is an appropriation of so much money to the use of the payee.

Error to the District Court for the city and county of Philadelphia.

Opinion by READ, C. J. Delivered May 17th. 1873.

James Greenwood was indebted to David Cook for oil sold, and in payment, gave a check on the defendants, the Seventh National Bank, for $174.50, to J. C. Barnes, a clerk of the plaintiff, payable to the order of D. Cook. Mr. Barnes endorsed it with the name of D. Cook, and his own name, drew the money, and appropriated it to pay an amount due him by his employer, and made the proper entries on the books of D. Cook. The plaintiff refused to recognize the acts of his clerk, and obtained the cancelled check from Greenwood, presented it to the bank, was refused payment, and then commenced this suit. The court charged the jury that "the only question is whether Barnes had authority to endorse the check for Cook, and upon that, I leave the case with you," and the jury found a verdict for the plaintiff Cook, for the amount of the check. Upon the argument the counsel for the bank cited but one case, Bank of Republic v. Millard, 10 Wallace, 152, and contended the holder of the check could not recover against the bank. It was in evidence that the bank had paid the check when presented by Barnes, and that upon settlement of Greenwood's bank book, the check was returned with other checks, cancelled, and of course charged against the depositor. This brings it within the exception stated by the Supreme Court of the United States towards the close of their opinion in 10 Wallace. "*It may be* if it could be shown that the bank had charged the check on its books against the

drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex aquo et bono* should be applicable, as the bank having assented to the order, and communicated its assent to the paymaster (the drawer), would be considered as holding the money thus appropriated for the plaintiff's use, and, therefore, under an implied promise to him to pay it on demand."

On the merits, therefore, the case was for the plaintiff.

It is in fact an acceptance, and binds the bank as a certified check does. "It is tantamount to an acceptance of the draft."

There is nothing in the other assignments of error.

Judgment affirmed.

THE IMPERIAL FIRE INSURANCE COMPANY v. WILLIAM MURRAY, RICHARD WINLACK AND WALTER RANDALL.

AND THE NORTH BRITISH MERCANTILE AND INSURANCE COMPANY v. SAME.

1. A lessee who covenants to return the property at the expiration of the lease in good order and condition, has an insurable interest equal to the whole value of the property.
2. "This insurance to cover their working interest in the above insured property," *Held:* to cover the entire insurable interest.

Error to the Common Pleas of Columbia county.

Opinion by MERCUR, J. Delivered May 17th, 1873.

These two cases were argued together. The facts and principles of law involved, are substantially the same in each. The same property is covered by each policy; each is for one year, from the 17th September, 1869. The loss occurred January 19th, 1870.

The plaintiffs have filed twenty-three assignments of error. We will not consider them separately. The twenty-second and twenty-third assignments are based upon an alleged false representation in the application. As we are not furnished with a copy of the application, we are unable to determine with certainty how far the facts go towards sustaining the allegation. As we understand the whole evidence bearing upon that branch of the case, we cannot see that the court committed any error in holding, that if the applicants fairly represented what they honestly believed, it would not defeat the action, and that it was not such a statement of a material fact as amounted to a warranty.

All the other assignments, except the first, sixth, and seventh, may be considered together. They relate to the value of the interest insured. That the property was of much greater value than the amount of the insurance, does not admit of a question under the evidence; besides, the jury has so found. It is urged, however, by the plaintiffs, that the interest of the lessees therein was of much less value, and that that lesser value only was covered by the insurance. They claim that the value of the lessees' interest therein was measured by the value of the use thereof, from the time of the loss until the expiration of their term. In this view we cannot concur. The use of the property for the remainder of the term, by no means fixed or defined its value as to them. They had not only a right to its use and enjoyment, but had also assumed an obligation to return and redeliver it in good order and condition at the expiration of the term. If they failed so to do, they were liable to their lessors for its full value. If they redeliver according to the requirements of their lease, they would be discharged from that obligation. They then had a large value in the property superadded to that of its use. Hence the court was correct in charging that the insurable interest of the lessees was to the extent of the value of the property which they were bound to replace.

The right of the insured and the liability of the companies, were fixed at the time of the loss, provided the requisite notices and proofs were furnished. Such being the case, the evidence referred to in the fifth assignment of error is wholly irrelevant. No arrangement made between the Locust Mountain Coal and Iron Company of the one part, and Goddard & Draper, of the other part, after the expiration of the term of the defendants in error, relieved them from their obligations to return the leased property to Goddard & Draper, or pay them its value. The coal breaker, engines, boilers, pumping and hoisting machinery, apparatus and improvements, leased to the defendants in error, were the property of Goddard & Draper, and not the property of the Locust Mountain Coal and Iron Company. If the latter took possession of the leased premises, and released the former from all liability, it was for a valuable consideration paid by Goddard & Draper. It in no wise showed the determination of the estate which the assured had in the land at the time of the loss; nor of their release from liability for failing to restore the property upon which they had the insurance.

The language of the policy after describing the property, avers, "this insurance to cover their working interest in the above insured property." The court correctly held this was sufficiently comprehensive to cover the entire insurable interest which the assured had in the property.

The first and sixth assignments relate to the notice and proofs of loss.

We have looked in vain through the testimony to find any evidence of the extent of the powers which the companies gave to their agent Bodey. We find, however, that he was in fact exercising extensive powers. The companies were both foreign corporations, with officers and directors abroad. They also had an office in New York, and this agency in Pottsville. Bodey countersigned those policies; he filled them up; the applications were filed in his office; he kept them as references; were not sent abroad; he paid losses when they occurred.

There is no evidence that the companies ever questioned his rightful exercise of all those powers. So there was sufficient evidence to submit to the jury as to the extent of his agency, within the general scope of the business intrusted to his care. Union Mutual Life Insurance Co. of Maine v. Wilkinson, Insurance Reporter, 18th April, 1872, No. 16. The question of waiver as to time and particulars of loss, was correctly submitted to the jury. Franklin Fire Ins. Co. v. Updegraff et al., 7 Wright, 350; 5 Wright, 162; 6 Wright, 188; 11 Wright, 205.

The seventh assignment was not pressed, and has no merit. We discover no error in the bills of exception, nor in the charge of the learned judge.

Judgment affirmed in each case.

SALLER v. RIESZ.

Specific performance of an agreement to sell real estate will not be decreed against a vendor who is a married man, and whose wife refuses to join in the conveyance, so as to bar her dower, unless the vendee is willing to pay the full purchase money, and accept the deed of the vendor without his wife joining.

Appeal by defendant Riesz from the decree of the Court of Common Pleas of Philadelphia county.

Opinion by SHARSWOOD, J. Delivered May 17th, 1873.

It is not proposed to enter upon an examination and review of the cases which have been decided in England and our sister States upon the question presented upon this appeal. Great industry and ability have been exhibited by the learned counsel on both sides, in their printed and oral arguments, and it is but just to say that no suggestion or authority appears to have escaped them. But we consider the point as definitely settled in this State in the opinion of Chief Justice Gibson, in Clarke v. Seiser, 7 Watts, 107, recognized and affirmed as it has been in many subsequent cases. Riddlesberger v. Mentzer, 7 Watts, 141; Shurtz v. Thomas, 8 Barr, 363; Bitner v. Brough, 1 Jones, 138; Hanna v. Phillips, 1 Grant, 256; Weller v. Weyand, 2 Ibid, 102, These cases settle, if any amount of authority can settle anything, that in Pennsylvania, specific performance of an agreement to sell real estate will not be decreed against a vendor who is a married man, and whose wife refuses to join in the conveyance so as to bar her dower, unless, indeed, the vendee is willing to pay the full purchase money, and accept the deed of the vendor without his wife joining. The policy of these decisions is very manifest. The wife is not to be wrought upon by her love for her husband, and sympathy in his situation, to do that which her judgment disapproves as contrary to her interest; nor is he to be tempted to use undue means to procure her consent. The vendor must be left in such cases to his action at law to recover damages. The principles upon which damages are recovered, and the measure of them, under different circumstances in such an action, are well explained in Bitner v. Brough, 1 Jones, 127.

The same sound policy which forbids a decree for the execution of a deed by the husband—to be enforced by his imprisonment if he cannot obey, prevents any decree looking to compensation, abatement or indemnity. The case does not fall within the principle of those decisions, where the vendor who cannot make title to all he has contracted to convey, is held to be not thereby relieved from specific performance as far as in his power; but shall be compelled to execute his contract with a reasonable abatement in the price. The right of dower of the widow is of such a contingent nature, depending as it does as well upon her surviving her husband, as on her continuance in life after his death, that no abatement in the price can be made which will be just to both parties, without in effect making a new contract for them; a contract, which, perhaps, in the first instance, neither party would have come into, certainly not the vendor. Receipt of the purchase money in full may have been the main object of the sale to enable him to pay debts or carry out other plans. If he is to be subjected to serious pecuniary loss by his wife's refusal to join, it will operate almost as powerfully as the peril of his imprisonment, as a moral coersion and compulsion upon her to yield her consent, instead of that free will and accord which the law jealously requires her to declare by an acknowledgment upon an examination before a magistrate, separate and apart from her husband. The learned master, Mr. Clay, to whom it was referred to report what amount of the purchase money should be retained by the vendee upon mortgage, as a compensation for him for any claim the wife might thereafter make against the premises for dower, reported that in his opinion not less than forty per cent. of the price should be left in his hands for that purpose; a result no doubt just as to him, but how as to the vendor, who was personally in no default? No stronger argument could be adduced to show the impolicy of making any decree. Specific performance is a matter of grace, and these are considerations which address themselves powerfully to the conscience of the chancellor.

Decree reversed. And now it is ordered and decreed that the bill be dismissed without prejudice; the costs in the court below and in this court to be paid by the complainant.

MEITZLER v. HELFRICH.

An auditor declined to find the fact whether the wife of a defendant in an execution had made the claim of exemption on the day of the levy, on the ground that a written claim made afterwards by the husband came too late: *Held*, to be error.

Appeal by Wm. Meitzler from the decree of the Common Pleas of Lehigh county.

Opinion of the court by AGNEW, J. Delivered May 17th, 1873.

It has been held repeatedly by this court that the wife, or a member of the family, of the defendant in an execution, who is absent from home at the time of a levy on his property, may claim his exemption for him. Waugh v. Buckel et al., 3 Grant, 319; Wilson v. McIlroy, 8 Casey, 82; McCarthy's Appeal, 18 P. F. Smith, 217. The reason of this is said to be a presumption of agency in such case for the debtor, who is absent, and incapable of protecting his interest, until it might be too late, and interfere with the execution of the writ and the interest which the family of a debtor has in retaining the property that the law intends to secure to the family, as well as to the debtor himself. Indeed, there are cases where the exemption has been denied to him, when it was manifest the interests of his family would fail to be promoted by its allowance. Hammer v. Friese, 7 Harris, 255; Weaver's Appeal, 6 Harris, 307.

In the present case, the demand of the benefit of the exemption made by the wife at the time of the levy, is proved clearly by two witnesses. This was denied by the sheriff, who testified that not finding the defendant at home, he went after him, found him, and explained the object of his

visit, and that the defendant made no claim of his exemption. After the *ven. ex.* had been issued, and the property advertised, the defendant made a written request for the benefit of the exemption law, on the 25th of April, and an appraisement was made on the 1st day of May, four days before the sale, the appraisers having appraised personal property to the value of $18.25, found that the real estate was worth more than the remainder, $281.75, but that the land could not be divided without prejudice. The auditor declined to find the fact whether the wife of the defendant had made the claim of exemption on the day of the levy, on the ground that the written claim came too late, being governed, as he states, by the decision of the court below in the case of Kreebal v. Seibert. That decision has been reversed in an opinion just read. We think the auditor, acting under this stress, erred in refusing to decide the question of claim. Had he done so, and found the claim of the exemption had been properly made by the wife on the day of levy, it would have brought the case within the principle of the decision just made in Seibert v. Kreebal et al.

The decree of the court is therefore reversed, and the record remanded, with an order that the case be referred to an auditor to determine the facts necessary to make a final distribution of the fund, and the costs of this appeal are directed to be paid by the appellee.

CITY OF ALLENTOWN v. HENRY.

1. The Legislature has the constitutional right to confer upon municipal corporations the power of assessing the cost of local improvements upon the properties benefited.
2. A city ordinance, made under an authority of an act of Assembly, must conform to the letter and spirit of the act.

Error to the Court of Common Pleas of Lehigh county.

Opinion by MERCUR, J. Delivered May 17th, 1873.

We think the learned judge correctly held that although the act of 14th April, 1868, might be unconstitutional, so far as it sought to authorize a private corporation to levy and collect a tax upon a citizen, yet it does not follow that that power may not be conferred upon a municipal corporation. The manifest intent and meaning of the act of 22d March, 1870, are to give to the plaintiff all the rights, privileges, powers and franchises which previous acts had declared to be given to the Allentown Water Company, as fully as the language used therein, professed to give the same, so that the plaintiff now holds and possesses them as fully as if they had been re-enacted in the same words.

We, however, are unable to concur in his conclusion that the said acts are unconstitutional. We do not understand this act of 14th April to impose an assessment for a general public benefit. Upon the contrary, it is a local tax, substantially for a local benefit. The tax is local, as it is imposed upon those dwelling houses only, situate upon the lines of the water pipes. The benefits are local, as the use of the water must necessarily be mostly restricted to the benefit of the property on those lines, both for domestic purposes and the extinguishment of fires. The effect of supplying those streets with water is to enhance the value of the dwelling houses thereon. The maintenance of the pipes, and the supplying of water, are necessarily a continuing expense, and this tax is evidently designed to defray those expenses. It is well settled, that the Legislature has the constitutional right to confer upon municipal corporations the power of assessing the cost of local improvements upon the properties benefited. Hammett v. Philadelphia, 15 P. F. Smith, 146; Kirby v. Shaw, 7 Harris, 258.

We concur that the verdict was correctly taken. The ordinance did not follow the act of Assembly. The act authorized the assessment to be levied upon "every dwelling house situated in any of the streets, lanes and alleys of the said city, in, through and along which, and as far as, the water pipes are now laid, and shall hereafter be laid." The ordinance imposes the tax upon such dwelling houses only as are "not supplied with hydrants."

This is an unwarranted departure from the letter and spirit of the law.

Judgment affirmed.

[Not having a report of the opinion of the court in the following case, the syllabus by which it was headed, in our issue of last week, was incorrectly drawn. We now publish the opinion, which has been kindly furnished us by a member of the court.

ED.]

District Court of Philad'a.

LORENZ v. LEHIGH NAV. CO.

1. Where the production of the books or papers of a corporation, before a commissioner to take depositions, is necessary and proper, a *subpœna duces tecum* will be issued to the officer having the custody of them, and he will be compelled to produce them, whether he has authority from the board of directors or not.
2. But a party cannot, upon an eight day rule to take depositions, subpœna the other party, and compel a disclosure of his case, or the production of evidence in his possession.

Saturday, May 17th, 1873.

This was an action of trover and conversion for five certificates of stock in defendants' company, belonging to plaintiff. After issue, but before trial, a rule was entered to take depositions of witnesses under section 35, rule 10th, of District Court (Court Rules, p. 29). The treasurer of defendants was served with a subpœna *duces tecum* to appear before the commissioner and bring with him certain books and papers, among which were the certificates of stock in question, and an alleged power of attorney of plaintiff to transfer said certificates. On the hearing before the commissioner, the witness attended and was examined. From his testimony it appeared that he was the officer of the company who had charge and actual custody of the books and papers called for, which he declined to produce before the commissioner. Plaintiff filed an affidavit that the alleged power of attorney was a forgery, and that an inspection of it was necessary to enable him to prove this fact. A rule was then taken for an attachment on witness for disobeying the subpœna.

R. H. McGrath and *John Samuel, Esqs.*, for the rule.

As to plaintiff's right to inspect before trial—It was his alleged deed, of which he had no copy. It was material to enable him to maintain his action. Black v. Gompertz, 7 Exch. 67; Tebbutt v. Ambler, 7 Dowl. 674; Doe dem. Child v. Roe, 1 Ell. & Bl. 279; Scott v. Walker, 2 Ell. & Bl. 555; London Gas Light Co. v. Vestry of Chelsea, 6 C. B., N. S.; Pennark Harbor Dock Co. v. Cardiff Water Works, 7 C B., N. S.

The witness was bound to produce the papers; act of 1865 had made parties witnesses. Corsen v. Dubois, 1 Holt, 239; Arndy v. Long, 9 East, 473; 1 Camp, 14.

The act of 1798 did not apply, this being a tort; Morgan v. Watson, 2 Wh. 10; and the object being inspection before trial.

Charles Gibbons, Esq., contra: Witness being a servant of the company, could not, without their authority, produce their books and papers. 1 Gr. 453; Rose v. King, 5 S. & R. 241. A subpœna *duces tecum* will not go against officers of a company to produce its books. 5 Cowen, 27–419. He argued as to the opportunity for abuse, which the practice sought to be enforced would allow.

HARE, P. J., said he had no doubt that in a proper case the *subpœna duces tecum* would be enforced against the officer of a corporation having actual custody of the books or papers. A servant could not ordinarily be compelled to produce his master's books, because his custody of them was, in law, the master's custody, and the latter was the person amenable to process for their production. But if the master were out of the jurisdiction, or were, as in the present case, a mere legal entity, which could be acted on only through its officers or servants, then the *subpœna* would properly go against the person having the actual custody, and this, without regard to the master's orders.

There was, however, a more formidable objection to this rule. The plaintiff sought to compel the defendant in this summary way to disclose his defence, or, at least, to exhibit a material part of his evidence, and this he could not be permitted to do.

The regular proceedings in equity for discovery, and the perpetuation of evidence, guarded the rights of parties with great care, and it would be difficult, if not impossible, for the court to give them equal protection in these summary and less formal proceedings. It was a novelty, and neither the act of 1865, nor the rule of court required its sanction. The majority of the court, therefore, were of opinion that the rule must be discharged.

THAYER and MITCHELL, JJ., dissented.

WAGNER v. PETERSON.

1. Where a broker is employed to purchase and carry stock on a margin, if on a settlement of his account, there be any dispute between him and his principal as to the amount of margin remaining, the action should be *account render*, and not *assumpsit*.
2. An account rendered, and not excepted to within a reasonable time, becomes an account stated, unless there be fraud or mistake not apparent on the face of the account, and not known to the recipient at the time of its receipt.

Opinion by LYND, J. Delivered May 24th, 1873.

Plaintiff employed the defendant, a banker and stock broker in Philadelphia, to purchase and carry for him a number of shares of the stock of the Fort Wayne and Chicago R. R. Co., and deposited with the defendant certain U. S. 5-20's as margin. He alleged that the defendant was to charge interest at the rate of seven per cent. per annum only, for the carrying of said stock. Several purchases in pursuance of several orders were made—in all three hundred shares—between August 13th, and September 7th, 1869. The defendant commenced to make "extra" charges as early as the 9th September, and continued the same at an increasing rate till the 27th September, when the "extra" charge for that day amounted to $442. This was shortly after black Friday.

The plaintiff had had no acquaintance or business with the defendant prior to this transaction. His friend George W. Hewes, to whom he had expressed his desire to buy the Fort Wayne stock, undertook to make the necessary arrangements with defendant, and did make the alleged arrangement with him, without the presence of the plaintiff.

Hewes also accompanied the plaintiff to the defendant's office upon the occasion of each order and deposit of margin for the purchase of stock, and was always the *spokesman* for the plaintiff.

The defendant communicated the fact that he was making the said charges to Hewes, and on September 7th, consulted him as to the propriety of selling a part of the stock. He, "knowing that the margin would be eaten up," directed a sale of two hundred shares. This direction and the occasion for it were fully stated and explained by Hewes to the plaintiff the same evening. The plaintiff did not repudiate the direction; he did not even "complain" of it.

The next day the defendant sent for the plaintiff and told him that he must furnish an additional margin, or the balance of the stock must be sold. Plaintiff said he had no more margin, and assented to a sale of the remaining shares.

They were accordingly sold, and an account rendered by defendant about the 8th October, showing a balance due plaintiff of $395.27. About October 12th, plaintiff directed defendant to buy fifty shares of Fort Wayne stock, the said balance to be used as margin. This venture was closed out in November, and the plaintiff received from the defendant a small balance then due him.

He made no complaint of or to defendant for some seven months, when he commenced this suit.

The majority of the court are of opinion that the non-suit must be sustained.

I. The primary duty of the defendant was to *account* to the plaintiff, and that the action should therefore have been account render.

Reeside's Executor v. Reeside, 13 Wr. 322. On page 332, his Honor Justice Agnew states the ground of distinction between *assumpsit* and account in clear and unmistakable terms.

II. But even if the action had been account render, the plaintiff should have been non-suited, because the evidence was clear that an account had been rendered by the defendant, in which the plaintiff, with full knowledge and comprehension of its items, and after full time for reflection and professional advice, acquiesced. He does not allege that there was any fraud or mistake in the *statement* of the account. He says: "I presumed they had a right to make these extra charges, and that I was helpless; I had no knowledge of their right to do so. I afterwards saw

a newspaper report of a suit against a broker for such charges, and went to counsel and brought suit."

Even if courts were intended for the relief of those who act upon mistaken views of their legal rights, certainly the laches of those who lie by until their errors are revealed in the court columns of the daily press, would not be tolerated. *Vigilantibus non dormientibus leges subveniunt.*

The doctrine that an account rendered becomes an account stated, unless excepted to in a reasonable time, and that it is absolutely binding, unless as to mistake or fraud not apparent upon the face of the account, or not known by the recipient at the time of its receipt, is clearly and exhaustively stated by his Honor Justice Sharswood (then the President Judge of this court) in Bevan v. Cullen, 7 Barr, 28.

In Thompson v. Fisher, 1 Harris, it is said: "Rendering an account of itself, does not make it an account stated, but it becomes so by the consent of the consignors to whom it is sent. Their assent is inferred from a silence unnecessarily long. It is a presumption *juris et de jure;* for an account current must be objected to without unnecessary delay, or it is considered on well settled principles an account stated, and as such obligatory on the adverse party." * * * "Nor is there more solidity in the objection that the rule does not hold when the parties live in the same place. Indeed, the presumption derived from acquiescence would seem to apply with more force in such a case, than where they live in another country and another State."

If this be the rule applied to those who fail to indicate within a reasonable time their dissent to an account rendered, how can the plaintiff, who expressly assented to the account submitted, to him by the defendant, hope to escape its operation?

HARE and THAYER, J J., do not concur.

MITCHELL, J., concurs in the result.

Legal Gazette.

REPORTS OF CASES

DECIDED IN THE

UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA; THE SUPREME COURT OF PENNSYLVANIA AT NISI PRIUS; THE DISTRICT COURT, COURTS OF COMMON PLEAS, QUARTER SESSIONS, OYER AND TERMINER AND ORPHANS' COURTS OF PHILADELPHIA;

AND IN THE COURTS OF THE THIRD, EIGHTH, NINTH, ELEVENTH, TWELFTH, TWENTY-SIXTH, TWENTY-EIGHTH, AND TWENTY-NINTH JUDICIAL DISTRICTS OF PENNSYLVANIA.

Originally Reported in the Legal Gazette,

From July 2, 1869, To January 5, 1872, inclusive.

BY JOHN H. CAMPBELL.

VOL. 2. JUST ISSUED.

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Chief Justice, Supreme Court, Pa.

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Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, JUNE 6, 1873. No. 23.

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[Reported specially for the Legal Gazette.]

United States Supreme Court.

LIFE INSURANCE COMPANY v. TERRY.

1. In the case of a policy of life assurance, where there is a condition in the instrument that if the assured shall "die by his own hand," the policy shall be void, the rules to be applied in case of the death of the party by such means, are these, that is to say:
2. If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery.
3. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable.

Error to the Circuit Court, for the District of Kansas.

Mary Terry brought an action in the court below against the Mutual Life Insurance Company, of New York, to recover the sum of $2,000, claimed by her as due upon a policy of insurance on the life of her husband, George Terry, made and issued to her, as his wife.

The policy contained a condition, of which a portion was in these words, viz.: "If the said person, whose life is hereby insured, . . . shall die by his own hand, . . . this policy shall be null and void."

Within the terms of the policy, George Terry died from the effects of poison taken by him.

Evidence was given tending to show that at the time he took the poison he was insane. Evidence was also given, tending to show that at that time he was sane, and capable of knowing the consequences of the act he was about to commit.

Thereupon the counsel for the defendant requested the court to instruct the jury thus:

"*First.* If the jury believe from the evidence in the case, that the said George Terry destroyed his own life, and that, at the time of self-destruction, he had sufficient capacity to understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, the plaintiff cannot recover on the policy declared on in this case.

"*Second.* That if the jury believe from the evidence that the self-destruction of the said George Terry was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, it is wholly immaterial in the present case that he was impelled thereto by insanity, which impaired his sense of moral responsibility, and rendered him, to a certain extent, irresponsible for his action." The court refused to give either of these instructions, and charged as follows:

"It being agreed that deceased destroyed his life by taking poison, it is claimed by defendant that he 'died by his own hand,' within the meaning of the policy, and that they are, therefore, not liable.

"This is so far true that it devolves on the plaintiff to prove such insanity on the part of the decedent, existing at the time he took the poison, as will relieve the act of taking his own life from the effect which, by the general terms used in the policy, self-destruction was to have, namely, to avoid the policy.

"It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable.

"To do this, the act of self-destruction must have been the consequence of the insanity, and the mind of the decedent must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing.

"If he was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition, that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand, there is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity, and if you believe from the evidence that the decedent, although excited or angry, or distressed in mind, formed the determination to take his own life, because, in the exercise of his usual reasoning faculties, he preferred death to life, then the company is not liable, because he died by his own hand within the meaning of the policy."

The cause came to this court on exceptions to the refusal of the court to give the instructions requested by the insurance company, and to the charge which was actually given.

The case was submitted on briefs; where it was elaborately argued on principle and precedents by Messrs. H. E. and J. T. Davies, for the plaintiff in error; the English case of Borradaile v. Hunter, 5 Manning & Granger, 639, being referred to as the leading one, where the rule, it was said, was early settled in England against the pretensions of cases like the present, and settled in accord with what the counsel maintained was a just construction of the words of the contract; a case, it was urged, which had been supported by the weight of authorities both in England and with us; as Clift et al. v. Schwabe, 3 Manning, Granger and Scott, 437; Dufaur v. Professional Life Insurance Co., 25 Bevan, 602; Cooper v. The Massachusetts Mutual Life Insurance Co., 102 Massachusetts, 257; Nimick et al. v. Mutual Life Insurance Co., 10 American Law Register, New Series, 101; and Gay v. Union Mutual Life Insurance Company of New York, 9 Blatchford, 142.

Mr. W. W. Nevison, contra, relied on Breasted v. The Farmers' Loan and Trust Co., 4 Hill, 73, S. C. on appeal, 4 Seldon, 299; Branch v. Baxter, 2 Aitken, 167; State v. Felter, 25 Iowa, 67; and submitted that the charge of the court below was in truth sustained by the Circuit Court for Connecticut, in Gay v. Union Mutual Life Insurance Co., relied on by the other side.

Mr. Justice HUNT delivered the opinion of the court.

The request for instructions made by the counsel of the insurance company, proceeds upon the theory that if the deceased had sufficient mental capacity to understand the nature and consequences of his act, that is, that he was about to take poison, and that his death would be the result, he was responsible for his conduct, and the defendant is not liable; and the fact that his sense of moral responsibility was impaired by insanity, does not affect the case.

The charge proceeds upon the theory that a higher degree of mental and moral power must exist; that although the deceased had the capacity to know that he was about to take poison, and that his death would be the result, yet, if his reasoning powers were so far gone that he could not exercise them on the act he was about to commit, its nature and effect, or if he was impelled by an insane impulse which his impaired capacity did not enable him to resist, he was not responsible for his conduct, and the defendant is liable.

It may not be amiss to notice that the case does not present the point of what is called emotional insanity, or *mania transitorial*; that is, the case of one in the possession of his ordinary reasoning faculties, who allows his passions to convert him into a temporary maniac, and while in this condition commits the act in question. This case is expressly excluded by the last clause of the charge, in which it is said that anger, distress, or excitement does not bring the case within the rule, if the insured possesses his ordinary reasoning faculties.

The case of Borradaile v. Hunter, reported in 5th Manning & Granger, p 639, is cited by the insurance company. The case is found also in 2 Bigelow's Life & Accident Insurance Cases, p. 280, and in a note appended are found the most of the cases upon the subject before us. The jury found, in that case, that the deceased voluntarily took his own life, and intended so to do, but that at the time of committing the act he was not capable of judging between right and wrong. Judgment went for the defendant, which was sustained upon appeal to the full bench. The counsel for the company argued that where the act causing death was intentional on the part of the deceased, the fact that his mind was so far impaired that he was incapable of judging between right and wrong, did not prevent the proviso from attaching; that moral or legal responsibility was irrelevant to the issue. The court adds: "It may very well be conceded that the case would not have fallen within the meaning of the condition, had the death of the assured resulted from an act committed under the influence of delirium, or if he had, in a paroxysm of fever, precipitated himself from a window, or, having been bled, removed the bandages, and death, in either case, had ensued. In these and many other cases that might be put, though strictly speaking the assured may be said to have died by his own hands, the circumstances clearly would not be such as the parties contemplated when the contract was entered into." In delivering the opinion of the court, Erskine, J., says all that the "contract requires is, that the act of self-destruction should be the voluntary and wilful act of a man having, at the time, sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having, at the time, a purpose and intention to cause his own death by that act, and the question, whether at the time he was capable of understanding the moral nature and quality of his purpose, is not relevant to the inquiry, further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself." Chief Justice Tindal dissented from the judgment. In speaking of the verdict, he says: "It is not, perhaps, to be taken strictly as a verdict, that the deceased was *non compos mentis* at the time the act was committed, for if this latter is the meaning of the jury, the case would then fall within that description mentioned in the argument to be without the reach of the proviso, namely, the case of death inflicted on himself by the party whilst under the influence of frenzy, delusion or insanity." This authority was followed in Clift

v. Swable, 3 Common Bench, 437, where it was substantially held that the terms of the condition included all acts of voluntary self-destruction, and that whether the party is a voluntary moral agent, is not in issue.

These decisions expressly exclude the question of mental soundness. They are in hostility to the tests of liability or responsibility adopted by the English courts in other cases from Coke and Hale onwards. Coke said "a little madness deprives the lunatic of civil rights or dominion over property, and annuls wills." But to exempt from responsibility for crime, he says, "complete ignorance of the knowledge of right and wrong must exist." Lord Mansfield holds the legal test of a sound mind to be the knowledge of right and wrong, of good and evil; of which the converse is ignorance of knowledge of right and wrong, of good and evil. Lord Lyttleton held the test to be the state called *compos mentis* or sound mind. Lord Erskine, Defence of Hadfield, defined it to be the absence of any practicable delusion traceable to a criminal or immoral act. In Pritchard, on the Different Forms of Insanity, p. 16; and see 1 Shelford on Lunatics, 46, will be found the somewhat lengthy definition of insanity by Lord Lyndhurst.

The English judges refuse to apply to the act of the insured in causing his death the principles of legal and moral responsibility recognized in cases where the contract, the last will, or the alleged crimes of such person may be in issue.

In Hartman v. Keystone Insurance Company, Vol. 1, 21 Pennsylvania State, 466, the doctrine of Borradaile v. Hunter was adopted with the confessedly unsound addition that suicide would avoid a policy, although there were no conditions to that effect in the policy.

In Dean v. Mutual Life Insurance Company, 4 Allen, 96, the courts of Massachusetts held substantially the doctrine of Borradaile v. Hunter. In Kentucky, in St. Louis Life Insurance Company v. Graves, 6 Bushnell, 268, the court were divided upon the question of the soundness of Borradaile v. Hunter, but held unanimously that where the suicide was committed during an uncontrollable passion caused by intoxication, the condition was broken and the policy avoided. In Cooper v. Massachusetts Life Insurance Company, 102 Massachusetts, 227, the doctrine of Dean v. American Life Insurance Company was reaffirmed, the plaintiff offering to prove that the deceased was insane at the time he committed the act; that he acted under the influence and impulse of insanity, and that his act of self-destruction was the direct result of his insanity.

In Mimick v. Insurance Company 10 American Law Register, New Series, 102, McKennon, Circuit Judge of the United States, for the Western District of Pennsylvania, held that if the assured comprehended the physical nature and consequences of the act, and intended to destroy his life, the policy was void, although he did not comprehend the moral nature of the act.

On the other hand, in Eastabrook v. Union Insurance Company, 54 Maine, 224, the judge at the trial instructed the jury, "that if the insured was governed by irresistible or blind impulse in committing the act of suicide, the plaintiff would be entitled to recover." This decision was sustained by the Supreme Court of the State of Maine.

In the State of New York, the question arose in Breastead v. Farmers' Loan and Trust Company, 4 Hill, 73. In an action upon the policy, the defendants pleaded that the deceased committed suicide by drowning himself in the Hudson river, and died by his own hand. To this the plaintiff replied that the assured was "of unsound mind and wholly unconscious of the act." The defendants demurred. The Supreme Court overruled the demurrer, holding that the reply afforded a sufficient answer to the plea.

The case afterward came before the Court of Appeals of that State, 4 Selden, 299, when it was held that the provision in the policy had reference to a criminal act of self-destruction; that the self-destruction of the insured while insane, and incapable of discerning between right and wrong, was not within the provision.

In the case of Gay v. The Union Mutual Life Insurance Company, cited in 2 Bigelow, Life and Accident Insurance Cases, 4, it was held that if the deceased was conscious of the act he was committing, if he intended to take his own life, and was capable of understanding the nature and consequences of it, the policy was void; but if the insured destroyed himself while acting under an insane delusion, which overpowered his understanding and will, or if he was impelled to the act by uncontrollable impulse, the case did not fall within the proviso of the policy. This decision, it is stated by Bigelow, *supra*, was the result of careful deliberation between Judges Woodruff and Shipman at a Circuit Court of the United States, held by them jointly.

In his work on Insurance, section 894, Mr. Phillips, after citing the cases, closes thus: "And I take our law to be, that any mental derangement which would be sufficient to exonerate a party from a contract, would render a person incapable of occasioning the forfeiture of a policy under this condition."

There is a conflict in the authorities which cannot be reconciled. The propositions embodied in the charge before us are in some respects different from each other, but in principle they are identical. They rest upon the same basis, the moral and intellectual incapacity of the deceased. In each case the physical act of self-destruction was that of George Terry. In neither was it truly his act. In the one supposition he did it when his reasoning powers were overthrown, and he had not power or capacity to exercise them upon the act he was about to do. It was in effect as if his intellect and reason were blotted out or had never existed. In the other, if he understood and appreciated the effect of his act, an uncontrollable impulse caused by insanity compelled its commission. He had not the power to refrain from its commission, or to resist the impulse. Each of the principles put forth by the judge rests upon the same basis—that the act was not the voluntary intelligent act of the deceased.

The causes of insanity are as varied as the varying circumstances of man.

> "Some for love, some for jealousy,
> For grim religion some, and some for pride,
> Have lost their reason; some for fear of want,
> Want all their lives; and others every day,
> For fear of dying, suffer worse than death."

Armstrong on Health, book 4, vol. 84, cited, in Shelford on Lunatics In. 1, 43.

When we speak of the "mental" condition of a person, we refer to his senses, his perceptions, his consciousness, his ideas. If his mental condition is perfect, his will, his memory, his understanding are perfect, and connected with a healthy bodily organization. If these do not concur, his mental condition is diseased or defective.

Excessive action of the brain whereby the faculties become exhausted, a want of proper action whereby the functions become impaired and diminished, the visions, delusions, and mania, which accompany irritability, or the weakness which results from an excess of vital functions, indigestion and sleeplessness, are all the result of a disturbance of the physical system. The intellect and intelligence of man are manifested through the organs of the brain, and from these consciousness, will, memory, judgment, thought, volition, and passion, the functions of the mind, do proceed. Without the brain, these cannot exist. With an injured or diseased brain, their powers are impaired or diminished.

We have not before us the particular facts on which the questions of the sanity of Terry were presented. We may assume that proof was given upon which the propositions of the charge were based. We do not know whether he was sleepless, unduly excited, or unnaturally depressed; whether he had abandoned his accustomed habits and pursuits and adopted new and unusual ones; from a quiet, orderly man, had become disorderly, vicious or licentious; that his fondness for his wife and children changed to dislike and abuse. That jealousy, pride, the fear of want, the fear of death, had overtaken him. He may have realized the state supposed by the counsel in arguing Borradaile v. Hunter, viz., that his death might have resulted from an act committed under the influence of delirium, or that, in a paroxysm of fever, he might have precipitated himself from a window, or having been bled, he might have torn away the bandages. Whether he swallowed poison or did the other insane acts, might result from the same condition of body and mind.

Delirium, fever, tearing away the bandages for preserving the life, the taking of poison, in a case like that before us, are all results of bodily disease. If bodily disease in these or other forms overthrew Terry's reasoning faculties; in other words, destroyed his consciousness, his judgment, his volition, his will, he remained the form of the man only. The reflecting, responsible being did not exist. In the language of the successful counsel in Borradaile v. Hunter, "in these and many other cases, though strictly speaking the assured may be said to have died by his own hand, the circumstances clearly would not be such as the parties contemplated when the contract was entered into."

That form of insanity called impulsive insanity, by which the person is irresistibly impelled to the commission of an act, is recognized by writers on this subject. See Blandford on Insanity—"Impulsive Insanity." It is sometimes accompanied by delusions, and sometimes exists without them. The insanity may be patent in many ways, or it may be concealed. We speak of the impulses of persons of unsound mind. They are manifested in every form—breaking of windows, destruction of furniture, tearing of clothes, firing of houses, assaults, murders, and suicides. The cases are to be carefully distinguished from those where persons in the possession of their reasoning faculties are impelled by passion merely in the same direction.

Dr. Ray, cited by Fisher, Fisher on Insanity, p. 83, approves the charge of the judge in Haskell's case, where he says: "The true test lies in the word *power*. Has the defendant in a criminal case the power to distinguish right from wrong, *and the power to adhere to the right and avoid the wrong?*"

The question of sanity has usually been presented upon the validity of an agreement, the capacity to make a will, or upon responsibility for crime. If Terry had made an agreement under the circumstances stated in the charge, a jury or a court would have been justified in pronouncing it invalid. A will, then, made by him would have been rejected by the surrogate if offered for probate. If upon trial for a criminal offence, upon all the authorities, he would have been entitled to a charge that upon proof of the facts assumed, the jury must acquit him. Freeman v. People, 4 Denio, 9; Willis v. The People, 32 New York 719: Seaman Society v. Hopper, 33 Id. 619; The Marquis of Winchester's Case, 6 Reports, 23; Combe's Case, Moore, 759.

We think a similar principle must control the present case, although the standard may be different.

We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable.

In the present instance, the contract of insurance was made between Mrs. Terry and the company, the insured not being, in form, a party to the contract. Such contracts are frequently made by the insured himself, the policy stating that it is for the benefit of the wife, and that in the event of death the money is to be paid to her. We see no difference in the cases. In each it is the case of a contract, and is to be so rendered as to give effect to the intention of the parties. Nor do we see any difference for this purpose in the meaning of the expressions, commit sui-

cide, take his own life, or die by his own hands. With either expression, it is not claimed that accidental self-destruction, death in endeavoring to escape from the flames, or the like, is within the proviso. The judgment affirmed.

Mr. Justice Strong dissented.

Supreme Court of Pennsylv'a.

READING v. FINNEY.

1. An assessor is required to assess and return the lands in his township in single tracts, according to their ownership.
2. Though by reason of an apparent severance of unseated lands, not acquiesced in by the owner, the assessment against him be for a less number of acres than his tract contains, and the balance be separately assessed, his title to the entire tract can not be divested by a tax sale so long as all the taxes assessed against him are paid.
3. Biddle v. Noble, 18 P. F. S. 279, explained.

Error to the Court of Common Pleas of Elk county.

Opinion by SHARSWOOD, J. Delivered May 17th, 1873.

It is certainly true, that under the acts of the General Assembly, providing for the sales of unseated lands for taxes, the land is the debtor, and is subject to sale without regard to the ownership; no matter in whose name it may be assessed. Strauck v. Shoemaker, 1 W. & S. 166. But it is also true that these acts, and the decisions of this court in the construction of them, have not neglected to look to the protection of the rights of the owner, so that if he is not in default in the payment of the taxes on the land demanded of him, his title cannot be divested. Hence, proof of the actual payment of the tax avoids the sale. Nay, if the tax be paid, though not by him, it will avail him; for if two men have surveys which interfere with each other, and he whose warrant and survey are junior, pays the tax on all the land included in his survey, and he who has the senior warrant and survey, does not, and the land surveyed to him is sold for taxes, such sale will pass no title to the interference on which the tax has been paid by the other. Hunter v. Cochran, 3 Barr, 105. Hence, also, it is not in the power of the assessors—much less of a mere stranger or trespasser—by the division of an entire tract without his knowledge and consent, to jeopard his title. "The acts relating to the assessment of lands, say Mr. Justice Agnew, "are plain, and require the assessor to assess and return the lands in his township in single tracts, according to their ownership. He may follow the sale or division of the tract by the owner; but he has no power himself to cut up the property of a single owner and return it in parcels. The acts on the subject are collated by Huston, J., in Morton v. Harris, 9 Watts, 326, showing conclusively that the entire process of assessment, from the beginning to the end, contemplates taxation and sale by single tracts, following the title of the owner." Brown v. Hays, 16 P. F. Smith, 235. Where an entire tract is divided and retained without the act or consent of the proprietor, and both parcels are charged with taxes, either by the number of the warrant or the name of the original warrantee or subsequent owner, it is a case of double assessment; for nothing is better settled than that a misstatement of the number of acres contained in a tract will not vitiate a sale of the whole. In Williston v. Colhett, 9 Barr, 78, a tract was originally assessed in the name of the warrantee for nine hundred and ninety-nine acres. During subsequent years the amount was reduced as sales were made. It was finally assessed as two hundred acres, when in fact it contained six hundred. A treasurer's sale, made under such an assessment, was held to pass the title to the whole six hundred. Brown v. Hays, already cited, is a remarkable illustration of the same doctrine. There was an assessment of a tract of one thousand and twenty-six acres by the number of the original warrant, and the name of the warrantee in Polk township, Jefferson county. By the division of the township, a part of it was thrown into a new township, named Heath, and there separately assessed as three hundred acres. The taxes on the entire tract in Polk township, though assessed as only seven hundred and twenty-six acres, were paid by the owner. It was held that the purchaser, at a tax sale of the three hundred acres assessed in Heath township, took no title. "The number of acres," says Mr. Justice Agnew, is simply descriptive, and would not overturn the number of the tract, the name of the warrantee, and the duty of the assessor." It seems to follow logically, from these premises, that the return and assessment of warrant No. 4896, in this case, without the knowledge and consent of the owner to such division, was wholly without warrant of law. The tract was assessed at first in the name of Wilhelm William, for nine hundred and ninety acres. From 1826, it appears on the book in two parcels; one of one hundred and fifty acres, in the name of Joel Woodworth, and the other of five hundred and fifty-nine, in the name of Gilliam Demorest. Demorest paid the taxes for 1826–7–8. In 1829 and 1830, it was assessed in the name of Alexander Boyd. In 1832, the treasurer sold it to the commissioners of the county for unpaid taxes of 1830 and 1831, and a deed was duly made to them for the said tract as five hundred and fifty-nine acres. The entire tract, including both parcels, was omitted from the assessment list from 1832 until 1838, that is, during the period of time that the title was in the county. The cases cited, I think, show that the commissioners, by the treasurer's deed, acquired title to the whole tract No. 4896. They so considered, and when in 1838 they sold to Josiah W. Smith, they conveyed to him by metes and bounds the entire tract, as it was claimed by the owner. It was less, indeed, than the amount returned in the original survey, because there were older warrants and surveys, which cut off a part of it by interference. Hence, the deed to Josiah W. Smith, after describing the land by metes and bound, recites it as "being part of a larger tract of land which was surveyed July 18th, 1794, in pursuance of a warrant dated 3d February, 1794, granted to Wilhelm William and others, and known by No. 4896, containing nine hundred and ninety acres." There is certainly nothing in this recital which limits the previous description of the land. Subsequent to 1838, Smith and his assigns paid the taxes on the whole tract as five hundred and fifty-nine acres, including the taxes of 1850 and 1851, for non-payment of which the parcel assessed as one hundred and fifty acres was sold to Qua, under whom the plaintiff below claimed. Upon this evidence, the instruction of the learned judge to the jury was right. "If you believe that Woodworth had the boundaries of his claim of one hundred and fifty acres actually marked on the ground, and returned to the assessor as his land, with the knowledge of the real owner, a sale of it for taxes would give the purchaser a good title. But an intruder, such as Woodworth appears to have been, cannot by such separate claim and assessment acquire a title against the real owner, who does not assent to such division, and who pays taxes on the whole tract." We think the plaintiff in error has no right to complain of the charge of the learned judge.

It has been strongly urged, however, that an actual line run on the ground by any claimant, with or without title, was sufficient authority to the assessor to return such survey as a separate tract. The assessor, it is said, has nothing to do with the title. He returns the tracts as he finds them on the ground. Perilous, indeed, would be the condition of the owner if such were the law. The assessor finds a line marked by trees in the wilderness, and is told that somebody claims that part of what he knows to be one entire tract, under an original survey. He returns it as a separate tract for taxation. The owner, ignorant of this transaction, pays all that he is charged with for the tract he holds. He assesses the number of acres described in his deed to be the true content of his survey. He sleeps in security, but wakes up to find that, perhaps, the most valuable part of his property has been swept from him, without his default. It is supposed that Biddle v. Noble, 18 P. F. Smith, 279, supports the contention, that all that is required to sever a tract of unseated land for taxation, is a line actually marked on the ground. But this is a misapprehension of that case. The entire tract then was seated, in consequence of a settlement upon part. The owner sold to the settler two hundred acres where the improvement was, so as not to interfere with the claim of any other settler. It was held that in the absence of a line on the ground, made with notice to the vendor, that there was no severance, and that a sale of the remainder of the tract as unseated was void.

Judgment affirmed.

HANNA v. HOLTON.

A., owning a judgment against a solvent defendant, marked it to the use of B. as a collateral security, the latter neglected to collect it, and the defendant becoming insolvent, it was held that B. must account to A. for the loss of the judgment.

Error to the Court of Common Pleas of Chester county.

Opinion of the court by AGNEW, J Delivered May 17th, 1873.

The cases cited for the plaintiff in error, are chiefly those of sureties, where the indulgence of the creditor was purely permissive, and the surety was therefore held not to be discharged. A creditor who holds a collateral security for the protection of his debt, stands in a different relation to the assignor of the collateral, though the latter be his debtor. By the assignment, a privity in contract is established, which invests the assignee with the ownership of the collateral for all purposes of dominion over the debt assigned. He alone is empowered to receive the money to be paid upon it, and to control it in order to protect his right under the assignment. This is the ground of the creditor's liability for the collateral, as stated by Tilghman, C. J., in Lyon v. Huntingdon Bank, 12 S. & R. 68; and, also, by the court in Beale v. The Bank, 5 Watts, 530. It is therefore settled in this State, that where the collateral is lost by the insolvency of the debtor in the collateral instrument, through the supine negligence of the creditor, he must account for the loss to his own debtor, who invested him with its entire control. Miller v. Gettysburg Bank, 8 Watts, 192; Bank U. S. v. Peabody, 8 Harris, 454; Dyott's Estate, 2 W. & S. 490; Chambersburg Ins. Co. v. Smith, 1 Iowa, 120; Sellers et al. v. Jones, 10 Harris, 423; Lisky v. O'Brien, 4 Watts, 141; Morehead v. Kirkpatrick, 9 Harris, 237; Ins. Co. v. Marr, 10 Wright, 507. We perceive no error therefore in the decision of the court below, that William Hanna must account to Alexander Holton for the loss of the judgment againt Jackson Holton, by reason of his omitting to keep up its lien, and afterwards failing to proceed to collect it, until Jackson became insolvent.

This action is not founded on the loss of lien alone. That is but a circumstance, or one of the facts constituting negligence. Had the failure to revive the judgment been the only cause of the loss of the debt, as under some circumstances it might be; the six years having then elapsed, before suit, the statute of limitations would have been a bar. But the loss of the lien was not in this instance the sole cause of the loss of the debt. Jackson Holton continued solvent, and the judgment remained collectable until 1866, when Jackson sold his property, and actually received a large part of the purchase money himself. Alexander Holton's debt to Hanna was contracted in October, 1860, and he then assigned to Hanna the judgment against Jackson Holton as collateral security. The lien of the judgment expired in September, 1863. Jackson sold his farm in July, 1866, and died insolvent in 1867; Hanna, in the meantime, taking no steps to secure or to collect the judgment, which all this time stood marked to his use on the docket. It is very clear that the real injury to Alexander Holton was not consummated until Jackson sold his farm, and put the proceeds in his pocket. The cause of action then arose, and the statute then began to run. At least, this was the earliest period it could arise, and this was only four years before the commencement of the action. The statute was no bar therefore, and the judgment is therefore affirmed.

LEGAL GAZETTE.

Friday, June 6, 1873.

JOHN H. CAMPBELL, EDITOR.

THEODORE F. JENKINS, ASSOCIATE EDITOR.

CONSTITUTIONAL CONVENTION.

The Constitutional Convention is at work in earnest now. Since they have commenced the second reading of articles, they have taken up and completed the articles on Suffrage and Elections, the Executive and Legislation, all of them quite lengthy, and of the highest importance. As the third reading of the articles will not materially change them, they may now be considered as almost adopted.

The important changes in matters pertaining to Suffrage and Elections are in substance as follows:

SECT. 1. To entitle a person to vote, he must be of the male sex and twenty-one years of age, and a citizen of the United States at least one month. He must also have resided in the election district two months, and have paid a State or county tax within two years, which tax must be assessed at least two months, and paid at least one month before the election.

SECT. 2. Elections shall be by ballot. Every ballot shall be numbered, and the number recorded opposite the name of the voter. Any elector may write his name on the back of his ticket.

SECT. 5. All laws regulating elections shall be uniform throughout the State. but no elector shall be deprived of his vote by reason of not being registered.

SECT. 6. Provides specifically for cases of bribery or corrupt solicitation to vote, declaring that any person guilty of the offences enumerated shall not vote.

SECT. 7. Any candidate, guilty of violating the election laws, shall be forever disqualified from voting or holding office, and any voter convicted of such offence, shall be disfranchised for four years.

SECT. 8. In contested election cases, no person shall be permitted to withhold his testimony on the ground that it may criminate himself.

SECT. 9. The Courts of Quarter Sessions shall form the election districts, and in cities of over one hundred thousand inhabitants, must divide a district wherever the preceding election shows the polling in such district of over two hundred and fifty votes.

SECT. 11. Women shall be eligible to any office of control or management under the school laws.

SECT. 12. *Inter alia*, students do not acquire a residence at a school by reason of their attendance there.

SECT. 13. District election boards shall consist of a judge and two inspectors, to be chosen annually by the citizens, each elector to vote for two. Election officers in cities to be exempt from jury service during their term of office.

SECT. 14. No person shall be an election officer who shall have held a State or Federal office within two months of the election, excepting, only, notaries public, justices of the peace and militia officers.

SECT. 15. The county Courts of Common Pleas shall have power to appoint two overseers, of different political parties, for election districts, when five citizens of the district ask for the same. Whenever the election officers shall differ, a majority of them, and of the overseers acting together, shall decide. In appointing overseers, all the law judges of the county shall concur.

SECT. 16. The trial and determination of contested election cases of Presidential electors, members of Legislature and all public officers, shall be by the courts of law, or by one or more law judges thereof.

BAR MEETING.

DEATH OF Z. POULSON DOBSON, ESQ.

A meeting of the bar was held on Wednesday, in the Supreme Court room, at 12 o'clock, to take appropriate action in regard to the death of Z. Poulson Dobson, Esq.

The meeting was organized by calling Judge Sharswood, of the Supreme Bench, to the chair, and the appointment of Thomas J. Ashton, Esq., as secretary.

Judge Sharswood said he had known Mr. Dobson from his earliest admittance to the bar. He had been very fond of literary pursuits, and this to a certain extent had kept him in the background in legal business, yet he was known as a man of talent and intellectual culture.

James Parsons, Esq., said Mr. Dobson, almost in the heart of a great city, was a hermit. For ten years he had led the life of a literary gentleman; was of singular refinement, cultivated in the classics, with a subtle and ingenious mind. He was a storehouse of knowledge on the common law, and thoroughly posted in the most recondite points of it. He had died without having the opportunity of showing to the world the erudition and powers which were in him. Mr. Parsons offered the following resolutions:

Resolved, That the bar of Philadelphia on this solemn occasion desire to offer their testimony to the learning and worth of the deceased. His was no vulgar ambition; he aspired to identify not his name merely, but himself with the science and literature of his business. His research into the recondite part of the law exhibits the versatility of his intellect and the variety of his accomplishments. The bar, but not the student, would have reaped the reward of his labors. His fame, like his character, must rest in the memory of his contemporaries, who recall with pleasure the association which they have had with a scholar at once unpretending and erudite.

Resolved, That a committee of three be appointed by the chair to communicate to those who stand nearest to the deceased a copy of the foregoing preamble and resolution.

They were seconded in a feeling address by Thomas J. Ashton, Esq., who said Mr. Dobson was an accomplished linguist and a thorough student in the black letter law. His was a shrinking and sensitive nature, and came but little in contact with the younger members of the bar.

Addresses were made by Charles W. Beresford, Robert W. Ryerss, Samuel Dickson, and J. Warren Coulston, Esqs.

The resolutions were adopted, and a committee was appointed to convey the same to the family of the deceased, consisting of Messrs. Parsons, Campbell, and Ryerss, to which the officers of the meeting were added.

The proceedings were ordered to be published, and the meeting adjourned.

PUBLICATIONS RECEIVED.

We have received the following publications, which we will notice at length in a subsequent issue:

A TREATISE ON THE AMERICAN LAW OF LANDLORD AND TENANT. By John N. Taylor. 6th edition revised and enlarged. Boston, Little, Brown & Co., 1873.

COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES. By Joseph Story, LL.D. In two volumes. 4th edition, with notes and additions by Thomas M. Cooley. Boston, Little, Brown & Co., 1873.

NEW HAMPSHIRE REPORTS, Vol. 51. (Vol. 3, Shirley.) Concord, B. W. Sanborn & Co., 1873.

We have also received the following:

CINCINNATI SUPERIOR COURT REPORTER. Vol. 2, Nos. 8–10. Cincinnati, Robert Clarke & Co., 1873.

Supreme Court of Pennsylv'a.

THE MANHATTAN COAL CO. v. JOHN GREEN.

1. An older survey can not be changed or contradicted by the lines of a junior survey, and the latter must give way to the former.
2. If the description in a warrant be loose and vague, a survey is necessary to identify the land; the title takes effect only from the time of the survey, and a junior warrant, containing an explicit description, issued before such survey is made, has precedence.
3. A survey without a warrant is void, except the surveys allowed actual settlers under the act of April 3d, 1792.

Error to the Court of Common Pleas of Schuylkill county.

Opinion of the court by AGNEW, J. Delivered May 17th, 1873.

John Green, the plaintiff below, claimed title under a warrant in the name of Philip Myer, to one of a block of thirteen surveys made by Henry Vanderslice, D. S., on the 18th to the 25th of May, 1794. The Myer survey, as claimed to be located, embraces parts of two surveys claimed by the defendants, contained in a block of fourteen surveys made by Henry Vanderslice, D. S., on the 11th to the 18th of February, 1794; and also parts of two surveys claimed by the defendants, made by Wm. Wheeler, D. S., on the 22d of January, 1794. Neither the Myer survey, nor the four surveys claimed by the defendants, can be located by marks on the ground, applicable to them individually, but in each case the location is ascertained by the places they occupy in their respective blocks. The block surveys, however, are readily ascertained and identified by original marks, and older surveys found on the ground on the north side of the block of thirteen surveys, and on the south side of the block of fourteen surveys. As thus ascertained, there is not room between the older surveys for the whole number of surveys in each block. In this state of the case, that portion of the block of thirteen surveys, on its south side, which interferes with the northern portion of the block of fourteen surveys, must give way, the thirteen being younger in date than the fourteen. The instruction of the judge on this part of the case given in answer to the 8th, 9th and 11th points of the defendants, was correct, except in the qualification of the answer to the 8th point, as to the supposed mistake in the call upon the south side of the block of thirteen surveys. The qualification was, in effect, contradictory; for the block of thirteen being younger than the block of fourteen surveys, no mistake in the call of the former could affect the location of the latter. An older survey cannot be changed or contradicted by the lines of a junior survey. The calls of the latter, whether mistaken or true, do not limit the lines of the former. Carbon Run Improvement Co. v. Rockefeller, 1 Casey, 49; Belon v. Cleaver, 4 Wright, 260. In affirming the defandant's 11th point, the court correctly informed the jury that the proper way to locate the block of thirteen, was first to run out the older blocks for which it called, and if there was not a sufficient vacancy left to contain the whole thirteen, those of the thirteen first surveyed would be entitled to the vacant land, but in no event could any of the younger blocks exclude any of the older blocks. The fact that the Philip Myer survey called for vacant land on the south and west, or that the call of the block of thirteen for the surveys in the block of fourteen, was owing to a mistake in some way by Vanderslice, the D. S., could not affect the older block of fourteen, or carry the Myer survey within its lines. The call of Philip Myer for vacant land south and west, makes it probable the surveyor thought it extended westward past the block of fourteen, as shown in a connected draft of three blocks, (these two and the block on the north of both) but this would not justify an interference with the older surveys. The defendants were therefore entitled to an unqualified instruction that the block of fourteen surveys being previously located, none of the surveys in the younger block of thirteen could interfere with any of the former, and no mistake of the surveyor in locating, or in the calls of the thirteen, could affect the surveys in the block of fourteen. In this attitude of the case, the plaintiff was drawn to another position. He claimed that the warrant of Philip Myer was precisely descriptive of the land in controversy, and on this ground, if found in its proper location, it antedated the defendant's title, even though the location fell within the block of fourteen. This raises the question as to the description in the Myer's warrant. Descriptive warrants are of two kinds, those which are precisely descriptive, and those which are only vaguely or loosely descriptive. The former are such as to clearly describe the land that it can be readily identified and the warrant applied. These take title from their date, the subject of the purchase being defined with sufficient certainty at the time of the application. On the other hand, a vague or loose description, only ascertains propinquity, and the land must still be defined by a survey, in order to ide tify by the

subject of the purchase, and render it certain. In the latter case the title takes date only from the time of survey. Hubbey v. Van Horne, 7 S. & R. 185; Norris v. Monin, 3 Watts, 469; Patterson v. Ross, 10 Harris, 340. In Patterson v. Ross, the warrant was for 400 acres of land north and west of the rivers Ohio and Allegheny, and Conewango creek, on the west bank of Big Beaver creek, and to include the walnut bottom lying on the run that falls into said creek, nearly opposite an island between the big and little falls, by estimation one mile above the block house. The evidence on the ground readily identified the big and little falls, the island, the site of the block house and the run falling into the creek on the west side, nearly opposite the island; but the identity of the walnut bottom lying on the bottom was not clearly ascertained, the bottom along the run being large enough to admit of several tracts of 400 acres. It was held that the warrant was not precisely descriptive, and the title took date only from the time of the survey. In regard to that particular description, I think the idea of vagueness was carried to an extreme, and that probably that part of the description which required the tract to lie on the west bank of the creek, was not given in its full force. But this does not change the principles on which the case was decided, that a vague or loose description gives title only from the survey, nor does it open the force of the illustration the case affords, in determining what is a vague description.

The description contained in the Philip Myer warrant is as follows: "400 acres of land on a branch of Big Schuylkill," called "Big run," adjoining lands surveyed on a warrant granted to John Hartman, down the said creek one mile, near the Tory path in Berks county. Excepting so much of this description as locates the tract "adjoining lands surveyed on a warrant granted to John Hartman;" the entire description is very loose and vague. No land is precisely ascertained by its being on Big run. It is not said on what side of the run it lies, or whether across it. Nor is it said how near, or on what side of the Tory path it lies. "Down the creek one mile," must mean, if it mean anything, one mile down the creek from the survey of John Hartman; otherwise the fact of adjoining that survey would be, in itself, a vague description, for it is not said on what side of the Hartman survey the Myer land is to lie. The Hartman survey is, therefore, the key to the description. In Fox v. Lyon, 9 Casey, 479, it was held that a warrant to John Fox for land adjoining a survey in the name of Mordecai Massey, on the north, and land of Fowler & Co., surveyed to adjoin Mordecai Massey on the north, but lying 150 perches from the Fowler & Co. lands, was a shifted location. So in De Haas v. De Haas, 2 Yates, 317, a survey including a path, and a chief part of the land lying *westward* of it, was viewed as deviating from the call in the warrant, which was for land "adjoining the path from Mahoning to Muncy creek, *eastward* of the said path." It is evident, therefore, that the description in the Myer warrant depends for its precision wholly on that part which calls for its "adjoining lands surveyed on a warrant granted to John Hartman." Without that, "down the creek one mile" is meaningless, and the Big run and the Tory path afford no evidence of precise locality. It will be noticed that the call is not for a *survey* merely, which might send the inquirer in the land office, as the ground to search for such a monument; but it is for land surveyed on a *warrant* granted to John Hartman. This description sends the inquirer directly to the files of the land office, and there to discover no trace of such a warrant and survey existing at the date of the Philip Myer warrant, on the 27th of February, 1793. The only warrant to be found in the office, according to the evidence, in the name of John Hartman, bears date afterwards on the 3d day of August, 1793, and the survey made under it was on the 21st of August, 1793. It is very clear, therefore, that this portion of the description in the Myer warrant was notice of nothing to those who desired to take up lands in this vicinity, and was void for uncertainty. When an applicant for land is informed of an office right, and survey under it, he has the means at once, by resorting to the files of the office, of ascertaining its location, and thus of avoiding an interference with it, in making his own survey. This is all important to him, for the State does not guarantee against loss where a previous warrant holder surveys the land appropriated to an older warrant. Hence, when no search he can make will lead to information, it is clear he cannot have legal notice of the former appropriation, by such a false description. In such a case he must suffer by his false description, which leads away from notice. Nor is the fact that a survey is mentioned, to be disconnected from the statement that it was made on a warrant. A survey without warrant is void, since the proprietary government and custom have ceased to exist, excepting surveys allowed to actual settlers under the act of 3d April, 1792. Under the Penns, surveys were sometimes made without a precept, and the custom to receive them has been permitted to be proved. Woods v. Galbraith, 2 Yates, 306. But since the divesting act of 27th November, 1779, the practice has not been allowed. Burton v. Smith, 1 Rawle, 403.

The importance of notice of pre-existing rights to those who take up lands from the commonwealth, cannot be overrated, and is strongly set forth by Judge Rogers, in Roland v. Long, 1 Harris, 464, and by Judge Woodward, in Emery v. Spencer, 11 Harris, 271. Judge Rogers said that an applicant is not bound to look beyond the land office, and although a warrant may be issued and money paid, yet if there be no return of survey in the office, the title, under the previous warrant, will be good. This is not to be taken in an unqualified sense, yet it is evidence of the importance attached to the records of the land office. Any one, therefore, reading the description in the Philip Myer warrant, and then finding in the land office no such warrant as that of John Hartman referred to in it, would not be bound to look further; for there is no other place than the land office where such warrants are legally to be found. And knowing that a survey without a warrant is void, he would not be led to believe that such a survey could be meant, when the description asserts that it was made on a warrant. The result is that the description in the Philip Myer warrant, that the tract adjoined lands surveyed on a warrant to John Hartman, is nugatory, and gives the warrant no precedence over junior claimants, and the remainder of the description being vague and uncertain, the title under the warrant takes date from the time of survey. This disposes of the case, and renders it unnecessary to pass upon the other assignments of error. The question becomes one of location merely, and if, as the evidence appears to show, the block surveys are identified by marks on the ground clearly indicating their location, the block of thirteen, being younger than the block of fourteen, must give way to the latter, and the Philip Myer warrant, not being precisely descriptive, must give way, so far as it interferes with any of the surveys of the block of fourteen.

Judgment reversed, and a *venire facias de novo* awarded.

In re ROAD IN SPRINGFIELD TOWNSHIP.

All that is required in a report of road viewers, is reasonable certainty where the road shall begin and end, and that the road as laid out shall begin and end substantially at the points designated in the petition.

Certiorari to the Court of Quarter Sessions of Montgomery county.

Opinion of the court by WILLIAMS, J. Delivered May 17th, 1873.

The petition in this case defines with reasonable certainty, the points of beginning and ending of the proposed road; and in laying it out, the viewers complied substantially, if not literally, with the petition and order of view. The petition prays for a road "to begin in the Germantown and Perkiomen turnpike road, at a point where the public road leading from the Flourtown and Norristown road intersects the said turnpike road, and to and in the Wissahickon road, at a point between the corner of lands of Samuel W. Paul and Peter Struper, and the angle or curve in the said last named road, opposite the dwelling house of the said Peter Struper." The viewers laid out a road "beginning at point in the middle of the Germantown and Perkiomen turnpike road, where the same is intersected by the middle line of the road leading from the Flourtown and Norristown road," and ending at the point designated in the petition. There is no substantial variance in the point of beginning, as described in the petition and the report of the viewers. Even if the point of intersection is, as the learned judge of the Court of Quarter Sessions suggested, the outside and not the middle line of the turnpike road, the variance is immaterial. *De minimis non curat lex.* All that the law requires is reasonable certainty in defining the points where the road shall begin and end; and that the road as laid out by the viewers shall begin and end substantially at the points designated in the petition. But if mathematical exactness were required, it is by no means certain that there is any variance in the point of beginning. The viewers in laying out a road do not fix its width; nor run and mark the outside lines of the road on the ground. They run and mark but one line; the centre line of the road. The point of intersection of two roads, as laid out and marked on the ground by the viewers, is then the point where the middle or centre lines of the two roads intersects; the very point at which the viewers in this case commenced. But if this be not so, it is wholly immaterial whether they commenced at the intersection of the outside, or the middle line of the turnpike and public road.

Order setting aside the report for informality is reversed. The report is reinstated, and a *procedendo* awarded.

IN EQUITY.

BUTLER et al. v. THE CITY OF WILKESBARRE.

1. **The Legislature may delegate its power of taxation to a municipal government, to be legitimately exercised within its corporate limits.**
2. **An act authorized a municipality to require a license for carriages kept for pleasure or hire, from auctioneers, from the owners, &c., of bowling alleys and billiard tables, for the use of which pay is demanded. "And also all other places of business and amusement conducted for profit:" *Held*, the general words were to be limited to places similar to bowling alleys and billiard rooms.**
3. **Such an act would not authorize the imposition of a tax upon a merchant, banker, broker, druggist, or persons following like businesses.**
4. **An ordinance under such an act, can inflict only such penalties as the act provides.**

Appeal from the Common Pleas of Luzerne county.

Opinion by MERCUR, J. Delivered May 17th, 1873.

We cannot review the wisdom or the expediency of legislative enactments. They must violate some prohibition, expressly declared or clearly implied, of the constitution of this State or of the United States, before we can pronounce them to be unconstitutional.

Whatever power of taxation the Legislature possesses, it may delegate to a municipal government, to be legitimately exercised within its corporate limits.

The right of the Legislature to exempt certain classes of property, as well as classes of persons, from taxation, has always been recognized in this State. Thus, churches, meeting-houses, burial grounds, universities, colleges, academies, school houses, court houses and jails, have been exempted "from all and every county, road, city, borough, poor and school tax." Act of 16th April, 1838, Pur. Dig. 1368, pl. 77. So all lands granted to officers and soldiers of this State, for services in the armies of the Revolution, were exempted during the lifetime and ownership of the grantee. Act of 1st March, 1780, 1 Sm. Laws, 479. So during the late war for the suppression of the rebellion, volunteers who were in service, or who had been honorably discharged therefrom, were in many cases exempted from taxes laid to pay bounties to volunteers. Act of 14th April, 1863, P. L. 443, § 4; also, from a per capita tax. Act of 25th August, 1864, P. L. 987. In the exercise of the power of taxation, persons and things may be classified. Some classes may be taxed, other classes may be exempted. Thus, the act of April 29th, 1844, P. L. 497, imposed a State tax upon "all professions, trades and occupations, except the occu-

pation of farmers." Again, some species of property may be taxed for one purpose and not for another. "If the taxation is upon all of a class, either of persons or things," said Justice Sharswood, in Durach's Appeal, 12 P. F. Smith, 494, "it matters not whether those included in it be one or many." We are unable to see anything in the act of 2d April, 1872, which conflicts with the prohibitory clauses in the constitution, and the learned judge was correct in so holding.

The remaining question is, does the act of 2d April, 1872, support the ordinance of September 2d, 1872? We think it does not, for two reasons:.

First. The act authorizes the city authorities to require the payment, by ordinance or other general regulation, of license fees, for police purposes, from the owners or lessees of certain vehicles of burden or pleasure let for hire, or used in carrying goods or persons for pay; also, from auctioneers or other vendors of merchandise, or articles by outcry or bidding; also, from the owners, occupants or lessees of bowling alleys and billiard tables, for the use of which pay is demanded; and also of all other places of business or amusement conducted for profit. We have changed the relative position of some of the paragraphs, in order to present more clearly the different classes of persons and things subject to the payment of licenses. It will be seen they are: 1st. Persons using vehicles for certain purposes. 2d. Persons pursuing their occupation in a particuliar manner. 3d. Persons keeping for pay, certain places of amusement. The act specifically designating "bowling alleys and billiard tables" only. Then follows the clause: also, all other places of business or amusement conducted for profit" under this, the ordinance in question, has imposed license fees or taxes upon merchants, bankers, brewers, druggists, hotel keepers, and upon persons engaged in many other branches of industry, some of whom have filed this bill. We do not think the act is broad enough to cover these clauses. They are not within its scope and spirit. If the design of the law had been to impose this tax upon every person engaged in carrying on any branch of industry in the city, more certain and specific language would have been used. The fair import of the words used, taken in connection with the kind of property specifically designated and charged is, that "the other places of business or amusements," should be of purpose and character similar to bowling alleys and billiard tables. The ordinance therefore should have been so limited. Such we conceive being the true intent and meaning of the act, the ordinance has no basis upon which to rest, and is necessarily invalid.

Secondly. The penalties imposed by section six of said ordinance, for a failure to pay the license fee, cannot be sustained by authority, nor by sound reason. The ordinance makes no provision for the collection thereof, either by the recovery of a judgment and execution thereon, or by warrant of distress. It gives no authority to levy upon, seize or sell the property of the delinquent for its collection. In case of a failure or neglect to pay, and to procure the proper license within ten days after notice from the mayor, of the amount of the license fee required, it provides only for the imposition of a fine not exceeding one hundred dollars, and of imprisonment not exceeding thirty days, or either, at the discretion of the mayor. Thus, not only without any effort to collect the license fee out of the property of the delinquent, but, also, without the issuing of any process to collect the fine imposed, he may be incarcerated in prison. If the unfortunate citizen has permitted the ten days to run past without paying his license, the ordinance closes upon him; no alternative writ issues against him; his offence has been consummated; no payment will save him from prison.

There is nothing in the act of Assembly authorizing the imposition of such a sentence, without an indictment, and without a trial by jury. No authority was cited, no precedent has been found to warrant such action, or to sustain such a proceeding under any similar grant of power. Except for contempt, a trial by jury should precede a sentence to imprisonment.

Holding, then, that the ordinance is unwarranted by the statute, its enforcement should be enjoined; the decree must be reversed, and the relief asked for in the bill be granted.

And now, to wit: May 17th, 1873, this cause having come up by appeal from the decree of the Court of Common Pleas of Luzerne county, dissolving the injunction which it had previously granted, and dismissing the appellant's bill, and having been argued by counsel at Philadelphia; after due consideration thereof, it was ordered adjudged, and decreed as follows, to wit: That the said decree of the Common Pleas be reversed and set aside; and that the said defendant be restrained from proceeding to enforce the payment of the sums of money claimed to have been assessed upon said plaintiffs respectively, as a special tax or license fee, to enable them to prosecute their business in the city of Wilkesbarre; and it is further ordered, that the appellee pay the costs.

BOWER v. McCORMICK.

1. When a plaintiff's demand is over one hundred dollars, he cannot remit a portion, and bring his case within the jurisdiction of a justice of the peace.
2. If the plaintiff's demand has been reduced to a sum under one hundred dollars by actual payments, or dealings amounting thereto, a justice has jurisdiction.

Error to the Court of Common Pleas of Lycoming county.

Opinion of the court by AGNEW, J. Delivered May 17th, 1873.

The cases upon the subject of the jurisdiction of justices of the peace, under the act of 1810, when the demand of the plaintiff is reduced by his own abatement below $100, are not wholly free from inconsistency. It seems to be taken for granted in the earlier cases, that a plaintiff can remit a part of his claim, and thereby confer jurisdiction. In Darragh v. Warnock, 1 Penn'a, 21, where a verdict was rendered for $114.99, within six months after the judgment by the justice, this court said: "A plaintiff may, undoubtedly, remit a part of his demand to bring the residue within the jurisdiction of a justice." The counsel, on hearing the opinion, remitted the excess of the verdict at bar, and the court affirmed the judgment. In Cleaden v. Yeates, 5 Wharton, 94, it was said *per curiam:* "It never has been doubted that a plaintiff may reduce his demand to the standard of a limited jurisdiction by lopping off the excess." A stronger case, perhaps, is Hoffman v. Dawson, 1 Jones, 280. The plaintiff's book account was for $410, on which there were credits to the sum of $310.50, and the demand before the justice was $99.50, This court supported the jurisdiction, on the ground that the actual demand was under $100.

On the other hand, in Stroh v. Ulrich, 1 W. & S. 57, it was decided in very strong terms, that a party cannot confer jurisdiction by giving a credit of $170, of which $100 was on a note or counter-claim. To the same effect is Collins v. Collins, 1 Wright, 387. Woodward, J., there remarked: "If it appear that the plaintiff's demand really exceeded $100, and that he involved the justice in litigation beyond his jurisdiction, by omitting the excess, it is of importance to declare against the jurisdiction, else the defendant's rights may be sacrificed before he is aware of it, as was shown by Judge Rogers, in Stroh v. Ulrich." Perhaps the best statement of the result of the authorities is that made by Justice Woodward in that case, that when the plaintiff's claim is reduced below $100, by direct payments, or dealings which amount to or are admitted to be actual payments, the justice has jurisdiction, but where the claim is not thus reduced by payment, jurisdiction cannot be given by merely remitting a part. And in Evans v. Hall, 9 Wright, 235, Justice Thompson, while holding that interest may be waived, because it is a mere incident, states that no part of the principal can be thrown away in order to give jurisdiction.

Reliance was placed upon these cases in the argument, yet while some analogies may be drawn from them, it is not very clear that they are conclusive as precedents for the case now before us. Here the action was trover for logs claimed by the plaintiff. The act of 1814, giving jurisdiction to justices in trespass and trover, confers it "in all cases where the value of the property claimed, or the damages alleged to be sustained, shall not exceed $100. As the value of goods is a thing having no fixed standard, and depending on circumstances and opinion, it is not easy to see why a plaintiff may not generally fix the value upon his own belief, and ask to recover thereby. If he claim less than others would say is the value, no one is injured but himself. He does not thereby involve the justice in the settlement of demands beyond his jurisdiction, as in Collins v. Collins. Had the plaintiff in this case stated his claim absolutely at the sum of $99.86, without a deduction, it would be difficult to convict the learned judge of error in leaving it to the jury to say whether the plaintiff's demand was made in good faith, and not merely to give jurisdiction. Though the value might seem to be greater, yet an absolute demand, without deduction, for less than $100, may be really in good faith, allowing for the state of the property, the attending circumstances, and the difference of opinions, or other causes influencing the question of value. But in this case the demand was stated on the docket of the justice in these words: "Plaintiff claims the value of one hundred and seven saw logs, measuring twenty thousand three hundred and ten feet, board measure, at $6 per thousand, from which he deducts $22, leaving a balance now claimed of $99.86." Certainly on its face this wears the appearance of a premeditated remission to give jurisdiction. It is not an actual credit, but a mere deduction, without a reason given at the time, or on the trial, why the deduction was made. So far as the evidence discloses, it was a mere throwing off of a part of the value. The logs, at the rate stated by the plaintiff, would have brought $121.86. What makes the case stronger against the plaintiff is, that he testified at the trial that the logs were worth more than he claimed before the justice. In a question of value depending on good faith, we might hesitate to reverse, after a finding of the jury of a sum within the justice's jurisdiction. But we are precluded from even this concession to good faith by the binding instruction of the judge to the jury, that they could not allow more than $100. This left the jury in uncertainty. They could not find a sum over $100, for the instruction not to do so was absolute and unqualified; and they could not find for the defendant, if the evidence showed that the plaintiff was entitled to recover. Their only escape was a special verdict, had their ingenuity taught them to perceive it, in which they should find the plaintiff's demand over $100; but for that reason they find for the defendant, on the ground of a want of jurisdiction. In view of the statement of the demand in the transcript, and of the evidence in the case, it seems to us the plaintiff's true demand, as measured by the value of the logs, exceeded $100, and, therefore, that the court erred in submitting the question of jurisdiction in the manner it was submitted to the jury. The verdict itself, shows plainly that the jury, to escape a finding according to actual value, and to keep within the jurisdiction, found precisely the $99.86 stated in the transcript, with interest to the time of the verdict.

Judgment reversed.

WORMAN et al. v. KRAMER.

1. A sale of personal property in the hands of a bailee is good against an execution creditor, though there be no actual delivery, if the vendor do not retake the possession.
2. The mere subsequent employment of the vendor to use the goods, will not in itself stamp the character of a legal fraud upon the sale, if the property were really kept in an open and notorious manner by a third party as bailee.
3. Such an employment of the vendor may raise a question of fact whether or not his possession be concurrent with the bailee, and therefore a fraud in law.

Error to the Court of Common Pleas of Lehigh county.

Opinion of the court by AGNEW, J. Delivered May 17th, 1873.

This case was tried below on the grounds of fraud in law and fraud in fact, and in the argument the facts bearing on each branch have been somewhat blended. Fraud in law in this case, had relation to a retainer, or a concurrent possession, and not to the intent to hinder and delay creditors, which enters into the question of

fraud in fact. It is only by separating the evidence bearing distinctly upon each ground, that we can judge properly of the correctness of the judge's charge. Looking at his charge in this light, we do not discover any good reason to complain of it, except in two respects, which shall be noticed.

On the question of fraud in law, one fact of importance must not be overlooked, to wit, that the actual possession of the property appears to have been in the bailee of Kramer. The coach and horses were kept at Keim and Einstein's livery stable, and on the day of the sale to Kramer he bargained with Einstein to keep the coach, and the horses at hay, at $1.50 per week. In Linton v. Batz, 7 Barr, 89, it was held that a sale of personal property in the hands of a bailee is good against an execution creditor, though there be no actual delivery, if the vendor do not retake the possession. We cannot say, therefore, that there was error in that part of the charge set out in the first assignment of error; read as it must be, with the sentences immediately preceding and succeeding, in which it was left to the jury to say whether there had been an open, visible and notorious transfer of the possession. The mere employment of Beckenstock afterwards as a driver, would not, in itself, stamp the character of a legal fraud upon the sale, if the property was really kept by a third party, as bailee of Kramer, in an open and notorious manner. The facts were for the jury, as to how the coach and horses were kept and for whom; and whether Beckenstock returned into such an immediate and visible possession, as deprived the transaction of that open and notorious character, which would fairly indicate to the public an actual transfer of the possession at the time, and following the sale.

The evidence in this case did raise a serious question as to the openness and the visible character of the possession. The intimate relations Beckenstock sustained to the property, after the sale, raised a question of fact, whether his possession was not, at least, concurrent with that of Kramer, and the defendants were, therefore, entitled to full and clear instructions on that point. In this part of the case the learned judge fell into an error, by his qualification of the instruction, that a concurrent possession exists only where the person in actual possession of the property has some interest in it as a part owner. There was no question as to a part ownership, either as tenants in common or as partners. The sale was out and out, and the question was only upon the possession. The defendants alleged that the possession of the coach and horses, was, at least, mixed or concurrent between Kramer and Beckenstock, and if so, it was insufficient to indicate an open and complete transfer of the possession, and in this view they were entitled to an answer which would not mislead. The concurrent possession alleged, was such as that spoken of by Judge Strong in Brown v. Keller, 7 Wright, 104, where the control and use of the property by the vendor and vendee, were so confused and mixed, as to leave the question of possession uncertain. If that were the kind here, the defendants were entitled to an instruction that the transfer of possession was not such as to protect the sale, no matter how honest and fair. But when the judge defined, a concurrent possession to be one only where there is a part ownership of the property, he narrowed the instruction to the prejudice of the defendants. There was no evidence of a tenancy, either joint or in common, and the jury were, therefore, led away from what was meant by a concurrent possession; that is to say, a mixed or uncertain possession, apparently as much in one as in the other.

We think he erred, also, in refusing to give the defendants any benefit from the offered return of the brown horse, bought by Kramer of Snyder. If, as the evidence tended to show, the constable, after he found he had made a mistake in levying on the horse, as the property of Beckenstock, offered to return him to Kramer, who refused to take him, and the former then returned him to the stable, whence he took him, with notice to, or the knowledge of Kramer, it went in mitigation of damages. It might not atone for the trespass, in the taking, but if the horse were offered back, in as good plight as when taken, and in a reasonable time, clearly it was the duty of Kramer to receive him, unless he could show a good reason for not doing so. For these reasons the judgment is reversed, and a *venire facias de novo* is awarded.

SHERIFF'S SALES.

The following are the prices obtained for the properties sold at Sheriff's sale on Monday last.

John Chipman. $50
Timothy D. Crowley. 5,050
Isaac Heister. 5950
Eli H. Ashton. 5,100
Eli H. Ashton. 4,700
Wm. R. Matchett. 550
John Alex. Simpson. No. 1, $500. No. 2. 500
Louis R. Hibberd. No. 1, $100. No. 2, 510. No. 3. 250
Wm. Sweeney. 1,900
Levi H. Glisson. 1,400
Thomas Brown. 25
Edward Shields. 50
Amor Walton. 50
Wm. Senneff. 50
Wm. M. Stewart. 50
Chas. B. Roberts. No. 1, $200. No. 2, 200. No. 3, 150. No. 4. 200
Henry W. Black. No. 1, $8,200. No. 2, 6,000. No. 3. 1,000
Louis J. Wolf, owner, Thos. Donohue, contractor. 3,500
Solomon Wagner. No. 1, $4,650. No. 2. 4,500
John McGinnis. 1,025
Chas. H. Wilbank. 3,000
John G. Williams. No. 1, $310. No. 2, 15. No. 3, 110. No. 4, 75. No. 5, 60. No. 6, 80. No. 7, 15. No. 8, 100. No. 9. 40
Sam'l S. Green. No. 1, $1,050. No. 2, 1,050. No. 3, 800. No. 4. 800
Wm. H. Gesner. No. 6. 3,100
Archibald Dillon. 1,700
John G. Fleck. Nos. 1 & 3. 2,000
James M. Keenan. No. 1, $4,600. No. 2. 4,600
Edward Hughes. 7,000
Edward Hughes. 8,500
Edward Hughes. No. 1, $10,200. No. 2, 9,800
Howard Banes. 2,600
John Savage. 10
Veron Fletcher. 2,800
Jacob Moyer. No. 1, $1,000. No. 2. 300
John S. Greenawalt. No. 1, $25. No. 2. 5
Thos. Cunningham. 300
Michael Darcy. 525
Jacob Leonard. 50
Nicholas Quering. 3,200
Lawrence Kelley and Michael Eagin. 1,600
Matthew H. Kollock and Wife. 2,050
Jesse Ford, 1,400
Lewis Mayers. No. 1, $950. No. 2, 50. No. 3. 100
Gregg W. Reynolds. 50
Titus S. Emery. No 1. 5,300
John S. Greenawalt. No. 1, $40. No. 2, 40. No. 3, 40. No. 4. 40
Nathaniel Ledyard. 500
John & Thomas E. Williams. No. 1, $50. No. 2, 50. No. 3, 20. No. 4, 15. No. 5, 5. No 6. 5
Andrew Mowbray. No. 1, $500. No. 2, 500
Andrew McFarland. 2,075
Archibald Barron and Joel R. Leidy. No. 1, $3,300. No. 2, 2,500. No. 3, 2,650 No. 4. 2,600
Michael Deginther. 200
John Anderson and Isaac H. Griffiths. 25
Francis A. Abbott. 30
Edward E. Jones. No. 1, $300. No. 2. 40
Edward Hughes. 7,000
Chas. S. M. Leslie. No. 1, $3,000. No. 2, 2,500. No. 3, 2,400. No. 4. 2,450
Adam Schmunk. 1,100
Fonrose Millett. 3,000
John H. Yeager. 30
Edwin Ratsnyder. 1,100
Alfred Pharazyn. 2,600
Edwin M. Clements. No. 1, $2,700. No. 2, 2,300. No. 3, 2,100
Robert F. Christy. 325
Michael Delaney. 25
Alex. Nicholson. 100
Robert J. Mercer and Wife. 5,700
Christian Freyer. No. 1, $425. No. 2, 375
John Bateson. 300
Robt. B. Long. 775
Frank W. Newbold. 300
David D. King and Wife. 1,200
Jacob S. Frederick 2,300
Anna Mapother and others. 6,000
Wm. Crawford. 750
Solomon S. Williams. No. 1, $200. No. 2. 275
Wm. H. Neller, Jr. 2,800
Adam B. Ehresman. 2,300
John B. Rue. 2,100
John G. Williams. No. 1, $125. No. 2. 125
John L. Wiemer. 1,125
David C. Richardson. 500
Wm. Houck. 50
F. Frank and N. Lentz. 100
Wm. J. Bell. No. 1, $300. No. 2, 100. No. 3, 25. No. 4, 40. No. 5, 25. No. 6, 25
Joseph G. Wills. 1,600
Joseph G. Wills. 1,800
Joseph G. Wills. 1,600
Joseph G. Wills. 1,600
John Lauck. 4,000
Geo. W. Taylor. No. 1, $500. No. 2. 100
Geo. Adam Klenk. 500
John W. Ware. 20
Dan'l Hertz. 300
Wm. A. K. Smith. 1,925
Frederick Haas. 50
Jas. C. McCurdy. No. 1, $50. No. 2. 50
Henry T. Grout. 300
Arthur Stewart. 75

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in June, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

April 26, The Penna. Life Ins. Co., &c., Executors of THOMAS D. NANCREDE, dec'd.
" 26, Edward G. Lee, Administrator of SAMUEL BROWN, dec'd.
" 28, Mary Dillon, Administratrix of JOHN A. DILLON, dec'd.
" 29, Mary McGuigan, Administratrix of TERRENCE McGUIGAN, dec'd.
" 29, David Teller, Administrator of GEO. KONECKE, dec'd.
" 29, Charles H. Martin, Administrator c. t. a. of EMMA MARTIN, dec'd.
" 30, Hugh Fitzpatrick, Executor of JAMES & MARGARET WELSH, dec'd.
" 30, William F. Milligan, Administrator of GEORGE A. MILLIGAN, deceased.
" 30, S. Weir Lewis, Guardian of JOHN BARCLAY, late minor.
" 30, Thos. Cadwallader, Executor and Trustee of the last will and testament of JAMES HAMILTON, deceased.

May 2, Edward Ingersoll, Executor of ELIZABETH J. FISHER, dec'd.
" 2, Ann Maria Sharpless, Executrix of JOSEPH J. SHARPLESS, dec'd.
" 2, Geo. Brooke, Administrator d. b. n. c. t. a. of STEPHEN BALDWIN, dec'd.
" 2, Thomas Smith et al., Trustees under the will of EDWARD SMITH, deceased.
" 6, William Anson et al., Executors of JOHN ANSON, dec'd.
" 6, William Brown et al., Executors of MARY SINCLAIR, dec'd
" 7, Peter W. Hall, Executor of MARY P. FLEETWOOD, dec'd.
" 7, William Francis, Administrator of ELLEN WHITMAN, dec'd.
" 9, R. C. McMurtrie, Administrator of FREDERICK OSWALD BOHLEN, dec'd.
" 10, John F. Orne, Administrator of ELIZA J. McWATTERS, dec'd.
" 12, Rhoda M. Levy, Executrix of FELIX H. LEVY, dec'd.
" 13, Robert Scott, Surviving Executor of WILLIAM WHITE, dec'd.
" 13, Susannah Biggs, Administratrix of SARAH B. SCHULTZ, late INGLES, dec'd.
" 13, Robert McNairy et al., Executors of JOHN NEITHERCOT, dec'd.
" 13, Robert Scott, Administrator of ELEANORA WHITE, dec'd.
" 13, Nancy M. Grigg, Administratrix of JOHN GRIGG, dec'd.
" 14, Watson Comly, Executor of CYNTHIA GREEN, dec'd.
" 14, Andreas Hardel, Administrator of JOSEPH RIPKA, dec'd.
" 14, Andreas Hartel, Administrator of ALFRED RIPKA, dec'd.
" 14, William M. Thomas et al., Executors of SAMUEL THOMAS, dec'd.
" 15, Martha Dillon, Administratrix of EDWARD DILLON, dec'd.
" 15, George A. Twibill, Administrator of JOHN DENNING, dec'd.
" 15, James McCann, Guardian of ELLEN QUINN, otherwise known as ELLEN FOLEY, dec'd.
" 15, John C. Stockton, Administrator of ANN L. NANCREDE, dec'd.
" 19, Thomas Holt, Executor of SUSANNAH BOOTH, dec'd.
" 19, The Philada. Trust, Safe Deposit Co., &c., Administrators c. t. a. of GEO. LEYENBERGER, dec'd.
May 19, Geo. W. Steever et al., Executors and Trustees under the will of ROBERT S. JOHNSON, dec'd.
" 19, Philip H. Brice et al., Guardians of EMILY LE FOLL (formerly MERCER).
" 20, Solomon Rothschild, Guardian of FLORA ARNOLD, minor.
" 20, Solomon Rothschild, Guardian of LEON ARNOLD, minor.
" 20, William Myers, Administrator c. t. a. of GERHARD GRAEVE, dec'd.
" 20, Edmund Carpenter et al., Executors of MARY LINCOLN, dec'd.
" 21, Adolph Fischer, Administrator c. t. a. of CHRISTIANA FISCHER (formerly ELLWANGER), dec'd.
" 22, Lucinda E. Leu, Administratrix of GEORGE H. LEU, dec'd, as filed by William G. Stocker et al., Executors of LUCINDA E. LEU, deceased.
" 22, Samuel C. Brinckle, M. D., Guardian of JOHN C. MILLER, dec'd.
" 23, Philip M. Wheaton, Executor of SILAS WHEATON, dec'd.
" 23, William W. Ball et al., Executors of SARAH GRAHAM, dec'd.
" 23, Hannah L. Heaton et al., Executors of JOSEPH HEATON, dec'd.
" 23, Mary Ann Levy et al., Executors of JOHN P. LEVY, dec'd.
" 24, Susan N. Streper, Administratrix of OTTINGER G. STREPER, dec'd.
" 24, Benjamin J. Douglass, Executor and Trustee under the will of RICHARD H. DOUGLASS, dec'd.
" 26, William Yonker, Guardian of MARIA T. S. WILSON, late minor.
" 26, Sarah C. Bangs, Executrix of WM. P. BANGS, dec'd.
" 26, James W. Carson, Guardian of MILLARD F. LOGAN, minor.
" 26, Thomas Smith et al., Trustees under the will of CHAS. J. ADAMS, deceased.
" 26, Anthony Groves, Jr., Administrator of WILLIAM M. GROVES, dec'd.
" 26, Alfred Smith, Guardian of WILLIAM C. SMITH, late minor.
" 28, Howard Kirk et al., Administrators of HIRAM G. COOPER, dec'd.
" 28, James Johnson et al., Executors of PATRICK GIBSON, dec'd.
" 28, Edward S. Campbell, Executor of SUSANNA E. LEIDY, dec'd.
" 28, Edward E. Wallace, Administrator c. t. a. of JOSEPH K. VANDEGRIFT, dec'd.
" 28, Ellen Emery, Administratrix of DAVIS EMERY, dec'd,
" 28, Caroline Vendig et al., Administrators of RAPHAEL VENDIG, deceased.
" 28, Henry Gormley et al., Executors, &c., of JOHN GORMLEY, dec'd.
" 28, James F. C. Sickle, Administrator c. t. a. of WILLIAM CRISPIN, deceased.
" 28, Jas. H. Grier, Administrator of JANE K. ROSS, dec'd.
" 29, Jane B. Colahan, Guardian of JOHN J. O'DONNELL, minor.
" 29, Bridget Curry, Administratrix of EDWARD CURRY, dec'd.
" 29, Caroline E. Smith et al., Executors of ISAAC R. SMITH, dec'd.
" 29, Caroline Clark, Administratrix of MARY or MARIA THOMAS, deceased.
" 29, Jane G. Stanhope et al., Executors of HIRAM STANHOPE, dec'd.
" 29, Frank S. Crouse, Administrator of MARY J. KROUSE, dec'd.
" 29, John L. Shoemaker et al., Executors of GEORGE W. WIMLEY, M. D., deceased.
" 29, George W. Hall, Executor of GUSTAVUS H. KREEGER, M. D., deceased.
" 29, John B. Kelley, Executor of SARAH HARDIMAN, dec'd.
" 29, Sarah R. Scattergood, Executrix of JOSEPH R. SCATTERGOOD, deceased.
" 29, Joseph Campbell, Guardian of MARY FOSTER, minor.
" 29, John Ashbridge, Guardian of ELLEN A. STEPHENSON, late HARWOOD, minor.
" 29, John Ashbridge, Guardian of MARTHA FLORENCE WEED, late a minor.
" 29, James V. Watson, Administrator of ELIZABETH WATSON, dec'd.
" 29, Franklin Smith et al., Executors of JOHN M. SMITH, dec'd.
" 29, Francis E. Seal et al., Executors of BENJAMIN SEAL, dec'd.

WILLIAM M. BUNN,
May 30-4t Register.

Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, JUNE 13, 1873. No. 24.

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Supreme Court United States.

BUTCHERS' BENEVOLENT ASSOCIATION OF NEW ORLEANS, v. THE CRESCENT CITY LIVE-STOCK LANDING AND SLAUGHTER-HOUSE COMPANY.

RUCH et al., THE LIVE STOCK DEALERS' AND BUTCHERS' ASSOCIATION OF NEW ORLEANS, and CHARLES CAVAROC v. THE STATE OF LOUISIANA.

THE BUTCHERS' BENEVOLENT ASSOCIATION OF NEW ORLEANS v. THE CRESCENT CITY LIVE-STOCK LANDING, AND SLAUGHTER-HOUSE COMPANY.

1. The jurisdiction and duty of the Supreme Court of the United States to review a judgment of the highest court of a State violating the thirteenth or fourteenth amendment to the Constitution of the United States, is clear and imperative.
2. Matters of police regulation are within the exclusive control of the States respectively.
3. Wherever a Legislature has the right to accomplish a certain result, it has a right to create a corporation and endow it with the powers necessary to effect the purpose desired.
4. The Supreme Court of the United States cannot review a decision of a State Court as to the construction of the constitution of that State.
5. The only design of the thirteenth, fourteenth, and fifteenth amendments of the Constitution of the United States, was the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. They forbid slavery in any form, or of any race, but have no immediate relation to the rights of property.
6. By the fourteenth amendment, a person may be a citizen of the United States without being a citizen of a State. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born in the United States and under its jurisdiction, or to be naturalized, to be a citizen of the Union. He can of his own volition, by a *bona fide* residence therein, become a citizen of any State of the Union, with the same rights as other citizens of that State
7. Privileges and immunities of citizens of the United States, distinguished from those of citizens of a State.
8. An act of a Legislature conferring a monopoly upon a corporation, for the better effecting a police regulation, and to which all the citizens of the State are subject, is not contrary to the United States Constitution, or its amendments.

In error to the Supreme Court of the State of Louisiana.

Mr. Justice MILLER delivered the opinion of the court.

These cases are brought here by writs of error to the Supreme Court of the State of Louisiana.

They arise out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing and Slaughter-house Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the Legislature of that State.

The cases named above, with others which have been brought here and dismissed by agreement, were all decided by the Supreme Court of Louisiana in favor of the slaughter-house company, as we shall hereafter call it, for the sake of brevity, and these writs are brought to reverse those decisions.

The records were filed in this court in 1870, and were argued before it at length on a motion made by plaintiffs in error for an order in the nature of an injunction or supersedeas, pending the action of the court on the merits. The opinion on that motion is reported in 10 Wallace, 273.

On account of the importance of the questions involved in these cases, they were, by permission of the court, taken up out of their order on the docket, and argued in January, 1872. At that hearing one of the justices was absent, and it was found, on consultation, that there was a diversity of views among those who were present. Impressed with the gravity of the questions raised in the argument, the court, under these circumstances, ordered that the cases be placed on the calendar and reargued before a full bench. This argument was had early in February last.

Preliminary to the consideration of those questions is a motion by the defendant to dismiss the cases, on the ground that the contest between the parties has been adjusted by an agreement made since the records came into this court, and that part of that agreement is that these writs should be dismissed. This motion was heard with the argument on the merits, and was much pressed by counsel. It is supported by affidavits and by copies of the written agreement relied on. It is sufficient to say of these that we do not find in them satisfactory evidence that the agreement is binding upon all the parties to the record who are named as plaintiffs in the several writs of error, and that there are parties now before the court, in each of the three cases at the head of this opinion, who have not consented to their dismissal, and who are not bound by the action of those who have so consented. They have a right to be heard, and the motion to dismiss cannot prevail.

The records show that the plaintiffs in error relied upon, and asserted throughout the entire course of the litigation in the State courts that the grant of privileges in the charter of defendant, which they were contesting, was a violation of the most important provisions of the thirteenth and fourteenth articles of amendment of the Constitution of the United States. The jurisdiction and the duty of this court to review the judgment of the State court on those questions is clear and is imperative.

The statute thus assailed as unconstitutional was passed March 8th, 1869, and is entitled "An act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-stock Landing and Slaughter-house Company."

The first section forbids the landing or slaughtering of animals whose flesh is intended for food within the city of New Orleans and other parishes and boundaries named and defined, or the keeping or establishing any slaughter-houses or *abbatoirs* within those limits except by the corporation thereby created, which is also limited to certain places afterwards mentioned. Suitable penalties are enacted for violations of this prohibition.

The second section designates the corporators, gives the name to the corporation, and confers on it the usual corporate powers.

The third and fourth sections authorize the company to establish and erect within certain territorial limits, therein defined, one or more stock-yards, stock-landings, and slaughter-houses, and imposes upon it the duty of erecting, on or before the first day of June, 1869, one grand slaughter-house of sufficient capacity for slaughtering five hundred animals per day.

It declares that the company, after it shall have prepared all the necessary buildings, yards, and other conveniences for that purpose, shall have the sole and exclusive privilege of conducting and carrying on the live-stock, landing, and slaughter-house business within the limits and privileges granted by the act, and that all such animals shall be landed at the stock-landings, and slaughtered at the slaughter-houses of the company, and nowhere else. Penalties are enacted for infractions of this provision, and prices fixed for the maximum charges of the company for each steamboat and for each animal landed.

Section five orders the closing up of all other stock-landings and slaughter-houses after the first day of June, in the parishes of Orleans, Jefferson, and St. Bernard, and makes it the duty of the company to permit any person to slaughter animals in their slaughter-houses, under a heavy penalty for each refusal. Another section fixes a limit to the charges to be made by the company for each animal so slaughtered in their building, and another provides for an inspection of all animals intended to be so slaughtered, by an officer appointed by the governor of the State for that purpose.

These are the principal features of the statute, and are all that have any bearing upon the questions to be decided by us.

This statute is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meritorious class of citizens—the whole of the butchers of the city—of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families; and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city.

But a critical examination of the act hardly justifies these assertions.

It is true that it grants, for a period of twenty-five years, exclusive privileges. And whether those privileges are at the expense of the community in the sense of a curtailment of any of their fundamental rights, or even in the sense of doing them an injury, is a question open to considerations to be hereafter stated. But it is not true that it deprives the butchers of the right to exercise their trade, or imposes upon them any restriction incompatible with its successful pursuit, or furnishing the people of the city with the necessary daily supply of animal food.

The act divides itself into two main grants of privilege—the one in reference to stock-landings and stock-yards, and the other to slaughter-houses. That the landing of live-stock in large droves, from steamboats on the bank of the river, and from railroad trains, should, for the safety and comfort of the people and care of the animals, be limited to proper places, and those not numerous, needs no argument to prove it. Nor can it be injurious to the general community that while the duty of making ample preparation for this is imposed upon a few men, or a corporation, they should, to enable them to do it successfully, have the exclusive right of providing such landing places, and receiving a fair compensation for the service.

It is, however, the slaughter-house privilege which is mainly relied on to justify the charge of gross injustice to the public, and invasion of private right.

It is not, and it cannot be successfully controverted, that it is both the right and the duty of the legislative body—the supreme power of the State or the municipality—to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. To do this effectively it is indispensable that all persons who slaughter animals for food shall do it in those places *and nowhere else.*

The statute under consideration defines these localities, and forbids slaughtering in any other. It does not, as has been

asserted, prevent the butcher from doing his own slaughtering. On the contrary, the slaughter-house company is required, under a heavy penalty, to permit any person who wishes to do so, to slaughter in their houses; and they are bound to make ample provision for the convenience of all the slaughtering for the entire city. The butcher, then, is still permitted to slaughter, to prepare, and to sell his own meats; but he is required to slaughter at a specified place, and to pay a reasonable compensation for the use of the accommodations furnished him at that place.

The wisdom of the monopoly granted by the Legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit.

The power here exercised by the Legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may *now* be questioned in some of its details.

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent 2 Commentaries, 340, "be interdicted by law in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbor's; and that private interests must be made subservient to the general interests of the community." This is called the police power, and it is declared by Chief Justice Shaw, that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise. Commonwealth v. Alger, 7 Cushing, 84.

This power is, and must be, from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. "It extends," says another eminent judge, "to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; * * * and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the Legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned." Thorpe v. Rutland and Burlington R. R. Co., 27 Vermont R. 149.

The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power. It is not, therefore, needed that we should seek for a comprehensive definition, but rather look for the proper source of its exercise.

In Gibbons v. Ogden, 9 Wheaton, 203, Chief Justice Marshall, speaking of the inspection laws passed by the States, says: "They form a portion of that immense mass of legislation which controls everything within the territory of a State not surrendered to the general government—all which can be most advantageously administered by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts. No direct general power over these objects is granted to Congress; and consequently they remain subject to State legislation."

The exclusive authority of State legislation over this subject is strikingly illustrated in the case of the City of New York v. Miln, 11 Pet. 102. In that case the defendant was prosecuted for failing to comply with the statute of New York, which required of every master of a vessel arriving from a foreign port, in that of New York city, to report the names of all his passengers, with certain particulars of their age, occupation, last place of settlement, and place of their birth. It was argued that this act was an invasion of the exclusive right of Congress to regulate commerce. And it cannot be denied that such a statute operated at least indirectly upon the commercial intercourse between the citizens of the United States and of foreign countries. But notwithstanding this, it was held to be an exercise of the police power, properly within the control of the State, and unaffected by the clause of the Constitution, which conferred on Congress the right to regulate commerce.

To the same purpose are the recent cases of The License Tax, 5 Wall. 741, and United States v. DeWitt, 9 Wall. 41. In the latter case, an act of Congress which undertook as a part of the internal revenue laws, to make it a misdemeanor to mix for sale naptha and illuminating oils, or to sell oil of petroleum inflammable at less than a prescribed temperature, was held to be void, because, as a police regulation, the power to make such a law belonged to the States, and did not belong to Congress.

It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city, the noxious slaughter-houses, and large and offensive collection of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health, and comfort of the people require they shall be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent, and effectual. But it is said that in creating a corporation for this purpose, and conferring upon it exclusive privileges—privileges which it is said constitute a monopoly—the Legislature has exceeded its power. If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation and on the public would have been the same as it is now. Why cannot the Legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing? That wherever a Legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the powers necessary to effect the desired and lawful purpose, seems hardly to admit of debate. The position is ably discussed and affirmed in the case of McCulloch v. The State of Maryland, 4 Wheaton, 316, in relation to the power of Congress to organize the Bank of the United States to aid in the fiscal operations of the government.

It can readily be seen that the interested vigilance of the corporation created by the Louisiana Legislature will be more efficient in enforcing the limitation prescribed for the stock-landing and slaughtering business for the good of the city, than the ordinary efforts of the officers of the law.

Unless, therefore, it can be maintained that the exclusive privilege granted by this charter to the corporation is beyond the power of the Legislature of Louisiana, there can be no just exception to the validity of the statute. And in this respect we are not able to see that these privileges are especially odious or objectionable. The duty imposed as a consideration for the privilege is well defined, and its enforcement well guarded. The prices or charges to be made by the company are limited by the statute, and we are not advised that they are on the whole exorbitant or unjust.

The proposition is, therefore, reduced to these terms: Can any exclusive privileges be granted to any of its citizens, or to a corporation, by the Legislature of a State?

The eminent and learned counsel who has twice argued the negative of this question, has displayed a research into the history of monopolies in England, and the European continent, only equalled by the eloquence with which they are denounced.

But it is to be observed that all such references are to monopolies established by the monarch in derogation of the rights of his subjects, or arise out of transactions in which the people were unrepresented, and their interests uncared for. The great case of The Monopolies, reported by Coke, and so fully stated in the brief, was undoubtedly a contest of the commons against the monarch. The decision is based upon the ground that it was against common law, and the argument was aimed at the unlawful assumption of power by the crown; for whoever doubted the authority of Parliament to change or modify the common law? The discussion in the House of Commons cited from Macaulay clearly establishes that the contest was between the crown and the people represented in Parliament.

But we think it may be safely affirmed, that the Parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges—privileges denied to other citizens—privileges which come within any just definition of the word monopoly, as much as those now under consideration; and that the power to do this has never been questioned or denied. Nor can it be truthfully denied, that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to success in that way.

It may, therefore, be considered as established, that the authority of the Legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the constitution of that State or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited.

If any such restraint is supposed to exist in the constitution of the State, the Supreme Court of Louisiana having necessarily passed on that question, it would not be open to review in this court.

Plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the thirteenth article of amendment.

That it abridges the privileges and immunities of citizens of the United States.

That it denies to the plaintiffs the equal protection of the laws; and

That it deprives them of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment.

This court is thus called upon for the first time to give construction to these articles.

We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go.

Twelve articles of amendment were added to the Federal Constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically cotemporaneous with the adoption of the original; and the twelfth, adopted in 1803, was so nearly so as to have become, like all the others, historical and of another age. But within the last

eight years three other articles of amendment of vast importance have been added, by the voice of the people to that now venerable instrument. The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human rights; additional powers to the Federal Government; additional restraints upon those of the States. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction, and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal Government, and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle, slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery, they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel. And when hard pressed in the contest, these men (for they proved themselves men in that terrible crisis) offered their services, and were accepted by thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the Federal Government succeeded in that purpose. The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal Government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument. Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four millions of slaves—and with a microscopic search endeavor to find in it a reference to servitudes which may have been attached to property in certain localities, requires an effort, to say the least of it.

That a personal servitude was meant is proved by the use of the word "involuntary," which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English Government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded if only the word slavery had been used. The case of the apprentice slave, held under a law of Maryland, liberated by Chief Justice Chase, on a writ of habeas corpus under this article, illustrates this course of observation. Matter of Turner, 1 Abbott U. S. R. 84. And it is all that we deem necessary to say on the application of that article to the statute of Louisiana now under consideration.

The process of restoring to their proper relations with the Federal Government and with the other States those which had sided with the rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal Government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal Government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

These circumstances, whatever of false hood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal Government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection until they ratified that article by a formal vote of their legislative bodies.

Before we proceed to examine more critically the provisions of this amendment, on which the plaintiffs in error rely, let us complete and dismiss the history of the recent amendments, as that history relates to the general purpose which pervades them all. A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments that, notwithstanding the restraints of those articles on the States, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all those States denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.

Hence the fifteenth amendment, which declares that "the right of a citizen of the United States to vote shall not be denied or abridged by any State on account of race, color, or previous condition of servitude." The negro having, by the fourteenth amendment, been declared to be a citizen of the United States, is thus made a voter in every State of the Union.

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them, as the fifteenth.

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese cooley labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States, which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship; not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the territories, though within the United States, were not citizens. Whether this proposition was sound or not, had never been judicially decided. But it had been held by this court, in the celebrated Dred Scott case only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled, and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship, which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The first observation that we have to make on this clause, is that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States, without regard to their citizenship of a particular State, and it overturns the Dred Scott

(*Continued on page* 190.)

LEGAL GAZETTE.

Friday, June 13, 1873.

JOHN H. CAMPBELL,
EDITOR.

THEODORE F. JENKINS,
ASSOCIATE EDITOR.

Colonel Edward Campbell, who was appointed president judge of the fourteenth judicial district, composed of the counties of Fayette and Greene, was born in Uniontown, on the 24thof July, 1838; read law with Hon. Nathaniel Ewing, and was admitted to the Fayette county bar in September, 1859. He enlisted as a private soldier in the "three months service," in April 1861, re-enlisted in September, 1861; remained in the service during three years; was promoted to the lieutenant colonelcy of the 85th Regiment Penna. Volunteers, and was honorably discharged December, 1864. He resumed the practice of law in June, 1865, since which time he has given his entire attention to his profession. His appointment was made by Governor Hartranft on Friday, May 30th, 1873, and will continue in force until next December. We hope to have the pleasure of publishing some of Judge Campbell's opinions, so that our readers may judge for themselves as to the legal ability of the new incumbent.

Immediately after the opening of the court at Uniontown, upon the 2d inst. and the reading of Judge Campbell's commission, C. E. Boyle, Esq., read the resolutions lately passed by the members of the bar, in relation to the death of Judge Gilmore, and asked that they be spread upon the minutes of the court. A. E. Wilson, Esq., then delivered an eulogy on the character of Judge Gilmore as an upright and moral man, and a learned, honest, impartial and faithful judicial officer. All was summed up in this comprehensive sentence: "Judge Gilmore's aim was to find out the *right*, and do it." Mr. Wilson was followed in a few pertinent remarks by G. W. K. Minor, Daniel Downer and Wm. Parshall, Esqs., all of whom bore testimony to the honesty, ability and integrity of the deceased judge. All agreed with Mr. Downer in the happy expression that "Judge Gilmore's honesty, ability, and impartiality were known, admitted, and admired by all who knew him."

Chief Justice Read's term expires this year, and already there are numerous persons talked of as his probable successor, it being understood that the Chief Justice declines a nomination. On the Republican side, Judge Paxson, of Philadelphia, Judge Butler, of Chester, and Judge Williams, of Tioga, are named; and on the Democratic side, we hear of Judge Ross, of Montgomery, Judge Elwell, of Columbia, Judge Trunkey, of Mercer, Ex-Chief Justice Thompson, and Hon. Silas Clarke, of Indiana.

Supreme Court of Pennsylv'a.

THE BOROUGH OF WARREN v. DAUM.

1. A resolution by borough authorities to levy a tax to pay bounties for volunteers, is not an offer to pay bounties.
2. The mere fact of a volunteer upon re-enlistment declaring himself to be a resident of a certain county, is no evidence that he intended to help fill the quota of that county and will not support an action for bounty.
3. When one seeks to establish a contract predicated upon a general proposal, he must show that the party making the proposal received notice of his acceptance.

Error to the Common Pleas of Warren county.

Opinion by MERCUR, J. Delivered May 17th, 1873.

The learned judge put this case upon the true ground when he said to the jury, "the right of the plaintiff to recover depends entirely upon whether or not a valid contract exists between him and the defendant." Such being the law of the case, the well recognized rules of evidence necessary to establish a contract, must be applied.

We are unable to discover in the resolution of 11th February, 1864, any evidence that the Borough of Warren offered a bounty to volunteers. It merely declared that the authorities would levy a tax sufficient for that general purpose. It was an act between the borough authorities and the tax-payers only. It was no offer to volunteers. It is true, it contemplated that the fund should subsequently be used in procuring volunteers at such prices as might be agreed upon, not exceeding three hundred dollars. It gave no one any right to say, I will enlist, and you shall pay me three hundred dollars. That the authorities so understood it, is shown by the fact that upon each, the 13th and 22d February, 1864, they passed a resolution to issue bonds for the same purpose. The passage of these resolutions was the first step towards putting the borough in a condition to justify it in offering bounties. It was providing the funds in advance of their appropriation. The making of contracts with persons to enlist, is entirely a different matter. To hold that this resolution offered a bounty to volunteers, is to extend it beyond its true scope and meaning. It did not, as was said in Foulke v. West Bethlehem Township, 3 P. F. Smith, 221, *ex proprio vigore*, it did not impose a liability upon the borough to pay any bounty. The first assignment of error is therefore sustained.

The other assignments of error may be considered together.

It appears by the muster roll that when Daum was mustered into service on the 29th February, 1864, at Martinsburg, Va., he declared his residence to be "Warren, Warren county, Pennsylvania." There is no evidence that he, at the time of his re-enlistment, said or did anything indicating an intention to enlist to help fill the quota of the plaintiff, or to be credited thereto. The evidence is that he first gave notice of any such claim a short time before the commencement of this suit; which was in January, 1871. It is true, the second section of the act of May 1st, 1866, P. L. 114, provides that "the place of residence named in the re-enlistment and muster-in-rolls shall, in the absence of other evidence, be considered the place of credit." This act, passed more than two years after his re-enlistment, throws no light upon his actual intention at the time of said re-enlistment. If the transaction, at the time, lacked the ingredients essentially necessary to create the contract relation, this subsequent act of Assembly could not create one which would be obligatory upon the parties.

The learned judge thought the jury, judging of Daum's human nature by that of other human beings, might infer that he re-enlisted for a bounty, to be paid by some locality, and in the absence of any evidence that he re-enlisted for any other place, they might infer he enlisted to the credit of the Borough of Warren. This is carrying the doctrine of presumption too far. It is building upon a too uncertain foundation. The result is, that the superstructure is as shadowy as the base upon which it rests. With much stronger probability, it might be said, that the reasonable and ordinary workings of the human mind would have induced him to have informed the defendant within less than six years, of some fact indicating a real or pretended claim.

The evidence shows that the borough authorities never made any contract with Daum personally; that he did not notify them that he would accept, or had accepted the general offer which they had made; they had no notice of his enlistment; they filled their quotas with other men, and never received any credit or allowance for Daum. The act of his re-enlistment, remote from the defendant below, did not carry any notice of itself. Upon general principles, when one seeks to establish a contract predicated upon a general proposal made by the other party, he must show that the one making the proposal was duly notified of the acceptance thereof. Notice of this acceptance is necessary, even when a distinct proposition is made by one to another. Emerson v. Graff, 5 Casey, 358. We see nothing in this case to take it out of the general rule. Washington County v. Berwick, 6 P. F. Smith, 466; Brecknock School District v. Frankhouser, 8 P. F. Smith, 380. The errors are sustained.

Judgment reversed.

HAFFEY v. CAREY.

1. A married woman may mortgage her real estate to secure a future indebtedness of her husband.
2. It is not necessary that such a mortgage should be acknowledged according to the act of April 11th, 1848. An acknowledgment in conformity to the law enabling a married woman to pass her estate before that, is sufficient.
3. Moon v. Conell, 18 P. F. Smith, 320, explained.

Error to the Court of Common Pleas of McKean county.

Opinion by SHARSWOOD, J. Delivered May 17th, 1873.

It is well settled that a married woman may mortgage her estate for her husband's benefit, or to secure the payment of his debts. Hoover v. The Samaritan Society, 4 Whar. 445; Black v. Galway, 12 Harris, 18; Miner v. Graham, Ibid, 491; Lytle's Appeal, 12 Casey, 131. This being so, there is no reason why she may not do so to secure future as well as existing indebtedness. Lyle v. Ducomb, 5 Binn. 585. Indeed, in point of policy, there are considerations in favor of the latter which cannot be urged for the former. The wife's property being thus pledged to secure credit for her husband. may enable him to engage in business, and by his enterprise and industry make a good living both for him and her, and their family. Nor is it necessary that the provision of the act of April 11th, 1848, Pamp. L. 533, as to the acknowledgment of the mortgage, should be observed. An acknowledgment in conformity to the law, before that, to enable a married woman to pass her estate, is sufficient, as has been more than once decided and confirmed by the act of Assembly of April 9th, 1849, Pamp. L. 526; April 18th, 1853, Pamp. L. 573; April 11th, 1856, Pamp. L. 315; Miner v. Graham, 12 Harris, 491; Shinn v. Holmes, 1 Casey. 142; Stoops v. Blackford, 3 Ibid, 213. It was not intended in Moore v. Cornell, 18 P. F. Smith, 320, to depart in the least from these authorities, or to hold that in an assignment of a wife's mortgage, by husband and wife, it was necessary that the acknowledgment should be in any other form, or before any other officer than is required in any other case where the contract of a married woman in realty is to be bound or transferred. The act of April 11th, 1848, provides that the property of a married woman shall not be sold, conveyed, mortgaged, transferred, or in any other manner encumbered by *her husband*, without her written consent first had and obtained, and duly acknowledged before one of the judges of the Court of Common Pleas of this commonwealth, that such consent was not the result of coercion on the part of her said husband, but that the same was voluntarily given, and of her own free will. This provision has no application, whether in the transfer of real and personal estate of the wife, when the husband and wife unite in the execution of the transfer, but the law remains as it stood before the passage of the act of 1848.

Judgment affirmed.

CONWAY v. HALSTEAD.

1. The act of February 24th, 1806, authorizes a prothonotary to enter judgment on a warrant of confession, only for the amount which from the face of the instrument may appear to be due, or which may be ascertained by calculation from the face of the writing.
2. If it is necessary to ascertain a fact *dehors* the instrument, the prothonotary cannot enter judgment.

Error to the Court of Common Pleas of Susquehanna county.

Opinion of the court by AGNEW, J. Delivered May 17th, 1873.

By the act of 24th February, 1806, Brightly's Purdon, 577, pl. 32, it is made the duty of the prothonotary upon the application of the holder of a bond or other instrument containing a warrant of attorney to confess judgment, "to enter judgment against the person or persons who executed the same, for the amount, which on the face of the instrument may appear to be due," &c. This act does not confer upon the prothonotary all the power of an attorney at law to confess a judgment, but only authorizes him without the agency of an attorney, to enter a judgment in the way specified in the act, to wit: for the *amount* which from the *face* of the instrument may appear to be due. This would probably embrace a case where the sum due can be ascertained by calculation from the face of the writing, upon the maxim, *id certum est quod*

certum reddi potest." But in this case the sum or amount due could by no possible calculation be made to appear from the face of the instrument. It was an agreement for the sale of a tract of land by loosely stated boundaries, and no quantity stated. The price was to be at the rate of ten dollars an acre, and the number of acres was to be ascertained by a survey. Until the number should be thus determined, a matter wholly outside of the face of the paper, the amount of the purchase money could not be known. The prothonotary had no guide, therefore, in entering the judgment. In fixing the sum, he must rely upon evidence outside of the writing; and this would not be according to the letter or spirit of the act, which intended that a judgment should be entered only on the acknowledgment of the party himself contained in the writing. It is evident the law did not intend to make the prothonotary an arbitrator or umpire to determine uncertain things, and to conclude the party by his act; for by entering the judgment the party is brought into court, and the judgment is final and concludes him, unless set aside or reversed. The filing of a survey and the affidavit of the plaintiff, as permitted by the court on hearing the rule to set the judgment aside, did not mend the matter; for at the bottom lay the want of authority in the prothonotary to bring the defendant into court on this writing. His act must be strictly according to the law, and is not like the general authority of an attorney at law, who may appear and confess judgment and arrange the details of the judgment.

Judgment reversed, and the writing ordered to be stricken off the file.

BOLEN v. CONNELLY.

A recovery by the plaintiff in ejectment, upon an equitable title, is good against a vendee of the defendant purchasing *lis pendens*.

Error to the Court of Common Pleas of Luzerne county.

Opinion of the court by AGNEW, J. Delivered May 17th, 1873.

Michael Bolen, the plaintiff, bought *lis pendens*, and therefore with notice; the ejectment of Connelly against Whitmore, to November term, 1865, being indexed according to the requirement of the act of 22d April, 1856. The difficulty he encountered in this action was the fact that Connelly, the plaintiff in that action, and as assignee of Barnard Burns, the vendee of Terrance Timmons, held an equitable title only upon which he recovered, the parol evidence showing that it was the only title he set up. No evidence was given to show that Whitmore, the defendant in that action, and grantor of Bolen, the plaintiff in this, set up any defence, other than non-payment of the purchase money. In this state of the case, the recovery of Connelly in the ejectment of 1865, was final, according to the doctrine of Seitzinger v. Ridgway, 9 Watts, 496, and Peterman v. Hulings, 7 Casey, 432. Had Whitmore in that trial set up the deed from Terrance Timmons to himself as a purchaser for a valuable consideration, and without notice of the sale of Timmons to Barnard Burns, and that he had duly recorded his deed, a different question might have arisen in the trial of this case. But as no such issue was presented and tried in the former ejectment we must presume now that Whitmore failed to set up the defence, because he knew then it would not avail him, and therefore defended against the plaintiff's equity alone.

Bolen, the present plaintiff, standing in privity with Whitmore, and having notice of the pendency of the former ejectment when he bought, stands now in no better situation than Whitmore.

The verdict and judgment in the former ejectment were therefore final, and now estop the plaintiff from setting up a new issue.

Judgment affirmed.

SEIBERT v. KREIBEL et al.

A defendant in an execution claimed an appraisement. The sheriff did not allow it. Before the day of sale the term of the sheriff expired. His successor, upon a new request of the defendant, caused an appraisement to be made on the day of sale, and set apart certain property as exempted. *Held*, The defendant was not in default. He was therefore entitled to the exemption allowed him.

Appeal from the decree of the Common Pleas of Lehigh county.

Opinion of the court by AGNEW, J. Delivered May 17th, 1873.

The auditor making the distribution of the proceeds of the sheriff's sale, found the fact distinctly, that on the day of the levy by the deputy sheriff, Daniel Seibert properly claimed the benefit of the exemption law. The sheriff, from some unexplained cause, omitted to make an appraisement; but on the day of sale, the new sheriff, on the application of the defendant, made the day before, set apart $30.25 of the personal property, and $269.75, to come out of the proceeds of sale of the real estate, the appraisers finding that the real estate could not be divided without prejudice. The auditor allowed the exemption, but the court below set it aside on the ground that the request to appraise came too late. In this, we think the court erred. The fact that Daniel Seibert made claim to the exemption on the day of the levy, is not disputed. The sheriff failed to perform his duty in time, but this was no fault of the defendant in the writ. He could do no more than he did. True, if the sheriff had entirely omitted to allow the exemption, the defendant had his remedy against the sheriff: Marks' Appeal, 10 Casey, 36; Nueman v. Smith, 6 Casey, 264; Wilson v. Ellis, 4 Casey, 238. But when the sheriff finally complied with the claim, and had an appraisement made, why should we encourage litigation, and suffer the officer to be harassed with a suit, when justice can be so easily done, by allowing the defendant his right in this proceeding. It does no injury to the plaintiff in the execution, for the defendant had entitled himself to the exemption by his prompt claim. It would be doing a wrong to the defendant and to the officer to turn the defendant round to his action against the sheriff. Where the sheriff mistakenly or wrongfully allows an appraisement, the plaintiff has an easy remedy by moving the court to set aside the appraisement. But here the defendant has entitled himself to an appraisement, and the sheriff had actually had it made, and there is no reason to withhold the money from the defendant. The decree of the court is, therefore, reversed, the defendant is allowed his exemption, to be paid out of the fund in court, and final distribution is ordered to be made, in accordance with this opinion, and the costs of the appeal are ordered to be paid by the executors of the plaintiff in the execution, out of his estate.

Recent Decisions.

PENNSYLVANIA.

Our thanks are due to P. F. Smith, Esq., State Reporter, for advance sheets of Vol. 20, of his reports. (Vol. 70 Pa. State Reports) We make the following selections from them.]

NAPIER et al. v. DARLINGTON.

1. A lease contained a stipulation that the lessee at the end of the time might have a conveyance of the premises at a specified price; he assigned the lease. *Held*, that the assignee was entitled to a conveyance.

2. Such stipulation is not merely a personal covenant but a right, which may be transferred to his vendee, and enforced at his election, as if the contract had been absolute.

3. The stipulation was a continuing offer to sell, and when accepted by the lessee, a contract of sale was completed.

4. In an ejectment, the plaintiffs recovered a verdict to be released on the defendant paying into court the sum found as purchase money of the *whole* tract, to be taken out by the plaintiffs on their filing a deed to the defendant of the premises. The defendant paid in the sum, and the plaintiffs filed a deed purporting to convey the whole tract. It being ascertained that the plaintiffs were the owners but of 2-5, the defendant was allowed to take out 3-5 of the money paid in, and the plaintiffs to file a deed conveying but 2-5.

5. Kerr v. Day, 2 Harris, 112; Erwin v. Myers, 10 Wright, 96, recognized.

November 2d, 1871. Before THOMPSON. C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the District Court of Allegheny County: No. 209, to October and November Term, 1870.

EBBERT'S APPEAL.

1. A deed to persons as tenants in common, who are partners, must, as to *purchasers* of the title and *creditors* having liens on it, stand as the foundation of their rights and govern in distributing the proceeds of a sale of the title.

2. As to creditors, the effect of such deed cannot be changed by parol evidence, and the land converted into partnership assets; so as to affect the liens of otherwise preferred creditors.

3. As between the partners, a trust may result to the firm and the proceeds of the land be assets of the partnership, when they so treated the title and paid for it from partnership funds.

4. Partners can direct the application of the firm funds, and secure their identity in the kind of title they take for them.

5. If they take the title as tenants in common, they give character to the title as to those who afterwards deal with them.

6. It is the duty of counsel to furnish to the court an argument, with authorities.

7. Cumming's Appeal, 1 Casey, 268; Erwin's Appeal, 3 Wright, 535; Hale v. Henrie, 2 Watts, 143; Kramer v. Arthurs, 7 Barr, 165; Lancaster Bank v. Myley, 1 Harris, 544; McDermot v. Laurence, 7 S. & R. 438; Ridgway et al.'s Appeal, 3 Harris, 177, approved; Abbott's Appeal, 14 Wright, 234, distinguished.

November 3d, 1871. Before THOMPSON. C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Appeal from the decree of the District Court of Allegheny County: No. 78, to October and November Term, 1871.

PECK et al. v. JONES.

1. An affidavit of defence should aver distinctly every fact necessary to constitute a defence; nothing should be left to inference.

2. When land is sold with general warranty, the opening of a public highway in virtue of eminent domain, is not an eviction which will entitle the vendee to maintain an action for breach of the covenant.

3. A defect or encumbrance not known to the vendee when he accepts the deed, is a defence to a bond for purchase money, although there be a general warranty.

4. Knowledge or ignorance of an encumbrance, or of a defect not appearing on the face of the title, is immaterial.

5. In an action on an agreement of sale, the vendee cannot defalk from the purchase money on account of a public road upon land which the owner covenanted to sell and convey.

6. Peterson v. Arthurs, 9 Watts, 152, adopted.

November 4th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Allegheny county: Of October and November Term, 1871, No. 27.

MATHIAS v. THE SUPERIOR IRON COMPANY.

An iron company made coupon bonds, amounting in all to $300,000, interest payable semi-annually at 8 per cent., and secured them by mortgage to trustees on their real estate; they issued $280,000 of the bonds, $20,000 remaining in their hands. They offered their property for sale by sealed proposals; the sale to be subject to the mortgage of $300,000, due May 1st, 1889, payment of the bid in excess of the mortgage to be made ¼ cash, the remainder in 4 equal annual payments, no bid to be received for less than $566,000, "including the amount of the mortgage." The defendant bid $605,000, and agreed "to pay $300,000 of the company's mortgage-bonds and interest, as and when the same mature," and the balance as stipulated in the offer. His bid was accepted. The company sued defendant for six months' interest on $20,000 of bonds remaining in their hands. *Held*, that he was liable for interest at 8 per cent., notwithstanding the bonds had not been issued by the company, $300,000 being part of the consideration, and being represented by all the bonds.

November 11th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the District Court of Allegheny county: No. 59, to October and November Term, 1870.

(*Continued from page* 187.)

decision by making *all persons* born within the United States, and subject to its jurisdiction, citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase "subject to its jurisdiction," was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

The next observation is more important, in view of the arguments of counsel in the present case. It is that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State, to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think these distinctions and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those citizens of the several States. The argument, however, in favor of plaintiff, rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the *United States.*" It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the words citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are we will presently consider, but we wish to state here that it is only the former, which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States, as such, and those belonging to the citizen of the State, as such, the latter must rest for their security and protection where they have heretofore rested, for they are not embraced by this paragraph of the amendment.

The first occurrence of the words privileges and immunities in our constitutional history, is to be found in the fourth of the articles of the old confederation.

It declares "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States, and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions, as the inhabitants thereof respectively."

In the Constitution of the United States, which superseded the articles of confederation, the corresponding provision is found in section two of the fourth article, in the following words: The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of Corfield v. Coryel, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania, in 1823. 4 Wash. C. C. R. 371.

"The inquiry," he says, "is what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate.

"They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

This definition of the privileges and immunities of citizens of the States is adopted in the main by this court in the recent case of Ward v. The State of Maryland, 12 Wallace, 430, while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure.

In the case of Paul v. Virginia, 8 Wallace, 180, the court, in expounding this clause of the Constitution, says that "the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens."

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.

Its sole purpose was to declare to the several States that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal Government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States as above defined, lay within the constitutional and legislative power of the States and without that of the Federal Government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and useful functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and Federal governments to each other, and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the Legislatures of the States which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal Government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found, if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal Government, its national character, its Constitution, or its laws.

One of these is well described in the case of Crandell v. Nevada, 6 Wallace, 36. It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its sea-ports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several States." And quoting from the language of Chief Justice Taney in another case, it is said "that *for all the great purposes for which the Federal Government* was established, we are one people, with one common country, *we are all citizens of the United States;*" and it is, as such citizens, that their rights are supported in this court in Crandall v. Nevada.

Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemole and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal Government.

We are not without judicial interpretation, therefore, both State and national, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans, be held to be a deprivation of property within the meaning of that provision.

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these amendments and the pervading purpose, of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then, by the fifth section of the article of amendment, Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the national government from those of the State governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the general government.

Unquestionably this has given great force to the argument, and added largely to the number of those who believed in the necessity of a strong national government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of persons and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States and to confer additional power on that of the nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution or of any of its parts.

The judgments of the Supreme Court of Louisiana in these cases are affirmed.

LAW ASSOCIATION.

NOTICE.—An Adjourned Meeting of the Law Association of Philadelphia, will be held on Saturday, the 21st inst., at one o'clock P. M., at the Library Room, to consider certain proposed amendments to the charter.

June 11, 1873. EDWARD HOPPER.
jun 13-3t Secretary.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in June, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

April 26, The Penna. Life Ins. Co., &c., Executors of THOMAS D. NANCREDE, dec'd.
" 26, Edward G. Lee, Administrator of SAMUEL BROWN, dec'd.
" 28, Mary Dillon, Administratrix of JOHN A. DILLON, dec'd.
" 29, Mary McGuigan, Administratrix of TERRENCE McGUIGAN, dec'd.
" 29, David Teller, Administrator of GEO. KONECKE, dec'd.
" 29, Charles H. Martin, Administrator c. t. a. of EMMA MARTIN, dec'd.
" 30, Hugh Fitzpatrick, Executor of JAMES & MARGARET WELSH, dec'd.
" 30, William F. Milligan, Administrator of GEORGE A. MILLIGAN, deceased.
" 30, S. Weir Lewis, Guardian of JOHN BARCLAY, late minor.
" 30, Thos. Cadwallader, Executor and Trustee of the last will and testament of JAMES HAMILTON, deceased.

May 2, Edward Ingersoll, Executor of ELIZABETH J. FISHER, dec'd.
" 2, Ann Maria Sharpless, Executrix of JOSEPH J. SHARPLESS, dec'd.
" 2, Geo. Brooke, Administrator d. b. n. c. t. a. of STEPHEN BALDWIN, dec'd.
" 2, Thomas Smith et al., Trustees under the will of EDWARD SMITH, deceased.
" 6, William Anson et al., Executors of JOHN ANSON, dec'd.
" 6, William Brown et al., Executors of MARY SINCLAIR, dec'd
" 7, Peter W. Hall, Executor of MARY P. FLEETWOOD, dec'd.
" 7, William Francis, Administrator of ELLEN WHITMAN, dec'd.
" 9, R. C. McMurtrie, Administrator of FREDERICK OSWALD BOHLEN, dec'd.
" 10, John F. Orne, Administrator of ELIZA J. McWATTERS, dec'd.
" 12, Rhoda M. Levy, Executrix of FELIX H. LEVY, dec'd.
" 13, Robert Scott, Surviving Executor of WILLIAM WHITE, dec'd.
" 13, Susannah Biggs, Administratrix of SARAH B. SCHULTZ, late INGLES, dec'd.
" 13, Robert McNairy et al., Executors of JOHN NEITHERCOT, dec'd.
" 13, Robert Scott, Administrator of ELEANORA WHITE, dec'd.
" 13, Nancy M. Grigg, Administratrix of JOHN GRIGG, dec'd.
" 14, Watson Comly, Executor of CYNTHIA GREEN, dec'd.
" 14, Andreas Hardel, Administrator of JOSEPH RIPKA, dec'd.
" 14, Andreas Hartel, Administrator of ALFRED RIPKA, dec'd.
" 14, William M. Thomas et al., Executors of SAMUEL THOMAS, dec'd.
" 15, Martha Dillon, Administratrix of EDWARD DILLON, dec'd.
" 15, George A. Twibill, Administrator of JOHN DENNING, dec'd.
" 15, James McCann, Guardian of ELLEN QUINN, otherwise known as ELLEN FOLEY, dec'd.
" 15, John C. Stockton, Administrator of ANN L. NANCREDE, dec'd.
" 19, Thomas Holt, Executor of SUSANNAH BOOTH, dec'd.
" 19, The Philada. Trust, Safe Deposit Co., &c., Administrators c. t. a. of GEO. LEYENBERGER, dec'd.
May 19, Geo. W. Steever et al., Executors and Trustees under the will of ROBERT S. JOHNSON, dec'd.
" 19, Philip H. Brice et al., Guardians of EMILY LE FOLL (formerly MERCER).
" 20, Solomon Rothschild, Guardian of FLORA ARNOLD, minor.
" 20, Solomon Rothschild, Guardian of LEON ARNOLD, minor.
" 20, William Myers, Administrator c. t. a. of GERHARD GRAEVE, dec'd.
" 20, Edmund Carpenter et al., Executors of MARY LINCOLN, dec'd.
" 21, Adolph Fischer, Administrator c. t. a. of CHRISTIANA FISCHER (formerly ELLWANGER), dec'd.
" 22, Lucinda E. Leu, Administratrix of GEORGE H. LEU, dec'd, as filed by William G. Stocker et al., Executors of LUCINDA E. LEU, deceased.
" 22, Samuel C. Brinckle, M. D., Guardian of JOHN C. MILLER, dec'd.
" 23, Philip M. Wheaton, Executor of SILAS WHEATON, dec'd.
" 23, William W. Ball et al., Executors of SARAH GRAHAM, dec'd.
" 23, Hannah L. Heaton et al., Executors of JOSEPH HEATON, dec'd.
" 23, Mary Ann Levy et al., Executors of JOHN P. LEVY, dec'd.
" 24, Susan N. Streper, Administratrix of OTTINGER G. STREPER, dec'd.
" 24, Benjamin J. Douglass, Executor and Trustee under the will of RICHARD H. DOUGLASS, dec'd.
" 26, William Yonker, Guardian of MARIA T. S. WILSON, late minor.
" 26, Sarah C. Bangs, Executrix of WM. P. BANGS, dec'd.
" 26, James W. Carson, Guardian of MILLARD F. LOGAN, minor.
" 26, Thomas Smith et al., Trustees under the will of CHAS. J. ADAMS, deceased.
" 26, Anthony Groves, Jr., Administrator of WILLIAM M. GROVES, dec'd.
" 26, Alfred Smith, Guardian of WILLIAM C. SMITH, late minor.
" 28, Howard Kirk et al., Administrators of HIRAM G. COOPER, dec'd.
" 28, James Johnson et al., Executors of PATRICK GIBSON, dec'd.
" 28, Edward S. Campbell, Executor of SUSANNA E. LEIDY, dec'd.
" 28, Edward E. Wallace, Administrator c. t. a. of JOSEPH K. VANDEGRIFT, dec'd.
" 28, Ellen Emery, Administratrix of DAVIS EMERY, dec'd,
" 28, Caroline Vendig et al, Administrators of RAPHAEL VENDIG, deceased.
" 28, Henry Gormley et al., Executors, &c., of JOHN GORMLEY, dec'd.
" 28, James F. C. Sickle, Administrator c. t. a. of WILLIAM CRISPIN, deceased.
" 28, Jas. H. Grier, Administrator of JANE K. ROSS, dec'd.
" 29, Jane B. Colahan, Guardian of JOHN J. O'DONNELL, minor.
" 29, Bridget Curry, Administratrix of EDWARD CURRY, dec'd.
" 29, Caroline E. Smith et al., Executors of ISAAC R. SMITH, dec'd.
" 29, Caroline Clark, Administratrix of MARY or MARIA THOMAS, deceased.
" 29, Jane G. Stanhope et al., Executors of HIRAM STANHOPE, dec'd.
" 29, Frank S. Crouse, Administrator of MARY J. KROUSE, dec'd.
" 29, John L. Shoemaker et al., Executors of GEORGE W. WIMLEY, M. D., deceased.
" 29, George W. Hall, Executor of GUSTAVUS H. KREEGER, M. D., deceased.
" 29, John B. Kelley, Executor of SARAH HARDIMAN, dec'd.
" 29, Sarah R. Scattergood, Executrix of JOSEPH R. SCATTERGOOD, deceased.
" 29, Joseph Campbell, Guardian of MARY FOSTER, minor.
" 29, John Ashbridge, Guardian of ELLEN A. STEPHENSON, late HARWOOD, minor.
" 29, John Ashbridge, Guardian of MARTHA FLORENCE WEED, late a minor.
" 29, James V. Watson, Administrator of ELIZABETH WATSON, dec'd.
" 29, Franklin Smith et al., Executors of JOHN M. SMITH, dec'd.
" 29, Francis E. Seal et al., Executors of BENJAMIN SEAL, dec'd.

WILLIAM M. BUNN,
May 30-4t Register.

Legal Gazette.

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[Reported specially for the Legal Gazette.]

Supreme Court United States.

GUNN v. BARRY.

An exemption law of Georgia, passed several years ago, exempted from execution in favor of each head of a family, "fifty acres of land, and five additional ones for each of his children under the age of 16 years, the land to include the dwelling house and improvements, if the same do not exceed $200," and exempted many other things, chiefly household furniture, wearing apparel, books, family portraits, &c.; the value of which was not limited, and which might vary with different debtors and their families. With that law in force A. obtained a judgment for $531 against B., who had 272½ acres of land, worth $1,300, and had no other property but land worth $100, from which the judgment could be satisfied. In this state of things Georgia having passed an "ordinance of secession," withdrew her senators and representatives from the Congress of the United States, and went into the rebellion. The rebellion being suppressed, but Georgia not being allowed by Congress yet to send senators and representatives to its sessions, Congress passed what was known as the reconstruction act. This act reciting that "no legal State government or adequate protection for life or property now existed in the rebel State of Georgia," authorized the said State to make a constitution, which being submitted to Congress and approved by it, the State should be entitled to representation. The people of the State did accordingly make a new constitution and submit it to Congress. This new constitution provided that "each head of a family should be entitled to a homestead of realty to the value of $2,000 in specie, and personal property to the value of $1,000 in specie, to be valued at the time they are set apart;" and ordained further that—

"No court or ministerial officer in the State shall ever have jurisdiction or authority to enforce any judgment, decree, or execution against said property so set apart, including such improvement as may be made thereon from time to time, except for taxes, money borrowed or expended in the improvement of the homestead, or for the purchase money of the same, and for labor done thereon, or material furnished therefor, or removal of incumbrances thereon."

The constitution with this exemption and these provisions in it was submitted to Congress, which approved part of it and disapproved of other parts; enacting only that after certain changes were made, the State should be entitled to representation. No objection was made to the clauses of exemption or the provisions above quoted. The State of Georgia complied with the requirements of Congress, and a constitution satisfactory to that body being made—these clauses of exemption and the accompanying provisions being in it—the State was declared entitled to representation. *Held*,

1. That as respected a creditor who had obtained by his judgment a lien on the land which the old exemption secured to him while the new one destroyed it, the law creating the new exemption impaired the obligation of a contract, and was unconstitutional and void.
2. That the fact that the constitution had been made under the special circumstances and in the special way above mentioned, and under the eye of Congress, did not change the case.

Error to the Supreme Court of Georgia; the case being thus:

By a statute of Georgia, passed many years ago, it was enacted that the following property, belonging to a debtor who was the head of a family, should be exempt from levy and sale.

"Fifty acres of land, and five additional ones for each of his children under the age of 16 years, the land to include the dwelling house, if the same and improvements do not exceed $200.

"One farm horse or mule.

"One cow and calf.

"Ten head of hogs.

"Fifty dollars' worth of provision, and *five dollars' worth for each additional child.*

"Beds, bedding, and *common* bedsteads sufficient for the family.

"One loom, one spinning-wheel, two pair of cards, and one hundred pounds of lint cotton.

"*Common* tools of trade for himself and his wife.

"Equipments and arms of a militia soldier and trooper's horse.

"*Ordinary* cooking utensils and table crockery.

"Wearing apparel of himself and family.

"Family Bible.

"*Religious works* and school books.

"*Family portraits.*

"The library of a professionul man not exceeding $300 in value, to be selected by himself."

In 1861, with this statute in existence, the State of Georgia passed what was called "an ordinance of secession" from the United States; and joined in the treason and rebellion against the Federal government into which the slaveholding States, for the most part, entered. Her senators and representatives withdrew from Congress; her State government passed into the hands of persons at war with the United States; and she became one of the States styled "The Confederate States of America;" a confederacy which waged war for several years on the government, and whose insurrection and rebellion the government, on the other hand, sought by force of arms to suppress. The arms of the United States having proved triumphant, the so-called government of the confederate States fell to pieces, and the State of Georgia was left where she had put herself; that is to say, in the hands of traitors and rebels. No senators or represenatives were allowed by the Congress of the United States to come back to its chambers as of old.

In this state of things, in May, 1866, Gunn obtained judgment in one of the courts of the State for $402.30 principal, and $125.60 interest (in all $527.90), against a certain Hart. For what the judgment had been obtained did not appear. Hart had at this time 272½ acres of land, worth $1,300, and the judgment bound it as a lien. He had no other land but one piece worth about $100.

On the 2d of March, 1867, the rebellion being suppressed, but the ancient relation of Georgia to the general government being still, in point of fact, not restored by representation, the Congress of the United States passed "an act to provide for the more efficient government of the rebel States;" the act commonly called the reconstruction act. 14 Stat. at Large, 428. This act—reciting that "no legal State governments or adequate protection for life or property now existed in the rebel States of Virginia, Georgia, North Carolina," &c., and that it was "necessary that peace and good order should be enforced in the said State till loyal republican State governments could be legally established," and putting these said States under military rule—enacted that when the people of any one of the said rebel States should have formed a constitution of government in conformity with the Constitution of the United States in all respects... and "when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same... &c., said State shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom."

In pursuance of what was contemplated by this act, and of certain amendments to it, the people of Georgia did make a constitution. This constitution by the first section of its seventh article ordained that—

"Each head of a family, or guardian, or trustee of a family of minor children, shall be entitled to a homestead of realty to the value of $2,000 in specie, and personal property to the value of $1,000 in specie, to be valued at the time they are set apart."

It went on further to declare:

"And no court or ministerial officer in this State shall ever have jurisdiction or authority to enforce any judgment, decree, or execution against said property so set apart, including such improvement as may be made thereon from time to time, except for taxes, money borrowed or expended in the improvement of the homestead, or for the purchase money of the same, and for labor done thereon, or material furnished therefor, or removal of incumbrances thereon."

The constitution having been thus adopted in form by the people of Georgia, was sent with this article included to the Congress of the United States, which by an act of June 25th, 1868, 15 Id. 73, "to admit the States of Georgia, &c., to representation in Congress," reciting that, whereas, the people of Georgia, North Carolina, &c., had in pursuance of the already quoted act of March 2d, 1867, "framed constitutions of State government, which are republican, and have adopted said constitutions," enacted that each of the States of North Carolina, *Georgia*, &c., shall be entitled and admitted to representation in Congress as a State of the Union, when the Legislature of such State shall have duly ratified the amendment to the Constitution of the United States..... known as "article fourteen:" *Provided*, That the State of Georgia shall only be entitled and admitted to representation upon this further fundamental condition, that the first and third subdivisions of section seventeen of the fifth article of the constitution of said State, except, &c., shall be null and void, and that the General Assembly of said State, by solemn public act, shall declare the assent of the State to the foregoing provision.

The State having afterwards ratified the fourteenth amendment, and complied with other requirements, was by an act of Congress, passed July 15th, 1870, 16 Stat. at Large, 363, declared entitled to representation in Congress.

The constitution of Georgia being thus approved by Congress, and operative, the Legislature of Georgia, on the 3d of October, 1868, passed "An act to provide for setting apart a homestead of realty and personalty, and for the valuation of said property, and for the full and complete protection and security of the same, to the sole use and benefit of families, as required by section first of article seventh of the constitution, and for other purposes."

The language of this act was the same as the provision of the constitution. Under this act all the land of Hart, which altogether, it will have been observed, was worth about $1,400, was set apart to him and his family as a homestead.

On a requirement by Gunn, to the sheriff of the county, one Barry, that he should levy on the two hundred and seventy-seven and a half acres, Barry refused to do so, upon the ground that they had been set off to Hart and his family under the act of 1868, and on a petition for mandamus against Barry to compel him to make the levy, the courts of Georgia, including the Supreme Court, having decided that the refusal of the sheriff was right, the case was brought here.

The question involved was, of course, the constitutionalty as against Gunn, who had got his judgment before its passage, of the new exemption.

Mr. *P. Phillips*, for the plaintiff in error.

Hart having had two hundred and seventy-two and a half acres of land, worth $1,300, of which land fifty acres, or at very most say a half, was exempt under the old law, obtained a judgment for $527.90. His debt is thus perfectly secure. He has an interest in the land to

the extent of the judgment, an interest which binds it in the hands of the debtor, and to whomsoever the debtor may transfer it. Then come the new constitution and law which withdraw the whole of the land from the lien, and for all practical purposes dissolve or destroy the lien. The remedy which was before complete, is now annihilated. And the creditor who, before would have been paid in full, is deprived of getting anything. If this is not impairing the obligation of a contract, if it is not destroying vested rights, what is?

There was, no doubt, great inducement in the Southern States, arising out of the disasters of the war, to legislation in favor of debtors. But while much may be said in extenuation of such legislation, nothing when it is like that here, can be judicially said in justification of it. In Arkansas an exemption of $7,000 has been made In Mississippi of $4,000. In other Southern States exemptions more or less large. With the operation of these exemptions on contracts made subsequently to them, we do not deal. But when applied to contracts made when no such exemptions were allowed or thought of, the illegality is obvious.

Some singular results follow as respects the State of Georgia. The population of the State is estimated at one million five hundred thousand. Under the new exemption every head of a family is entitled to $2,000 in land. Assuming that five persons constitute a family, we have three hundred thousand heads of families, and if each "head" obtained the $2,000 in land, the law appropriates land to the amount of $600,000,000. This is three times more than all the land in the State is estimated at.

No counsel appeared on the other side; but the court was referred to arguments made in Georgia, where the validity of the laws making the new exemption had been sought to be maintained. So far as our special reporter understood them, the grounds were somewhat thus:

The old law, so far as it operated on contracts made after its date, was confessedly valid. Practically from the time of its passage, no court or ministerial officer of the State had jurisdiction or authority to enforce any judgment, decree, or execution against property set aside under it.

The old law being valid, what made the exemption of 1868 invalid? It was not invalid.

I. In Von Hoffman v. Quincy, 4 Wallace, 553, this court said:

"It is competent for the States to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are deemed legitimate, and those which under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances."

So, in that same case, this court referring to an observation made in an earlier case, that "one of the tests that a contract has been impaired, is that its value has by legislation been diminished; say, page 553:

"This has reference to legislation which affects the contract directly, and not incidentally or only by consequence. The right to imprison for debt is not a part of the contract. It is regarded as penal rather than remedial. The States may abolish it whenever they think proper. They may also exempt from sale under execution, the necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture. It is said, Beers v. Houghton, 9 Peters, 359; Ogden v. Saunders, 12 Wheaton, 230; Mason v. Haile, 12 Id. 273; Sturges v. Crownenshield, 4 Id. 200, 'regulations of this description have always been considered in every civilized community, as properly belonging to the remedy to be exercise by every sovereignty according to its own views of policy and humanity.'"

This court, then, here admitted that though a contract was in existence, the Legislature might legislate upon it so as to diminish its value, provided the legislation were indirect. And the very sort of legislation which was in question in this case is given as an illustration of the means through which a diminution, lawful in character, may be made. The reason of the lawfulness, though the legislation be retroactive, was also plainly adumbrated. It was that the principles of humanity having in all civilized countries, time out of mind, induced Legislatures to intervene between the creditor and his debtor to prevent the former from stripping the latter and his family of those articles which are necessary to their existence, and this sort of legislation being exercised by every sovereign "according to his own views of policy and humanity," every person entering into a contract enters into it with a full recognition of the right of the Legislature to act on the subject according to such, its own views —views which, of course, must vary according to times and exigencies.

Hence, if the right of the Legislature was legitimately exercised; if, in other words, the particular law did not transcend the limits of fair legislation, the "obligation of contracts" was not impaired even though the legislation were retroactive, and though by a change in the character of the articles exempted, the remedy might, in particular cases, be less visibly efficacious, as in others it might be more so.

Now, was the argument this? to wit, that the act of 1868 is unlawful, because abstractly and in itself considered it made an exemption too great in amount. That fact was denied. An exemption of a house and lot worth $2,000, and of personalty worth $1,000, was not so plainly an excessive exemption as to be certainly void; void whether considered prospectively or retrospectively. Such a thing cannot be affirmed; the Legislature of Georgia having had a right within fair limits to act according to "its own views of policy and humanity."

Then, was it void because by it a greater amount was exempted than by the former act? If the fact were so, still, if the increase were made by the Legislature of the State in a fair exercise of the Legislature's "views of humanity and policy," it would be hard to say, under the language of this court above quoted from Von Hoffman v. City of Quincy, that from this cause merely—the increase not being really great—it was void *in toto*. But the increase in the magnitude of the exemption was denied by the argument in Georgia. On the contrary, looking at the number of items exempted under the old law, and their character, it was asserted that in some cases of land in some families the exemption would be much less. A homestead of at least fifty acres, worth any sum, and if a man had ten children, of 100 acres, was exempted. Then the "bedsteads," "tools," and "cooking utensils" exempted must all be "common" or "ordinary." But nothing else was so required to be. All wearing apparel of the debtor and of all his family, however numerous the family or valuable the apparel, was exempted; so would a theological library be, however extensive and valuable, and family portraits which, if by certain artists, would have great value. In a case where the fifty acres were near a city, or where the family was of any quality and with members at all numerous, the articles exempted by the old law could hardly fail far to exceed $3,000 in value. The new provision was but an equalization to all the people of the State of what was meant to be given by the old law, but was not really given.

II. Then was the case affected by the fact that the constitution and statute changing the character of the exemption declare that no court or ministerial officer in the State shall ever have authority to enforce any judgment, decree, or execution against said property so set apart? &c. How did that affect the matter? Under the old exemption no court or ministerial officer of the State could ever have had jurisdiction or authority to enforce any judgment, decree, or execution against the property set apart. Assuming that the exemption itself was valid, any prohibition by words was useless, and any words of prohibition were but surplusage. The prohibition followed from the validity of the exemption, and followed as much without words of prohibition as with them.

The case, then, was this: The Legislature, acting on "its own views of policy and humanity," has so far modified an old exemption that, instead of some real estate, the value of which varied, and might be worth much more than $2,000, and a great number of articles of personalty *nominatim*, whose value also varied, and which, of themselves, might be worth much more than $1,000, and might be found in some families, and not at all in others; now exempts realty worth $2,000, and personalty worth $1,000; so as to make the law operate for all as equally and equitable as possible. Is the legislative power constitutionally incapable of making such a change?

Then it could not be contended, that by the mere contract, whatever it was on which this judgment had been obtained, any lien was acquired. The new constitution withdrew nothing from the operation of the contract. And though a lien was acquired by the judgment, yet, if the new exemption did withdraw the land from the operation of it, the obligation of no contract was impaired.

But the strongest view, it was said, remained. In 1865 a revolution had swept over the land. The old State government had gone to wreck. The people had no civil government, and were in anarchy. The Congress of the United States invited them to make a government, and undertook to guarantee to the State one of a republican form. The constitution of 1868 was the result. It was made through the power and agency of Congress, under its laws, and under its eye. It was more the work of Congress than of the State. Congress insisted that a portion of the proposed constitution, which it disliked, should be fundamentally rejected; and that no place should be given to new propositions which it thought good. The people of the State wanted neither change. But all that Congress prescribed to be done was done. Congress then assented that the instrument should go into effect, and it is in virtue of that assent that it it did go into effect. The constitution of Georgia is, therefore, an act of Congress, and it has, accordingly, all the validity of such an act. Now there is no doubt that Congress may, if it please, pass a law impairing the obligation of contracts; Evans v. Evans, Peter's Circuit Court, 322; though the States may not.

No one can cast his eyes over the former and later exemptions without being struck by the greatly increased magnitude of the latter.

SWAYNE, J., having quoted the old exemption law, and the more modern provisions and stated facts of the case, gave the opinion of the court to the following effect:

Section 10 of article 1 of the Constitution of the United States, declares that "no State shall pass any law impairing the obligation of contracts."

If the remedy is a part of the obligation of the contract, a clearer case of impairment can hardly occur than is presented in the record before us. The effect of the act in question, under the circumstances of this judgment, does not, indeed, merely impair, it annihilates the remedy. There is none left.

But the act reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is in effect taking one person's property, and giving it to another without compensation. This is contrary to reason and justice, and to the fundamental principles of the social compact. Calder v. Bull, 3 Dallas, 388. But we must confine ourselves to the constitutional aspect of the case. A few further remarks will be sufficient to dispose of it. It involves no question which has not been more than once fully considered by this court.

Georgia, since she came into the Union as one of the original thirteen States, has never been a State out of the Union. Her constitutional rights were, for a time, necessarily put in abeyance, but her constitutional disabilities and obligations were in nowise affected by her rebellion. The same view is to be taken of the provision in her organic law, and of the statute in question, as if she had been in full communion with her sister States when she gave them being. Though her constitution was sanctioned by Congress, this pro-

vision can in no sense be considered an act of that body. The sanction was only permissive as a part of the process of her rehabilitation, and involved nothing affirmative or negative beyond that event. If it were express and unequivocal, the result would be the same. Congress cannot, by authorization or ratification, give the slightest effect to a State law or constitution in conflict with the Constitution of the United States. That instrument is above and beyond the power of Congress and the States, and is alike obligatory upon both. A State can no more impair an existing contract by a constitutional provision, than by a legislative act; both are within the probibition of the National Constitution.

The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A State may change them, provided the change involve no impairment of a substantial right. If the provision of the constitution, or the legislative act of a State, fall within the category last mentioned, they are to that extent utterly void. They are, for all the purposes of the contract which they impair, as if they had never existed. The constitutional provision and statute here in question, are clearly within that category, and are, therefore, void. The jurisdictional prohibition which they contain with respect to the courts of the State, can, therefore, form no impediment to the plaintiff in error in the enforcement of his rights touching this judgment, as those rights are recognized by this court. White v. Hart, 13 Wallace, 646; Von Hoffman v. The City of Quincy, 4 Id. 535.

The judgment of the Supreme Court of Georgia is reversed, and the cause will be remanded to that court, with directions to enter a judgment of reversal. to reverse the judgment of the Superior Court of Randolph county, and thereafter to proceed in conformity to this opinion.

BRIGHAM YOUNG v. GODBE.

1. When a suit turns on the question whether money claimed in it by the plaintiff has been advanced to the defendant, in one capacity or in another, evidence of what a person who had settled an account on the subject with the defendant *said* that the defendant told him, is not evidence.
2. The fact that the court in allowing the evidence to go to the jury, told them that they might consider it for what it was worth, does not alter the case.
3. In a case where interest, as a general thing, is due (as *ex. gr.*, in the case of an account stated), the fact that there may be no statute in the place where the account is settled and the transaction takes place, does not prevent the recovery of interest. In such a case, interest, at a reasonable rate, and conforming to the custom which obtains in the community in dealings of the same character, will be allowed by way of damages for unreasonably withholding an overdue account.

In error to the Supreme Court of the territory of Utah.

Godbe filed a complaint in the court below against Brigham Young, "as trustee in trust of the Church of Jesus Christ, a religious association in the territory of Utah," alleging an account stated by "said defendant," prior to February 12th, 1866, and upon such statement a balance of $10,020 "due from said defendant;" a payment of $5,000, May 30th, 1868, and praying judgment with interest at 10 per cent.. "by way of damages."

The defendant demurred, assigning for cause that it did not sufficiently appear from the complaint whether the suit was against the defendant "in his individual capacity or in his capacity as trustee in trust for the Church of Jesus Christ of Latter-Day Saints." The demurrer was overruled. The defendant then pleaded that no account had ever been settled by him as "trustee in trust," as alleged in the complaint, and that neither the sum stated in the complaint, nor any other sum had been found due to the plaintiff from "said defendant as said trustee."

On the trial, evidence was given tending to show that the money alleged to have been advanced by the plaintiff had been advanced to Young in some capacity, and an account stated and credit given as alleged. In what capacity was the question on which the controversy turned; whether, as alleged in the complaint, to him "as trustee in trust of the church," &c., or whether as agent of a company known as the "Deseret Irrigation and Canal Company;" a company which one of the witnesses swore was "so mixed up with the church, that he did not know the difference between them." The plaintiff sought to prove that it had been advanced to Young as "trustee in trust to the church," &c. Letters from Young sought to cast the debt on the Irrigation and Canal Company.

The defendant having given evidence tending to show that the Irrigation and Canal Company had an office in what was known as the council house, and that the "trustee in trust," &c., had his at what was known as the president's office, and that these departments were separate and distinct from each other, and had a separate set of clerks—the plaintiff brought one Armstrong, who testified that he was in 1857, and had been ever since, the bookkeeper of a firm known as Kimball & Lawrence, merchants in Salt Lake City; that they had an account of some $10,000 against the Deseret Irrigation and Canal Company; that Mr. Lawrence, one of the firm, took the account and went away with it, and in a short time returned "stating to this witness that it had been settled by the 'trustees in trust,' by giving credit to a certain person on tithing, and that the transaction appeared on the books of Kimball & Lawrence." The defendant objected to all this evidence, for the reason "that it was not in rebuttal, and, therefore, illegal." The court overruled the objection (the defendant excepting), "and the testimony was permitted to go to the jury for what it was worth."

In charging, the court charged that if the jury should find for the plaintiff, they would find $5,020, with interest on $10,020 from the day the account was rendered until the day of the payment of $5,000, and from that date to the day of trial on the amount remaining due.

Verdict and judgment having gone for the plaintiff, the admission of the evidence above mentioned, and the instruction to the jury were, among other matters, assigned for error.

Messrs. *C. J. Hillier* and *Thomas Fitch*, for the plaintiff in error; no opposing counsel.

Mr. Justice DAVIS delivered the opinion of the court.

The testimony of Armstrong, the bookkeeper of Kimball & Lawrence, was objected to by the defendant, for the reason that it was not in rebuttal, and, therefore, illegal, but the court overruled the objection, and permitted the testimony to go to the jury for what it was worth.

We are not prepared to say that Godbe could not rebut the case made by Young, by showing that the affairs of the company were so connected with the church, that, as one of the witnesses said, "he did not know the difference between them." But the evidence on this subject should not have been the declaration by one person of what another said. The fact that Young had settled the account of Kimball & Lawrence in the way he did, was proper evidence to go to the jury, if Lawrence had testified to it, but Armstrong's statement of what Lawrence told him was pure hearsay. Besides, the court on its own motion enlarged the scope of the evidence, by directing the jury to consider it for what it was worth. This direction enabled the jury to take a wider range of the subject than they otherwise would, and naturally inclined them to consider the evidence as fixing the right of the plaintff to recover from the defendant in the capacity in which he was sued.

On account of the error in admitting the testimony of Armstrong, and in indicating the effect which the jury should give to it, the judgment will have to be reversed.

But as the case goes back for a new trial, it is proper to say a word upon the subject of interest, which seems more than anything else to be the chief point of difference between the parties. We can see no objection to the charge of the court on this subject. If a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment. And if the account be stated, as the evidence went to show was the case here, interest begins to run at once. 1 American Leading Cases, 5th edition, pp. 626 and 514.

It is said there is no law in the territory of Utah prescribing a rate of interest in transactions like the one in controversy in this suit, and that, therefore, no interest can be recovered. But this result does not follow. If there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account. The rate must be reasonable, and conform to the custom which obtains in the community in dealings of this character.

Judgment reversed, and a *venire de novo* awarded.

Court of Common Pleas of Philadelphia.

PYLE v. PYLE.

1. If a man arrested under a bastardy process, marry the woman pregnant with the child of which he is the putative father, the marriage is good, unless it clearly appear that the charge was false.
2. The mere unsupported denial of the man of the truth of the charge, is not sufficient in proceedings for divorce to establish its falsity.
3. The court after discharging a rule for divorce, on motion referred the case back to the examiner to take additional testimony.

Opinion by ALLISON, P. J. Delivered June 14th, 1873.

The proceedings for divorce, instituted by the husband, are grounded upon the allegation of force or duress. The testimony shows that he was arrested upon the oath of the respondent, which charged seduction, under promise of marriage. When brought together in the office of the alderman, the libellant promised to marry the respondent in two weeks from that time, whereupon, the proceedings were dismissed, and the defendant discharged: this was on the 6th of May, 1872. Four days thereafter, the respondent again made oath against the libellant, charging that he was about to abscond; he was again arrested, taken before the alderman, who states in his testimony: "I told Mr. Pyle, before he offered to marry the respondent, that as she had sworn that he had seduced her under promise of marriage, I would have to hold him to bail, to answer the charge. He then said, 'I will marry her now.' I then married them, and after the ceremony, I discharged the libellant." This is confirmed by the testimony of the constable.

The libellant was examined as a witness. His statement is, that "the respondent, her brother and the alderman, told me that if I did not marry the respondent, I would be imprisoned The respondent and her brother threatened to send me to the penitentiary for three years, if I did not marry her. Under these threats, and fearing they would send me to the penitentiary, I consented to the marriage. I never seduced the respondent, and never promised to marry her, until after she had me arrested."

The material facts denied by the libellant, stand unsupported by any other testimony in this cause, and we think of no value. As shown by the testimony, he put in no denial of the seduction under promise of marriage, upon either arrest, upon both occasions promising to marry the respondent. Nor is his statement of threats of imprisonment corroborated; negatively, it is contradicted. The testimony of both the alderman and the constable is, that he was informed that he would be required to enter bail to answer the charge.

It has been held in Jackson v. Winne, 7 Wendell, 47, that if a man is arrested under a bastardy process, as the putative father of the child, of which the woman procuring the arrest is pregnant, marry her, even though being unable to procure bail, he do it purely to avoid being imprisoned, and though it afterwards appear he could have made a successful defence, still the marriage is good. Scott v. Shufeldt, 5 Paige 43, is to the same effect. The doctrine seems to be qualified that it would, perhaps, be different if the arrest was under a void process, or upon a false charge. Story on Contracts, sections 88, 89

In Collins v. Collins, 2 Brewster 515, it was decided by this court, that the falsity of the charge is essential, and Judge Brewster, who delivered the opinion in that case, found as a fact established by the testimony, that the charge was false, and the threat to imprison was upon process sued out maliciously and without probable cause.

In this case, we do not feel ourselves justified in reaching a similar conclusion upon the unsupported testimony of the libellant, and, therefore, discharge the rule, and refuse the divorce prayed for.

And now, to wit, June 14th, 1873, on motion of T. W. Arundel, Esq., the report of the examiner is referred back to him to take additional evidence.

T. W. Arundle, Esq., for libellant.

Edgar M. Chipman, for respondent.

LEGAL GAZETTE.

Friday, June 20, 1873.

JOHN H. CAMPBELL, EDITOR.

THEODORE F. JENKINS, ASSOCIATE EDITOR.

We give place to the following notice with the greatest of pleasure. The recipient of the testimonial is so well known to the bar of this city, for his uniform kindness, courtesy and obliging disposition, that it is unnecessary for us to urge upon every one of its members to have a part in making the testimonial one worthy of the occasion. Already over 400 names have been obtained and we have been asked to draw the attention of those who have not yet been made aware of it, to the fact that the subscription list has been opened. We would like to see upon that list the whole of the Philadelphia bar, from the oldest to the youngest.

TESTIMONIAL

To MR. BENJAMIN E. FLETCHER, FROM THE MEMBERS OF THE PHILADELPHIA BAR.

In view of the approaching departure of Mr. Fletcher, from the post he has so ably and faithfully occupied during the past seventeen years in the District Court office, it is believed to be the general desire of the members of the Philadelphia bar, who have profited by his large experience and thorough acquaintance with his official duties, and who are grateful for his uniform courtesy and assiduous exertions in their behalf, to manifest their friendship for Mr. Fletcher in some fitting form.

To accomplish this, the following gentlemen have consented to act as a committee to receive subscriptions of two dollars each from the members of our bar, in order to procure a suitable testimonial to be tendered with the names of the donors, to Mr. Fletcher. The amount has been fixed at this low figure, in order that the youngest donor may have an equal interest with the oldest in the gift.

Committee: Samuel Dickson, Esq., 32 South Third street; Joseph Parrish, Esq., 323 Walnut street; John Calwalader, Esq., 252 South Fourth street; T. B. Dwight, Esq., 200 South Fifth street; E. C. Shapley, Esq., 129 South Fifth street; Charles S. Pancoast, Esq., 416 Walnut street; Joseph M. Pile, Esq., 512 Walnut street; John H. Sloan, Esq., 213 South Sixth street; Richard P. White, Esq., S. W. cor. Sixth and Chestnut streets; Wm. H. Browne, Esq., 619 Walnut street; John J. Ridgway, Esq., 204 W. Washington Square; Wm. Ernst, Esq., 727 Walnut street

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The Constitutional Convention expect to get through with their work and adjourn by the 3d or the 10th of July, at the latest. It is to be hoped that this expectation will be realized, as the public is becoming impatient with the long sessions of that body. Some unwise members wish to adjourn over the hot weather.

NEW PUBLICATIONS.

DIGEST OF ALL THE REPORTED CASES ADJUDGED IN THE SEVERAL COURTS OF PENNSYLVANIA, FROM THE EARLIEST TIME. By Hon. James T. Mitchell, one of the judges of the District Court of Philadelphia.

A thorough and complete digest of the decisions of the Supreme Court of Pennsylvania has long been desired. This want has been only in a measure supplied by those of Wharton and Brewster. The latter of which, for its compass, containing seventeen volumes of reports, is by far the best. Since Brewster's was published, fourteen additional volumes of Supreme Court reports have been issued, and another volume will shortly make its appearance. Apart from these are the various law periodicals, containing many cases not in the reports. The bench and the bar are beginning to feel that a digest from Brewster to the present time is needed. The purpose, however, of a digest, is to have all the adjudications upon a particular branch of the law, collected and arranged together. If the number of digests be increased, they will be hardly more useful than the index to the reports, and will almost fail to effect their purpose. The want is one book, edited by a learned jurist, who has a discriminating mind, capable of both analyzing and generalizing. This, we think, is about to be obtained. Judge Mitchell has for several years been diligently laboring at the production of a digest of the decisions of the courts of Pennsylvania. We have before us specimen sheets of his work. They evidence care and discernment, and give promise that upon its completion, a great want will be amply supplied. It is to be published by T. & J. W. Johnson & Co., in two octavo volumes.

Recent Decisions.

PENNSYLVANIA.

[Our thanks are due to P. F. Smith, Esq., State Reporter, for advance sheets of Vol. 20 of his reports (Vol. 70 Pa. State Reports). We make the following selections from them.]

KNICKERBOCKER LIFE INSURANCE COMPANY v. GORBACH.

1. A widow brought suit on policies on the life of her husband, against an insurance company of New York. The defendants, alleging that the plaintiff was a citizen of Pennsylvania, applied for the removal of the case into an United States court. The defendant answered, that she was not a citizen of Pennsylvania, but of Austria; not being a citizen of Pennsylvania, her case was not subject to removal under the Acts of Congress of July 27th, 1866, and March 2d, 1867.

2. If the husband of a foreigner be a citizen, she will be a citizen.

3. The court below having decided the question of fact, the matter is concluded by that action, and is not reviewable in the Supreme Court.

4. The defendants should have made good their averment of the plaintiff's citizenship; her answer stood for proof until overturned by proof from the defendants.

November 11th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Certiorari to the District Court of Allegheny County: No. 79, to October and November Term, 1871.

PAISLEY'S APPEAL.

1. A testator gave to his wife "the rents and profits of all my property during her life for her support and the support and education of my children under the direction of my executors." This did not create a trust for the children either in the widow or executors, nor give the Orphans' Court jurisdiction to call them to account, or to decree in favor of the children for the future administration of the estate.

2. In the support of herself and children the widow was not under the direction of the executors; as long as the family lived together she was to have the control.

3. As to the management, renting and other disposition of the property, she was to be under the direction of the executors.

4. The children had no present interest, in any particular shares; the main object was to benefit the widow.

5. At the death of the widow the whole estate passes to the children under the intestate laws.

6. Pennock's Estate, 8 Harris, 268; Willard's Appeal, 15 P. F. Smith, 215, compared.

November 11th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Appeal from the decree of the Orphans' Court of Allegheny county: No. 69, of October and November Term, 1871.

SEIBERT v. WISE.

1. No words in a will are to be rejected, if any meaning can be assigned to them; they must be so construed as to carry out the testator's intention, if it can be done consistently with the rules of law; if not, those rules override the intention.

2. A devise was "to my two nephews, to John * * *, the one-half part of the above-mentioned farm to be taken off the east end; the other half to Jacob * * *, share and share alike, to hold to themselves and their heirs, the survivors or survivor of them forever." *Held*, 1. The words "survivors or survivor of them forever," did not apply to "heirs." 2. A survivorship between John and Jacob would be a devise over after a fee, and therefore could not stand as a remainder nor as an executory devise, being contrary to the rule against perpetuities. 3. The devisees took in severalty in fee.

3. Jacob at the time of the devise had no children or issue: if "heirs" could be construed "children," he took an estate tail—which would be destroyed by a deed, made by Jacob, to bar the tail.

4. Cote v. Von Bonnhorst, 5 Wright, 243; Taylor v Taylor, 13 P. F. Smith, 488, following Wild's Case, 6 Reports, 17, recognized.

November 10th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Allegheny county: No. 54, to October and November Term, 1871.

PITTSBURG'S APPEAL.

1. Under 19th section of act of January 6th, 1864, relating to municipal liens in Pittsburg, a judicial sale, if there be enough realized to pay such liens, divests them, and they are to be paid from the proceeds in preference to prior liens.

2. The findings of an auditor are to be set aside only for clear errors of fact or law.

3. The act of January 6th, 1864, section 19, construed.

4. Allegheny City's Appeal, 5 Wright, 60; City of Pittsburg's Appeal, 4 Wright 455, considered and distinguished.

November 8th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Appeal from the decree of the District Court of Allegheny county: No. 200, to October and November Term, 1871.

ZUG et al. v. COMMONWEALTH.

1. Under an act of Assembly, commissioners marked high and low water lines on the Allegheny, at Pittsburg. Zug erected buildings and cast cinders, &c., into the river between these lines. On an indictment at common law against Zug, the jury by special verdict found that the buildings, cinders, &c., did "not interfere with the navigation of the river at any stage of water." *Held*, that he was not guilty of nuisance.

2. Between high and low water the owner of the soil may use the river for his private purposes, if he do not interfere with the rights of the public.

3. Wainwright v. McCullough, 13 P. F. Smith, 66, distinguished.

November 10th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Quarter Sessions of Allegheny county: Of October and November Term, 1871, No. 57.

KLEPPNER v. LAVERTY.

1. A devise was to my daughter Mary Ann, for and during her natural life, all my real estate; and upon the happening of her death, I devise and bequeath the same to her lawful issue, should she leave any. In default of such lawful issue, I give, devise and bequeath said real estate to my brothers. Edward and Bernard, and to my sisters, Eliza and Rose, and their heirs, subject to the life estate of my said daughter therein. *Held*, an estate tail in the daughter, which under the act of 1855, became a fee.

2. "Issue" in a will means "heirs of the body," and in general is a word of limitation; but this construction will yield to an intention apparent on the face of the instrument, that it was to have a less extended meaning to be applied only to children or descendants of a particular class or at a particular time.

3. The rule in Shelley's case is not one of construction, but an inexorable rule of law, that where the ancestor takes a preceding freehold, a remainder shall not be limited to his heirs as purchasers.

4. Doebler's Appeal, 14 P. F. Smith, 9; Paxson v. Lefferts, 3 Rawle 59; Taylor v. Taylor, 13 P. F. Smith, 481, recognized.

November 3d, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the District Court of Allegheny county: No. 128, to October and November Term, 1871.

EASTERN DISTRICT.

Supreme Court of Pennsylv'a.

ROBERT J. JONES and EDMUND C. SWIFT, executors of ELIZABETH S. SWIFT, deceased, v. THE BENEFICIAL SOCIETY of the BOROUGH OF EASTON.

A beneficial society which is sustained by weekly dues paid by its members, and which pays benefits only to such of them as are in good standing, is not an association for charitable uses within the act of April 20th, 1855, and a legacy to it would not be subject to said act.

Error to Common Pleas of Northampton county.

Opinion by READ, C. J. Delivered May 17th, 1873.

The plaintiffs in this case are a beneficial society, both in name, and by the provisions of their charter, and their benevolence and benefits are exclusively confined to contributory members of the association. The members must be regularly admitted, must not be infirm, must be citizens, and between the ages of twenty-one and forty-five years of age; and no person shall be entitled to any benefits from this society, until he shall have been one year a member. Each person on being admitted a member of their society, shall pay such entrance money and monthly dues, and contributions, as the society may by their by-laws from time to time declare. A member is not in full standing, if in arrears for fines, contributions, or monthly dues; and not entitled to benefits in sickness, if in arrears for dues, contributions, or fines for three successive stated meetings, and may be expelled for arrears of dues or fines. The amount to be paid in case of death of a member or his wife, is fixed. There are other provisions showing that the benevolence is strictly a matter of contract, and may be enforced in a court of justice. The object of this society shall be the relief of its respective members, when sick, or disabled by bodily infirmities, to pursue their ordinary avocations. Its benevolence begins and ends at home. In Babb v. Reed, 5 Rawle, 151, it was held, that an association for the purposes of mutual benevolence among its members only, is not an association for charitable uses. This was a lodge of Odd Fellows. In Blenon's Estate, Brightly's Reports, 338, the beneficial societies who were claimants under the will of the testator, as "institutions of charity and benevolence," were so considered by the auditors, which decision was reversed by the Orphans' Court, who decreed, "That no friendly or beneficial society is entitled to any share in the bequest of the testator," which decree was affirmed by the Supreme Court. These decision are the settled law of this court.

The 11th section of the act of 20th April, 1855, P. L. 332, provides that "no estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic, or to any person in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible, and at the time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor, and all disposition of property contrary hereto, shall be void and go to the residuary legatee or devisee, next of kin, or heirs according to law: *Provided*, That any disposition of property within said period, *bona fide* made for a fair valuable consideration, shall not be hereby avoided."

No case comes within the English statute, of which this section is a copy in principle, unless the gift be for a charitable use, and the three cases which have been decided in this State under our act, were all charitable uses, and one of them also a religious use. Charitable uses are well understood in Pennsylvania, and the general subject has been largely discussed by Mr. Justice Strong in the Domestic and Foreign Missions' Appeal, 6 Casey, 433; Cresson's Appeal, Id. 437, and The Evangelical Association's Appeal, 11 Casey, 316, and clearly fix the meaning of charitable uses in the 11th section of the act of 1855.

Mrs. Elizabeth S. Swift made her will on the 22d May, 1872, evincing great care in distributing her property, and recollecting friends by various gifts, and towards the close of it, gives the legacy of "one thousand dollars to go to the old Easton Beneficial Society, of which my late husband was a member," and died on the 27th of the same month of May.

It is clear this is not a religious use, and it seems equally clear it is not a charitable use; and if so, it is a perfectly valid legacy, and must be paid by the defendants.

Judgment affirmed.

BOYNTON v. HOUSLER et al.

A vendee of a purchaser at sheriff's sale, knowing that the latter had promised a party in interest to bid in the property upon his account, is a trustee *ex maleficio* for him to whom the promise was made.

Error to the Common Pleas of Cameron county.

Opinion of the court by MERCUR, J Delivered May 17th, 1873.

The plaintiff claims to recover this land under title acquired at a sheriff's sale, when it was sold as the property of the estate of Merrick Housler, deceased. The defendant, who is the widow of said Housler, made defence to a portion of said land, called "the homestead," containing about eighteen acres. Prior to and at the time of the sheriff's sale, the defendant and her minor children were in the actual possession of the whole property. She had entered into a contract to purchase it from Aden Housler, who held a deed for it subject to the judgments. While thus holding whatever interest passed to her under this contract, as well as her right of dower, she made the arrangement with Simpson, under which he purchased at sheriff's sale.

The evidence given by the defendants, which the jury found to be true, was substantially this, to wit: Prior to the sheriff's sale the defendant had agreed with Aden Housler to bid off the whole land, provided it was not run up higher than $1,200 or $1,250, which was the value of the property, and if he became the purchaser he was to deed "the homestead" to her. Upon the day next preceding the sheriff's sale, Simpson, who was the plaintiff in the execution, was informed of this arrangement between Aden and the defendant. He then said to them if they would not interfere or bid at the sale, and have it bid off as low as possible, that she should have the homestead; she should not get any bidders, and he would get some one to bid it off; that would be better than for her to bid it off. The defendant and Aden agreed to this proposition. Relying upon it, they did not interfere or bid at the sale, nor did she get any other person to bid for her. Simpson bid it off for $110. The plaintiff bought of him with full knowledge of this arrangement.

Under these facts the court below held that a trust *ex maleficio* arose in favor of the defendant as to the homestead.

All the errors assigned are substantially to this conclusion.

Where a parol contract for the purchase of land has been carried on *mala fide*, there is a resulting trust implied by law, and equity will decree a conveyance according to the terms of the contract. McCulloch v. Cowher, 5 W. & S. 427. Equity will not permit one to hold a benefit which he has derived through the fraud even of another, and much less will it do so, if he has acquired it by means of his own fraud. Sheriff v. Neal, 6 Watts, 540. In Morey v. Herrick, 6 Harris, 128, Justice Bell said: "It is equally well settled that if one be induced to confide in the promise of another that he will hold in trust, or that he will so purchase for one or both, and is thus led to do what otherwise he would have forborne, or to forbear what he contemplated to do, in the acquisition of an estate, whereby the promissor becomes the holder of the legal title, an attempted denial of the confidence is such a fraud as will operate to convert the purchaser into a trustee *ex maleficio*." Where one holding an article of agreement for one hundred and sixteen acres of land, upon which he had paid five dollars only, and was liable to be turned off, surrendered his title under a parol contract that ten acres thereof should be conveyed to him so soon as the persons for whose benefit he gave up his title acquired a deed for the legal title, it was held to create a trust *ex maleficio* in his favor as to the ten acres. Plumer & Crary v. Reed, 2 Wright, 46. Nor does it make any difference that the title was acquired by Simpson through a judicial sale. Beagle v. Wentz, 5 P. F. Smith, 369, and cases there cited. This case of Beagle v. Wentz was one in which a debtor was induced to relinquish his claim to the $300 exemption and consent that the whole of his land be sold, under an agreement that the plaintiff was to take a sheriff's deed for the same, and make to the debtor a deed for the part agreed upon. It was held that if the debtor was induced to surrender his right on the false assurance that the part should be left to him, the plaintiff refusing, was a trustee *ex maleficio*. This was since the act of April 22d, 1856, and was held to be such a trust or confidence as was not affected by that act. The same principle is affirmed in Seichrist's Appeal, 16 P. F. Smith, 237.

It is contended, however, that inasmuch as the agreement between the defendant and Simpson was that she and her agent and friends should not bid at the sale, it was contrary to public policy, and therefore void. In support of this principle the case of Slingluff v. Eckel, 12 Harris, 472, is cited. We assent to the correctness of the law there declared, as applied to the facts in that case. That was an agreement between two persons, neither of whom had any possession of or interest in the land. The court there said "What we do decree is that one bidder cannot legally buy off another with money, or the promise of money."

The distinction in this case is that the defendant had an interest in the land in reference to which the contract was made, and she was to retain a portion of that land. This is a distinction clearly taken and recognized in Beagle v. Wentz, and in Seichrist's Appeal, *supra*.

Judgment affirmed.

BAUR & MILLER et al v. WILLIAMS.

1. A levy is not necessarily, as between debtor and creditor, a satisfaction of the debt. Up to the time of sale there is still a debt due by defendant to plaintiff, which may be attached in defendant's hands by a judgment creditor of the plaintiff.
2. B. & M. obtained judgment against W., and assigned it to S., who issued execution. Before sale, an attachment aur judgment against B. & M. was issued, in which W. was garnishee. The plaintiff in the attachment alleging the assignment to S was fraudulent, the court ordered a sale under the levy, and that the money should be paid into court to await the determination of the attachment suit: *Held*, There was no error.

Error to the Mayor's Court of the city of Scranton.

Opinion by MERCUR, J. Delivered May 17th, 1873.

Baur & Miller, for the use of Miller, obtained a judgment against Williams. Miller assigned it to Shoemaker, who issued execution thereon. After levy upon personal property, but before sale, Baillie commenced a suit by attachment, under the act of 17th March, 1869, against Baur & Miller, and served Williams as garnishee. The same day, a rule was granted to show cause why the execution issued on the judgment should not be stayed until the attachment suit was determined. Upon the hearing, Shoemaker claimed the money; but the defendant answered that the plaintiff in the attachment alleged the assignment to him to be fraudulent. The court refused to make the rule absolute, but ordered the marshal to proceed and collect, and to pay the money into court; and that distribution should await the final determination of the attachment suit, and directed the clerk to deposit the money in bank, subject to the further order of the court.

Shoemaker assigned this for error.

It is argued, that a levy upon personal property of the value of the debt, is a satisfaction thereof, and, therefore, no debt was due from Williams, to be attached.

The doctrine, however, that a seizure of goods in execution, to the value of the debt, whether they be sold or not, works a discharge of all responsibility on the part of the debtor, is subject to several exceptions. In Porter v. Boone, 1 W. & S. 252, it was held, that if the property be released by the plaintiff, at the instance and request of the defendant, it did not amount to a satisfaction of the judgment. In Cummins' Appeal, 9 W. & S. 73, the goods were suffered to remain after levy in the possession of the defendant in the execution, by whom they were used and disposed of. It was held to be no satisfaction of the judgment even as against a subsequent lien creditor of the defendant. This was affirmed in Davids v. Har-

ris, 9 Barr, 501, and in Chathcart's Appeal, 1 Har. 416.

It is true, in Fretz v. Heller, 2 W. & S. 397, it was said, that money levied by the sheriff upon a *fieri facias*, and either actually or potentially in his hands, cannot be attached. In that case, however, the attachment issued after the sheriff's sale, and sought to reach a portion of the money which the purchaser had agreed to pay. The attachment was not against the defendant in the execution, but against the purchaser at the sheriff's sale. The court then correctly held, that they would not suffer the distribution to be interfered with.

A levy is not necessarily, as between the debtor and creditor, a satisfaction of the debt. Up to the time of the sale, there is still a debt due from the defendant in the execution to the plaintiff. Being due and unpaid, it is liable to an attachment at the suit of the plaintiffs' creditors. Winternitz's Appeal, 4 Wright, 490.

It was a just exercise of the equitable powers of the court, to require the money to be collected, and to be held for future distribution. The defendant in the execution, is thereby protected from expensive litigation. The rights of the respective claimants to the fund can be determined by the trial of an issue framed for that purpose. We see no error in the decision of the court.

Judgment affirmed.

McCAFFERTY v. CUMMINGS.

In an action for purchase money, the court below refused to allow evidence of; 1. Judgments entered against the vendor subsequent to the sale. 2 An action of ejectment brought by the plaintiff's vendor. The court entered judgment for plaintiff, but that he should not collect it till he had delivered a deed to defendant. *Held*, there was no error.

Error to the District Court of Philadelphia.

Opinion by MERCUR, J. Delivered May 17th, 1873.

The first assignment of error is not in conformity with the rules. Rule 9, § 41 [8.] It should, therefore, be considered as no assignment. The evidence, however, as offered, was properly rejected. Upon the first of April, 1865, McCafferty had purchased, paid for, and taken possession of the land. This suit was commenced in September, 1869, and was tried in February, 1871. The lien of all judgments entered prior to McCafferty's purchase, had expired. After April, 1865, Cummings had no interest in the land to be bound by subsequent judgments. The offer was of judgments "entered from the thirteenth of March, 1869, to the seventeenth of February, 1870." There was no offer to show that any one of them was a *lien* upon the land.

The second error assigned has no merit. It is merely an offer to show the pendency of an action of ejectment for the land. Cummings had previously given in evidence, a deed from the plaintiff in the ejectment, to himself for the same land. There was no offer to connect or follow the record with any evidence of an outstanding title still existing in the plaintiff in the ejectment.

This action was brought to recover the money placed in McCafferty's hands for the use of Cummings. He was entitled to retain it until Cummings made him a good title to the land which he had previously sold to him. Before suit brought, Cummings several times notified McCafferty, that he was ready to make him the deed if he would pay over the money. He refused to pay. The jury have found the title of Cummings to the land to be good. The judgment is substantially that the plaintiff below shall not, collect the judgment until he shall have delivered the deed to the defendant. The plaintiff in error has no cause to complain of this.

Judgment affirmed.

KNAPP v. HARTUNG.

1. **A liberal construction should be given to the Acts of Assembly, allowing amendments in pleading.**
2. **Plaintiff was allowed to amend his narr. the new matter being the same cause of action originally declared for. The defendant pleaded to the amendment, and subsequently moved to strike it off. The court did strike off the amendment: *Held*, To be error.**

Error to the Common Pleas of Schuylkill county.

Opinion by MERCUR, J. Delivered May 17th, 1873.

This was an action of trespass *quare clausum fregit et de bonis asportatis.*

The original declaration filed, charged the defendant with entering the plaintiff's close, and with cutting down, taking away and converting oak, ash, beach and chestnut trees. After the jury was sworn, by leave of the court, upon the payment of the costs by the plaintiff, and without any exception on the part of the defendant, two separate, additional counts were filed. The one charging the defendant with entering another close of plaintiff's, and taking therefrom, and converting the cord wood and railroad sills. The other with taking and converting white oak, hickory, and black oak logs. The defendant alleged surprise, and the case was continued. To these amended counts the defendant plead not guilty, and the statute of limitations.

More than a year thereafter, another jury was called. After they were sworn, upon motion of defendant's counsel, the court struck off the first amended count, and hickory logs from the second amended count. To this the first assignment of error is made.

The substance of the plaintiff's cause of action was, that the defendant had entered the close of the plaintiff, and had cut thereon, and removed therefrom, and converted, his trees and lumber. They had all been cut upon a piece of land to which the plaintiff had acquired title from the father of the defendant. The plaintiff charged the defendant with a series of trespasses upon it.

The act of 21st March, 1806, permitting amendments, has received a liberal construction. Under it the power of the courts extends to every informality which will "affect the merits of the case" in controversy, except they cannot permit an entirely new cause of action to be introduced. If the plaintiff adheres to the original cause of action, he may add a count substantially different from the declaration. Carsell v. Cooke, 8 S. & R. 268; Yohe v. Robertson, 2 Whar. 155. This right is mandatory upon the courts. Mau's Lessee v. Montgomery et al., 10 S. & R. 192; Sandback v. Quigley, 8 Watts, 460.

In actions *ex contractu*, so long as the plaintiff adheres to the original instrument or contract on which the declaration is formed, an alteration of the grounds of recovery upon that instrument or contract, or of the modes in which the defendant has violated it, is not an alteration of the cause of action. Coxe v. Tilghman, 1 Whar. 287; Yost v. Eby, 11 Har. 327.

This rule is not restricted to actions *ex contractu*. In an action of slander, where the words spoken were so defectively set forth as not to be actionable, the declaration may be amended by setting out a good cause of action, provided the words substituted import a charge generally the same. 3 Penn. Rep. 65. In actions *ex delicto*, the rule is the same; the foundation of the complaint laid in the declaration must be adhered to; but the mode of stating that complaint may be varied by the amendment. Clymer et al. v. Thomas et al., 7 S. & R. 178; Coxe v Tilghman, 1 Whar. 290. Amendments should be liberally allowed; and the test of their propriety is whether they introduced a new cause of action. Steffy v. Carpenter, 1 Wright, 41.

Here the cause of action was for breaking the plaintiff's close, and taking therefrom the timber and lumber. Whether it was taken in the form of trees, or in that of wood, railroad sills or logs, all taken from, and originally forming a part of the trees cut upon the land in question. Whatever the kind of tree might have been, did not substantially change the cause of action. The amendments merely pointed out the additional modes, and more fully described the manner in which the defendant had committed the trespasses and aggravated the damages.

The court, however, had permitted these amendments to be filed, and imposed costs upon the plaintiff in consequence thereof. The defendant made no objections; but received those counts, and plead to the amendments. More than a year thereafter, and after another jury had been sworn in the case, he moved to strike them off. We think the learned judge erred in granting his motion. This view of the case will necessarily make the evidence admissible, which is set forth in the fourth assignment of error. We discover no other errors in the record.

Judgment reversed, and a *venire facias de novo* awarded.

[Since the act of May 10th, 1871, the court can permit amendments even though the form of action be changed. ED.]

BOWEN v. GOVANFLOW.

An executor who is also a devisee, is a competent witness in an issue *devisavit vel non*.

Error to the Common Pleas of Lehigh county.

Opinion of the court by MERCUR, J. Delivered May 17th, 1873.

The first error assigned is as to the competency of the party to testify. He was both a devisee and the executor. It was admitted upon the argument, that if he had been the executor only, he would have been competent under the exception to the proviso of the act of 15th April, 1869, P. L. 30; but inasmuch as he was a devisee also, it was argued that he was incompetent. We are not able to see the force of the reasoning, nor to adopt the conclusion. The language of the exception to the act is to make parties competent "in issues and inquiries *devisavit vel non*, and others, respecting the right of such deceased owner, between parties claiming such right by devolution, on the death of such owner."

This is an issue *devisavit vel non*. It is between parties claiming a right by devolution, on the death of the former owner. The subject matter is respecting the right so acquired. Thus, the form of the suit, the parties thereto, and the subject matter bring it within the exception. We see nothing in it to exclude a party who is either a devisee or executor only. A union of two conditions of competency, each unquestioned by itself, will not create incompetency, as its joint product. It follows that both parties, claiming an estate under the same decedent, which has devolved on them by descent or succession, are competent witnesses in the trial of an issue to settle their respective rights thereto. Karns v. Tanner, 16 P. F. Smith, 297.

No error is assigned to the general charge, but the answers of the court to the specific points submitted are assigned for error.

We have carefully examined the whole testimony. All the points submitted are substantially answered in the general charge. It contains a clear and correct statement of the law, as applied to the evidence in the case.

The errors are not sustained.

Judgment affirmed.

PALMER v. WILKINSON.

1. **Under a plea of *nul tiel* record to a *sci. fa.* sur recognizance in an appeal from arbitrators, the defendant cannot show that the costs in the original suit were not paid,**
2. **If no objection is made to the irregularity of the appeal, and the party appealing effects his object of obtaining another trial, it is too late for his surety to interpose such an irregularity as a bar to a recovery upon the forfeited recognizance.**

Error to the Common Pleas of Bucks county.

Opinion by MERCUR, J. Delivered May 17th, 1873.

This was a *sci. fa.* sur recognizance. The plaintiff pleaded *nul tiel* record, and assigned eight reasons therefor. The court sustained the sixth reason, and entered judgment in favor of the defendant. A prior suit had been pending between the plaintiff and one Emerick, in which the plaintiff obtained an award before arbitrators. Upon the twentieth day thereafter, Emerick paid to the prothonotary all the costs except the plaintiff's bill, appealed from the award, and with Wilkinson, the present defendant, entered into a recognizance. That case was subsequently tried, and the plaintiff recovered a verdict and judgment for a larger sum than the award. Thereupon, the plaintiff issued this *sci. fa.* upon the recognizance.

The ground upon which the court sustained the plea was, "That the recognizance was illegal, as was the appeal, because the former was taken, and the latter entered, without the payment of accrued costs."

It is true, one of the requirements of the statute to perfect an appeal from the award of arbitrators is, that all the costs that may have accrued in the suit shall

be paid. This fact, however, cannot be inquired into under the plea of *nul tiel* record. The writ of *scire facias* is not set forth in the paper book; yet, it is no part of the writ to recite the amount of costs that had accrued prior to the appeal, nor to aver anything in regard to their payment or non-payment. This plea merely puts in issue the existence of the record, as recited in the writ, and therefore is proper only where there is either no record at all, or one different from that upon which the plaintiff has declared. 1 Chit. Plead. 485; Burkholder v. Keller, 2 Barr, 51. The non-payment of a part of the costs was not admissible in evidence under the pleadings. It did not contradict the existence of the record as recited, nor that it differed therefrom This plea puts in issue nothing but the recognizance, the rest being merely inducement, and if the variance is material, it should be specially pleaded. Cooper v. Gray, 10 Watts, 442.

When the taxed costs have not all been paid, through the fault or negligence of the party appealing, the appeal may be stricken off upon the application of the opposite party; but where their non-payment is caused by the exclusive fault of the officer in withholding the knowledge of the existence of a portion of them, the payment of the omitted portion should be enforced by attachment. Fraley v. Nelson, 5 S. & R. 234; Carr v. McGovern, 16 P. F. Smith, 457.

If, however, no objection is made to the irregularity of the appeal, and the party appealing effects his object of securing another trial, it is then too late for him or his surety to interpose such an irregularity as a bar to a recovery upon the forfeited recognizance.

The ground upon which the learned judge predicated his action being untenable, and being unable to discover, in the other reasons assigned to sustain the plea, any cause to sustain the judgment, it must be reversed.

Judgment reversed, and judgment is entered in favor of the plaintiff.

LAW ASSOCIATION.

NOTICE.—An Adjourned Meeting of the Law Association of Philadelphia, will be held on Saturday, the 21st inst., at one o'clock P. M., at the Library Room, to consider certain proposed amendments to the charter.

June 11, 1873. EDWARD HOPPER.
Jun 13-2t Secretary.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in June, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

April 26, The Penna. Life Ins. Co., &c., Executors of THOMAS D. NANCREDE, dec'd.
" 26, Edward G. Lee. Administrator of SAMUEL BROWN, dec'd.
" 28, Mary Dillon, Administratrix of JOHN A. DILLON, dec'd.
" 29, Mary McGuigan, Administratrix of TERRENCE McGUIGAN, dec'd.
" 29, David Teller, Administrator of GEO. KONECKE, dec'd.
" 29, Charles H. Martin, Administrator c. a. of EMMA MARTIN, dec'd.
" 30, Hugh Fitzpatrick, Executor of JAMES & MARGARET WELSH, dec'd.
" 30, William F. Milligan, Administrator of GEORGE A. MILLIGAN, deceased.
" 30, S. Weir Lewis, Guardian of JOHN BARCLAY, late minor.
" 30, Thos. Cadwallader, Executor and Trustee of the last will and testament of JAMES HAMILTON, deceased.

May 2, Edward Ingersoll, Executor of ELIZABETH J. FISHER, dec'd.
" 2, Ann Maria Sharpless, Executrix of JOSEPH J. SHARPLESS, dec'd.
" 2, Geo. Brooke, Administrator d. b. n. c. t. a. of STEPHEN BALDWIN, dec'd.
" 2, Thomas Smith et al., Trustees under the will of EDWARD SMITH, deceased.
" 6, William Anson et al., Executors of JOHN ANSON, dec'd.
" 6, William Brown et al., Executors of MARY SINCLAIR, dec'd
" 7, Peter W. Hall, Executor of MARY P. FLEETWOOD, dec'd.
" 7, William Francis, Administrator of ELLEN WHITMAN, dec'd.
" 9, R. C. McMurtrie, Administrator of FREDERICK OSWALD BOHLEN, dec'd.
" 10, John F. Orne, Administrator of ELIZA J. McWATTERS, dec'd.
" 12, Rhoda M. Levy, Executrix of FELIX H. LEVY, dec'd.
" 13, Robert Scott, Surviving Executor of WILLIAM WHITE, dec'd.
" 13, Susannah Biggs, Administratrix of SARAH B. SCHULTZ, late INGLES, dec'd.
" 13, Robert McNairy et al., Executors of JOHN NEITHERCOT, dec'd.
" 13, Robert Scott, Administrator of ELEANORA WHITE, dec'd.
" 13, Nancy M. Grigg, Administratrix of JOHN GRIGG, dec'd.
" 14, Watson Comly, Executor of CYNTHIA GREEN, dec'd.
" 14, Andreas Hardel, Administrator of JOSEPH RIPKA, dec'd.
" 14, Andreas Hartel, Administrator of ALFRED RIPKA, dec'd.
" 14, William M. Thomas et al., Executors of SAMUEL THOMAS, dec'd.
" 15, Martha Dillon, Administratrix of EDWARD DILLON, dec'd.
" 15, George A. Twibill, Administrator of JOHN DENNING, dec'd.
" 15, James McCann, Guardian of ELLEN QUINN, otherwise known as ELLEN FOLEY, dec'd.
" 15, John C. Stockton, Administrator of ANN L. NANCREDE, dec'd.
" 19, Thomas Holt, Executor of SUSANNAH BOOTH, dec'd.
" 19, The Philada. Trust, Safe Deposit Co., &c., Administrators c. t. a. of GEO. LEYENBERGER, dec'd.
May 19, Geo. W. Steever et al., Executors and Trustees under the will of ROBERT S. JOHNSON, dec'd.
" 19, Philip H. Brice et al., Guardians of EMILY LE FOLL (formerly MERCER).
" 20, Solomon Rothschild, Guardian of FLORA ARNOLD, minor.
" 20, Solomon Rothschild, Guardian of LEON ARNOLD, minor.
" 20, William Myers, Administrator c. t. a. of GERHARD GRAEVE, dec'd.
" 20, Edmund Carpenter et al., Executors of MARY LINCOLN, dec'd.
" 21, Adolph Fischer, Administrator c. t. a. of CHRISTIANA FISCHER (formerly ELLWANGER), dec'd.
" 23, Lucinda E. Leu, Administratrix of GEORGE H. LEU, dec'd, as filed by William G. Stocker et al., Executors of LUCINDA E. LEU, deceased.
" 22, Samuel C. Brinckle, M. D., Guardian of JOHN C. MILLER, dec'd.
" 23, Philip M. Wheaton, Executor of SILAS WHEATON, dec'd.
" 23, William W. Ball et al., Executors of SARAH GRAHAM, dec'd.
" 23, Hannah L. Heaton et al., Executors of JOSEPH HEATON, dec'd.
" 23, Mary Ann Levy et al., Executors of JOHN P. LEVY, dec'd.
" 24, Susan N. Streper, Administratrix of OTTINGER G. STREPER, dec'd.
" 24, Benjamin J. Douglass, Executor and Trustee under the will of RICHARD H. DOUGLASS, dec'd.
" 26, William Yonker, Guardian of MARIA T. S. WILSON, late minor.
" 26, Sarah C. Bangs, Executrix of WM. P. BANGS, dec'd.
" 26, James W. Carson, Guardian of MILLARD F. LOGAN, minor.
" 26, Thomas Smith et al., Trustees under the will of CHAS. J. ADAMS, deceased.
" 26, Anthony Groves, Jr., Administrator of WILLIAM M. GROVES, dec'd.
" 26, Alfred Smith, Guardian of WILLIAM C. SMITH, late minor.
" 28, Howard Kirk et al., Administrators of HIRAM G. COOPER, dec'd
" 28, James Johnson et al., Executors of PATRICK GIBSON, dec'd.
" 28, Edward S. Campbell, Executor of SUSANNA E. LEIDY, dec'd.
" 28, Edward E. Wallace, Administrator c. t. a. of JOSEPH K. VANDEGRIFT, dec'd.
" 28, Ellen Emery, Administratrix of DAVIS EMERY, dec'd,
" 28, Caroline Vendig et al, Administrators of RAPHAEL VENDIG, deceased.
" 28, Henry Gormley et al., Executors, &c., of JOHN GORMLEY, dec'd.
" 28, James F. C. Sickle, Administrator c. t. a. of WILLIAM CRISPIN, deceased.
" 28, Jas. H. Grier, Administrator of JANE K. ROSS, dec'd.
" 29, Jane B. Colahan, Guardian of JOHN J. O'DONNELL, minor.
" 29, Bridget Curry, Administratrix of EDWARD CURRY, dec'd.
" 29, Caroline E. Smith et al., Executors of ISAAC R. SMITH, dec'd.
" 29, Caroline Clark, Administratrix of MARY or MARIA THOMAS, deceased.
" 29, Jane G. Stanhope et al., Executors of HIRAM STANHOPE, dec'd.
" 29, Frank S. Crouse, Administrator of MARY J. KROUSE, dec'd.
" 29, John L. Shoemaker et al., Executors of GEORGE W. WIMLEY, M. D., deceased.
" 29, George W. Hall, Executor of GUSTAVUS H. KREEGER, M. D., deceased.
" 29, John B. Kelley, Executor of SARAH HARDIMAN, dec'd.
" 29, Sarah R. Scattergood, Executrix of JOSEPH R. SCATTERGOOD, deceased.
" 29, Joseph Campbell, Guardian of MARY FOSTER, minor.
" 29, John Ashbridge, Guardian of ELLEN A. STEPHENSON, late HARWOOD, minor.
" 29, John Ashbridge, Guardian of MARTHA FLORENCE WEED, late a minor.
" 29, James V. Watson, Administrator of ELIZABETH WATSON, dec'd.
" 29, Franklin Smith et al., Executors of JOHN M. SMITH, dec'd.
" 29, Francis E. Seal et al., Executors of BENJAMIN SEAL, dec'd.

WILLIAM M. BUNN,
May 30-4t Register.

Legal Gazette.

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[Reported specially for the Legal Gazette.]

Supreme Court United States.

NEW ORLEANS v. GAINES.

1. Where a master on reference has followed the order of the judgment and enforced its directions, no objection can be taken, on appeal, to what he has done, when the appeal arises upon exceptions to his report, and not on objection to the original judgment under which the reference to him was made.
2. Though by the law of Louisiana, a defendant ordered by judicial decree to restore possession of real estate which it has been adjudged that he has held *mala fide* during his whole term of possession, have a right if the party recovering as true owner desire to retain improvements which the possessor *mala fide* has put on them, to demand the value of the materials and price of workmanship of such improvements; yet, where in a peculiar and complicated case, in which specific amounts and estimates were not possible to be made, and the case had to be adjusted largely on a system of equitable compensations—if the party finally dispossessed, have, by the decree, received in fact and good conscience, the value of his improvements, the court will not allow him to call for another and more specific payment.
3. The possessor in continuous bad faith, of real estate which the owner at last recovers, is chargeable, under the claim of *mesne* profits, with what the premises are reasonably worth annually, and interest on them to the time of the trial. An allowance of five per cent. interest in a Louisiana case, held to have been proper. On a claim for *mesne* profits by the owner against a possessor in continous bad faith, there is nothing in the civil code of Louisiana which limits the claim to profits for three years. On the contrary, the rule of English equity there prevails; and the decree is properly made of profits from the time that the complainant's title accrued. In the present case, the profits of fifteen years were given, with interest on them at five per cent.

Appeal from a decree of the Circuit Court, for the District of Louisiana, the case being thus:

In the year 1856 Mrs. Myra Clark Gaines filed a bill in the court below against the city of New Orleans, in which she sought to recover valuable real estate in New Orleans owned by one Daniel Clark, including a certain block or square described, on which a draining-house and out buildings, with a draining-machine for draining the city, was now and had been for many years situated.

The bill alleged that she was the only and legitimate child of Clark; that Clark had left a valid will, made in 1813, by which he devised all his estate to her; that this will having been lost or destroyed, and she a minor till 1827, and ignorant of her parentage and rights, a provisional will dated in 1811, of which Richard Relf and Beverly Chew were executors, and Clark's mother, Mary Clark, was universal legatee, was admitted to probate and ordered to be executed; that the will of 1813, which revoked the will of 1811, was subsequently found, and in 1856, established; that Relf and Chew, under pretended authority as executors of Clark and as attorneys in fact of his mother, had, in 1821, without right or authority, and in bad faith, sold this lot and others at public auction to one Evariste Blanc; that Blanc, equally without right or authority, and in bad faith, had sold it and others, by act of sale, on the 26th of September, 1834, to the city of New Orleans; that the city had notice of the fraudulent character of the proceedings of Relf and Chew, &c., and of the worthlessness of the title, &c., which they acquired. The bill payed a delivery of the property and an account of the rents and profits.

After a long and expensive litigation, including an appeal to this court; Mrs. Gaines succeeded in her case. See Gaines v. New Orleans, 6 Wallace, 642; and in pursuance of a mandate from this court, the court below, in June, 1870, entered a decree in her favor; decreeing that she was Clark's only legitimate child, and as his universal legatee was entitled to the lots in question; that the sale by Relf and Chew, and that also by Evariste Blanc was wholly unauthorized and illegal, and utterly null and void; and that the city of New Orleans at the time it purchased the property was bound to take notice of the circumstances which rendered the actings and doings of Chew and Relf in the premises utterly null and void, and "ought to be deemed and held, and was thereby deemed and held, to have purchased the property in question with full notice that the sale at auction, under the pretended authority of the said Richard Relf and Beverly Chew, and the said act of sale to the said Evariste Blanc were unauthorized, illegal, null, and void, and in derogation and fraud of the persons entitled to the succession of Daniel Clark. The court further decreed that Mrs. Gaines, as Clark's only and legitimate child and universal legatee, was entitled to the property with all the yearly rents and profits accruing from it since it came into possession of the city, on the 26th of September, 1834, and decreeing an account accordingly, referred it to the master to take the same.

The master reported that the city had never rented the lot on which the draining-house and machinery was built, nor received from it any rents or profits, except by an increase of the city revenue, brought about by the fact that the draining-machine had drained a large part of the city, and by making it of use, had largely augmented the property in the city that was taxed. While, therefore, he "found it difficult to fix the amounts of rents and profits for which the city was liable on this lot," he presented certain facts and figures from which the court could reach an equitable result. These were thus: The city, *it was estimated*, had received from increased taxation of *other* property, during the term embraced by the order (including interest), $208,825.

Now, this particular lot of land, it was testified, was originally worth $200. The buildings erected by the city, independent of the machinery, cost $18,000. The putting up of the machinery was finished July 1st, 1835 or 1836 (some witnesses testifying to the one year and some to the other), and it was testified that a fair rental of the land and building was $2,400 a year. The expense of repairs was $500.

The master, accordingly—disallowing to the city the benefit of the "prescription of three years," which it set up against the claim for rents—charged the city on this basis:

Rental value from July 1st 1835, to Nov. 1st, 1870....	$84,800 00	
Interest on the rents at five per cent.....	72,800 00	$157,600 00
And allowed the city:		
Expenses of repairs.....	$17,166 66	
Interest on repairs.....	15,166 55	32,333 21
And thus made the City chargeable with the difference.....		$125,266 79

On exceptions to his report, one of them was that as the draining-machine and buildings necessary therefor were made and erected by the city, with materials belonging to it, the only right of Mrs. Gaines as to them was, either to keep the same, and reimburse to the city their value and the price of workmanship, or to require the city to take away or demolish them; that the obligation, under the law of Louisiana, rested upon Mrs. Gaines to elect which she would do; and that the city had demanded of her, through the master, that she should make such election, and that the master refused to direct or require her so to do, and thus denied the city its rights under the law.

The master to this reported that the city, by its counsel, had cited article 500 of the civil code of Louisiana before him, and stated that it would call upon the complainant (then present) to elect whether she would keep said works, and improvements placed upon the land by the city, or pay the city for the same; and the master added that he had "regarded this as a mere notice of what the defendant intended to do at some future time, but as the point was not presented in writing, nor subsequently alluded to, he had assumed that it had been abandoned."

In this state of things, and after the disallowance of some other exceptions, the report came before the Circuit Court, Bradly, J. After examining those exceptions, the learned justice came to the main matter, the allowance of the $125,266.76. On that subject he said:

"The case of the city is a peculiar one. The estimation of the rents and profits in that case is so uncertain and speculative, that I do not feel entirely satisfied as to the decision that should be made. The master evidently felt the same embarrassment."

And after referring to the different estimates made by the master, and specially to the one above given, the learned justice said:

"As the master has not signified his adoption of either of these estimates, but has stated the facts to the court for its equitable determination, I have come to the conclusion that it would be equitable and just to set off the profits derived by the city from the draining-machine for the past thirty-five years against the cost of constructions and repairs, and to charge the city with the rents of the building and lands, less the ordinary repairs of the buildings, amounting, as shown by the report, to the sum of $125,266.76. Whilst the profits and advantages of the drainage-machine were indefinite and uncertain in amount, there is no doubt of their reality, nor, if we can place any reliance upon the estimates, is there any doubt of their being amply sufficient to reimburse the city for all its expenditures, including even the rent with which it is charged."

The learned justice of the Circuit Court accordingly ordered a confirmation of the report. From that decree this appeal came.

Messrs. *Miles Taylor* and *J. McConnell* for the appellant (suggesting that whereas the draining-machine was finished July 1st, in 1836, and that alone gave the land a value for rent, a charge for one year too much had in any view, been made), insisted upon certain exceptions, as follows:

1st. That the decree was erroneous in that it had the effect of giving to the complainant the buildings and machinery erected by the city, with the materials, and at the expense of the city, without paying the value of the materials and the cost of the workmanship, or any other price whatever.

2d. That the sum of the rents and profits above stated, was made up in part by the allowance of interest, at the rate of five per cent. per annum, on each year's rent, from the end of the year. This, it was argued, was in violation of the doctrines of the code of Louisiana, of 1825, as shown in its articles 1939 and 1905.

3d. That the refusal to allow the plea of prescription in bar of all rents or profits for the use of the square, which were received by the city more than three years anterior to the institution of the

suit on the 26th of December, 1856, was an error.

Messrs. *J. Emott* and *J. Q. A. Fellowes*, contra.

Mr. Justice HUNT delivered the opinion of the court.

The appeal before the court arises upon exceptions to the master's report only, and not to the original judgment.

1st. It is only where the master or the judge in acting upon his report, has departed from the order of the judgment, or has omitted to enforce its provisions, that a just objection can arise. The judgment has decided that the plaintiff was the owner of this property in question in 1834, when the defendant entered into its possession; that then and at all times since the defendant has illegally kept the plaintiff out of its possession, and has itself been in its possession during the same period, and that it obtained and during all this time held such possession wrongfully and in bad faith.

This statement furnishes an answer to the suggestion that the rents and profits were allowed for one year, during which the city was not in possession. This is not an open question. It is settled by the judgment, and the allowance is in accordance with the decision.

It is also decided, "that the city of New Orleans ought to be deemed and held, and is hereby deemed and held, to have purchased the property in question with full notice that the said sale at auction, under the pretended authority of the said Richard Relf and Beverly Chew, and the said act of sale to the said Evariste Blanc, were unauthorized, illegal, null, and void, and in derogation and fraud of the rights of the person or persons entitled to the succession of the said Daniel Clark." This sale to Evariste Blanc was the source from which the city derived its title to the property in question. During the whole time of its holding, the city was a possessor in bad faith of the property of the plaintiff. The civil code of Louisiana declares as follows:

"ARTICLE 3414. The possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact, as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which in fact belongs to another.

"ARTICLE 3415. The possessor in bad faith is he who possesses as master, but who assumes this quality, when he well knows that he has no title to the thing, or that his title is vicious and defective."

By the same code, a possessor in good faith may enjoy the fruits of the property until it is claimed by the owner, and is bound to account only from the time of a demand for restitution. He is also entitled, when evicted, to be reimbursed for the expenses he may have incurred on it. Article 3416.

To the same purport are articles 500 and 501.

"When plantations, constructions, and works have been made by a third person, and with such person's own materials, the owner of the soil has a right to keep them, or compel this third person to take away or demolish the same. If the owner requires the demolition of such works, they shall be demolished at the expense of the person who erected them, without any compensation; such person may even be sentenced to pay damages, if the case require it, for the prejudice which the owner of the soil may have sustained. If the owner keeps the works, he owes to the owner of the materials nothing but the reimbursement of their value, and of the price of workmanship, without any regard to the greater or less value which the soil may have acquired thereby.

"Nevertheless, if the plantations, edifices, or works have been done by a third person evicted, but not sentenced to make restitution of the fruits, because such person possessed *bona fide*, the owner shall not have a right to demand the demolition of the works, plantation, or edifices, but he shall have his choice either to reimburse the value of the materials, and the price of the workmanship, or to reimburse a sum equal to the enhanced value of the soil."

The case of the present defendant is an instance where the works were done, not by one not sentenced to make restitution because such person possessed *bona fide*, but by one who was sentenced to make restitution, and who was expressly adjudged to possess *mala fide*.

Mrs. Gaines, therefore, had the right to keep the improvements upon reimbursing their value and the price of the workmanship, or to compel the city to demolish and remove them. She has not been called upon legally to elect which course she would adopt. On the hearing an oral notice was given that she would be called upon to elect, which the master understood to be in the future, and not a present notice. The matter was never again presented, and the master considered the subject as abandoned. She may now properly rest upon her right to have the works demolished and removed. This would give the city the value of the materials only as taken down at its own expense and when separated from their position upon the land. This allowance has, however, already been made to the city. In the opinion of the judge at the circuit he uses this language: "I have come to the conclusion that it would be equitable and just to set off the profits derived by the city from the drainage-machine for the past thirty-five years against the cost of construction and repairs. . . . Whilst the profits and advantages (he says) of the drainage-machine are uncertain and indefinite in amount, there is no doubt of their reality, nor, if we can place any reliance upon the estimates, is there any doubt of their being amply sufficient to reimburse the city for all its expenditures, including even the rent with which it is charged."

It is evident from this statement that there has been already allowed to the city a sum not only equal to the value of the materials of the improvements, if they were demolished, but of their actual cost. The city has, therefore, no cause of complaint on this score, and the point under consideration must be held against it.

2. The question of the allowance of interest on the items of rent was not made before the master or before the judge at the circuit, and is not properly before us. Interest was allowed at the rate of five per cent., the rate fixed by the code of Louisiana. In Vandevoort v. Gould, 36 New York, 639, 647, it was adjudged that mesne profits consist of what the premises are reasonably worth annually, with the interest to the time of the trial. "Less than this," it is said, "would not give the plaintiff full and complete indemnity for the injury to his rights." Such is also the express declaration of article 1939 of the civil code of Louisiana.

The articles of the code, 1939 and 1905, are not, as it is urged, in hostility to this principle. The latter by its terms relates to contracts. By the former, liens which are due for the restitution of profits bear interest from the day the debtor was in default. By the judgment it is found that the city held this property wrongfully from the outset, and thus (which is the only sense in which the word can here be used) was in default continually.

The remaining question to be considered is upon the allowance of the plea of prescription. It is alleged as error that the plea of prescription was not allowed in bar of the claim for all the rents and profits which had accrued more than three years prior to the commencement of the action. The civil code enumerates as causes of action which are the subject of the prescription of three years—"the action for arrearages of rent charge, annuities and alimony, or of the hire of movables or immovables." Article 3503. "In general all personal actions except those above enumerated are prescribed by ten years, if the creditor be present, and by twenty years if he be absent." Article 3508.

These articles do not govern the present case. They prescribe actions which the party had the legal right to bring. They do not apply to rights like the present, which result from the determination of another action. Until the decree in the main suit there was here no existing cause of action to recover the mesne profits. No special action could be maintained for them until the title to the property should be judicially determined. It is controlled rather by the title "Of the Right of Accession to what is produced by the thing." Civil Code, 490–494.

"Fruits of the earth, whether spontaneous or cultivated, belong to the proprietor by right of accession." Article 490.

"The fruits of the thing belong to its owner, although they may have been produced by the work and labor of a third person, or from seeds sown by him, on the owner's reimbursing such person for his expenses." Ib. 493.

"The produce of the thing does not belong to the simple possessor, and must be returned with the thing to the owner who claims the same, unless the possessor held it *bona fide*." Ib. 494.

Speaking strictly, there was not only no cause of action, but no right to the mesne profits until the judgment in the original suit.

There is no article of the code to which our attention is called which limits this claim to the profits for three years. On the contrary, the rules of the civil law and the general principles of equity jurisprudence hold that there is no such limit. It will be observed that this question does not involve the allowance for improvements or to its extent. That point has been already disposed of, and the defendant has been allowed for the improvements and beneficial structures made by it during the term. We are now endeavoring to ascertain whether the recovery for the rents and profits which have been adjudged to be paid shall be limited as required by the defendant.

The rule is thus laid down in Justinian:

"If any man shall have purchased or by any other means honestly acquired lands from another whom he believed to be the true owner, when in fact he was not, it is agreeable to natural reason that the fruits which he shall have gathered shall become his own on account of his care in the culture; and therefore if the true owner afterwards appear and claim his lands he can have no action against the *bona fide* possessor for produce consumed. But this exemption is not granted to him who knowingly keeps possession of another's estate, and therefore he is compellable to account for *all the mense profits*, together with the land." Justinian Inst., lib. 2, tit. 1, § 35.

The chancery rule is thus laid down in Peere Williams: Bennet v. Whitehead, 2 Peere Williams, 645.

"Where one is in possession of lands belonging to an infant, if the infant when of age makes out his title, he shall recover the profits in equity from the first accruing of his title, and not from the filing of the bill only. So the defendant shall account for the profits from the time the plaintiff's title accrued, and not from the filing of the bill only, if the defendant has concealed the deeds and writings making out the plaintiff's title."

In Dormer v. Fortescue, 3 Atkyns, 128, Lord Hardwicke says:

"There are several cases where the court does decree an account of rents and profits, and that from the time the title accrued, as where there is a trust and an equitable title merely, or where a widow claims dower merely, but needs the aid of chancery to find out the lands, the court will give her the profits not only from the time of the demand, but from the time of her title accrued."

In the case before him he decreed an account upon these principles, for a period of fifteen years.

The present action was commenced by Mrs. Gaines nearly seventeen years ago. It was a bill in equity praying for a discovery, for an accounting for rents and profits, and for general relief. After much tribulation she has reached the point of an accounting, which the defendant has brought before us on appeal. We think there is no prescription of the rents and profits, but that the allowance in this respect was properly made.

Upon the whole case we are of the opinion that the decree or order upon the master's report must be affirmed, and the exceptions thereto disallowed.

Recent Decisions.

PENNSYLVANIA.

[Our thanks are due to P. F. Smith, Esq., State Reporter, for advance sheets of Vol. 20 of his reports (Vol. 70 Pa. State Reports). We make the following selections from them.]

GEORGE v. BRADEN.

George sold stock to Braden, and agreed that he would take it back and return the price if requested, and delivered a certificate. *Held*, that Braden could recover the price without tendering the certificate; but that he must surren-

der the certificate to George or file it in court, before execution could issue.

October 26th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Westmoreland county: No. 129, to October and November Term, 1870.

WILKINS TOWNSHIP SCHOOL DISTRICT.

1. The policy of the school laws is that the school districts should correspond with the division of counties into townships.

2. The notice required by 2d section of act of May 8th, 1855, for the *continuance* of independent districts, is to be given to the school directors upon proceedings to *create* a new district.

3. In reporting a new district, the commissioners should annex a draft showing both the lines of the independent district and those of the districts from which it is taken.

4. Sewickley Township, 9 Casey, 299, adopted.

November 7th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Certiorari to the Court of Quarter Sessions of Allegheny county: No. 17, to October and November Term, 1871.

CALDWELL v. HARTUPEE & CO., for use.

A trust-mortgage was made to Caldwell to secure, amongst others, a debt of Hartupee, who owed a firm of which Caldwell was a partner. Hartupee gave an order on Caldwell in favor of Cuthbert; on presentation Caldwell refused to pay Cuthbert, saying he would pay Hartupee's debt to his firm from what he was entitled to under the mortgage. At the trial Caldwell's partner consented that the firm's claim might be set off to Hartupee's claim against Caldwell. *Held*, that the order was an equitable assignment to Cuthbert, and he might recover from Caldwell.

November 3d, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the District Court of Allegheny county: No. 210, to October and November Term, 1870.

ARONSON v. CLEVELAND AND PITTSBURG RAILROAD CO.

1. Where the error alleged is in arresting judgment, the Supreme Court will not look to the testimony for aid in pronouncing on the judgment of the court below.

2. If the declaration be sound, the plaintiff is generally entitled to judgment.

3. A declaration was against defendants for loss of goods as *carriers;* after verdict it was to be presumed that this was made out.

4. In another action for the loss of the same goods against the defendants as *warehousemen*, the plaintiff would be estopped by his allegation that they were carriers.

November 3d, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Allegheny county: No. 98, to October and November Term, 1871.

VAN OHLEN'S APPEAL.

1. B., the owner of a tract of land, conveyed part of it to H. by metes and bounds, a parenthesis in the deed, saying the north "line to be the centre of a public road not more than 40 feet wide to be laid out and opened, diverging towards the valley of Snyder's run, or to run on said line as a centre up the hill as far, &c., provided, required by said B., his heirs or assigns." *Held*, that this was not a fixed and certain reservation, nor absolute in its nature.

2. The reservation was a power preserved by B. to himself to lay out a road along or near the line.

3. B. afterwards conveyed to C. part of the same tract on the north of the line and adjoining it; and to M. another part east of the first tract and of the *end* of the line: *Held*, 1. That M. could not enforce the opening of the road. 2. That H. could not enforce the opening on the north side of the line.

4. The reservation is governed by the property described in it as the property of B.; not by the fact that he was at the time owner of other property outside of that thus described.

5. An obscure reservation in a deed construed.

6. Jamison v. McCredy, 5 W. & S. 129; Kirkham v. Sharp, 1 Whart. 323, considered.

October 31st, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Appeal from the decree of the District Court of Allegheny county: In Equity: No. 197, to October and November Term, 1870.

PITTSBURG, ALLEGHENY AND MANCHESTER PASSENG'R RAILWAY COMPANY v. DONAHUE.

1. A boy riding on a car was wilfully and wantonly struck by the driver, and thereby thrown off the car; the car wheel passed over him. *Held*, in a suit against the car-owners: 1. That they were not liable for the act of the driver in striking the boy. 2. They were liable for negligently driving over him.

2. A master is liable for the results of the wilful conduct of his servant, if within the scope of his authority.

3. A blow may be given by a conductor or driver when by resistance to proper authority it becomes necessary.

4. The court charged that the jury "would be justified in giving the plaintiff compensation, not only for such damages as he had already sustained, also such as he will reasonably sustain in the future arising from the injury complained of, but also allow him for any pain and suffering he has sustained by the injury." *Held*, to be correct.

5. That damages for negligence are to be measured by the same rule to artificial persons as to natural persons, should be held by courts and juries, and care should be taken by judges trying the causes that it be so administered.

November 7th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the District Court of Allegheny county: No 18, to October and November Term, 1871.

NEEL'S APPEAL.

1. In partition, there being an executor the court appointed a stranger, trustee, to make sale of the premises. It being within the discretion of the court to determine whether the executor had neglected or refused to execute the order of sale, it was to be presumed that he had, notwithstanding his subsequent allegation that he had not.

2. The Supreme Court will not review the exercise of such discretion, unless it appear on the face of the record that there was a palpable and gross abuse of the discretion.

3. A widow refused to take under her husband's will, and in 1867 petitioned for proceedings in partition to set out her dower; an inquest was awarded, but the proceedings were stayed on the application of the executor, so that he might sell for the payment of debts. Orders were granted to him for that purpose, but he failed to sell. In 1870, the widow presented a petition reciting all the former proceedings, and praying the court to revoke the stay of the proceedings in partition, &c. *Held*, that the act of April 20th, 1869, gave the court jurisdiction to proceed, notwithstanding there was no assent of the parties interested; her petition of 1870 being treated as a new petition.

November 6th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Appeal from the decree of the Orphans' Court of Allegheny county: No. 73, to October and November Term, 1871.

McDERMOTT et al. v. HOFFMAN.

1. A caveat was entered April 6th, 1795, to returns of certain surveys in different blocks; in an ejectment for two surveys in one of the blocks, made August 25th, 1794, returned, and patented to Barton, a certified copy of an agreement of the original owners, Barton being one, to settle the line between the two *blocks*. entered into and filed in the caveat before the board of property, could not shift the location of the lands in controversy.

2. The agreement, reciting that it had been made on the basis of a draft, then before the parties, stated the location of the tracts within the blocks, and was offered as an admission of Barton, under whom the plaintiff claimed, of the location of the land in dispute, the draft not being produced or accounted for: *Held*, inadmissible without the draft.

3. The defendants offered in evidence the record of an ejectment by Barton against other parties for other lands—the record containing a bill of exceptions—on the ground that the testimony in that case was evidence of the admissions of Barton as to the location of the lands: *Held*, to be inadmissible; the testimony of a party's witnesses in one suit not being evidence against him in another suit for a different subject.

4. By producing a witness, a party admits for that case that he is credible, but does not admit that everything he says is true. He may contradict his witness or show he was mistaken, but he cannot directly impeach his veracity.

5. Where the record of a former suit is evidence, parol evidence may be given of what transpired on the trial to show that it was the same subject matter which was passed upon.

6. The original assessment of unseated lands contained the name of warrantee, number of acres, valuation and rate, but the amount of tax was not carried out: *Held*, to be evidence of the assessment of the land, which became debtor by being returned assessed and valued, and the rate fixed.

7. Treasurer's deeds for lands in the same block with that in dispute were evidence to show *location*, although not accompanied by evidence of an assessment and valid sale for taxes; but would not have been evidence to show title.

8. Assessment to a party is not of itself evidence to establish adverse possession, but may be corroborative, if there be other evidence of possession.

9. When a case is ordered to be tried by a struck or special jury, no special venire is necessary to summon the jury.

10. A special venire is required only in case of a view.

11. An objection to the regularity of summoning a jury should be by challenging the array; and an exception to it taken before the jury is sworn.

12. A peremptory challenge may be made to a juror on a struck list.

13. Location of lands under the land law of Pennsylvania considered in this case.

14. Truby v. Seybert, 2 Jones, 101, distinguished. Schwenk v. Umsted, 6 S. & R. 351, recognized.

October 24th, 1871. Before THOMPSON. C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Cambria county: No. 138, to October and November Term, 1870.

McCLELLAND'S EXECUTOR v. WEST'S ADMINISTRATOR, to use, &c.

1. A suit was by West, administrator, to use, &c.; a son of West had no interest in the claim to destroy his competency as a witness for plaintiff.

2. Under act of April 1st, 1869, all witnesses are *prima facie* competent as regards interest and policy.

3. Since the act of 1869, the court should discountenance all objections to witnesses on the score of interest and policy, unless made clearly to appear.

4. The settlement of an account and striking a balance is a clear admission of a precise indebtedness, in answer to the statute of limitations.

5. The balance of a settled account in which interest is included, carries interest on the whole from the settlement.

6. The balance of a stated account is principal; it cannot be re-examined to ascertain the items or their character.

7. Johns v. Lantz, 13 P. F. Smith, 324, approved; McClelland v. West, 9 P. F. Smith, 487; Weaver v. Weaver, 4 P. F. Smith, 152, distinguished.

November 13th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Fayette county: No. 37, to October and November Term, 1871.

LEGAL GAZETTE.

Friday, June 27, 1873.

JOHN H. CAMPBELL,
EDITOR.

THEODORE F. JENKINS,
ASSOCIATE EDITOR.

[Reported specially for the Legal Gazette.]

Supreme Court United States.

OLCOTT v. SUPERVISORS OF FOND DU LAC CO.

1. The Supreme Court of the United States will follow the decisions of the State courts only in local questions peculiar to themselves, or respecting the construction of their own constitution and laws.
2. Whether a use is public or private is not such a question. It is one of general law.
3. If a contract when made, was valid under the constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the Legislature or the judiciary will be regarded by this court as establishing its invalidity.
4. A railroad is a public highway. A State may impose a tax to build a railroad, even though it be owned by a private corporation.
5. An act of the Legislature of Illinois, authorizing the issue of county orders for money to aid in the building of a railroad, was a proper exercise of legislative authority, and the county is liable on such orders issued by it.

In error to the Circuit Court of the United States, for the Eastern District of Wisconsin.

Mr. Justice STRONG delivered the opinion of the court.

The county orders or promissory notes of the county, which are the foundation of this suit, were all issued on the 18th day of February, 1869, and were made payable to the Sheboygan and Fond du Lac Railroad Company, or bearer. They were issued in pursuance to an act of Assembly of the State, approved April 10th, 1867, entitled "An act to authorize the county of Fond du Lac to aid the completion of the Sheboygan and Fond du Lac Railroad, and aid the building of a railroad from the city of Fond du Lac to the city of Ripon." By that act the officers of the county were authorized to issue the orders to the railroad company, in case a popular vote, therein directed, should be in favor of railroad aid, and whether this act was a lawful exercise of constitutional power is the only question in the case. In the court below the jury was instructed, in substance, that the issue of the orders was unauthorized and void, and that the act of Assembly above referred to, was an unconstitutional exercise of legislative power. No other question was made at the trial, and no other is presented to us for our determination.

At the outset we are met by the fact that the Supreme Court of the State has decided the act was unauthorized by the constitution. It was thus ruled in Whiting v. Fond du Lac County, reported in 25 Wiscon. 188. If that decision is binding upon the Federal courts, if it has established a rule which we are under obligations to follow, the matter is settled. It is undoubtedly true in general, that this court does follow the decisions of the highest courts of the States respecting local questions peculiar to themselves, or respecting the construction of their own constitutions and laws. But it must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the constitution or statutes of a State, which the Federal courts adopt as rules for their own judgment.

That Whiting v. Fond du Lac County was not a determination of any question of local law, is manifest. It is not claimed to have been that. But it is relied upon as having given a construction to the constitution of the State. Very plainly, however, such was not its character or effect. The question considered by the court was not one of interpretation or construction. The meaning of no provision of the State constitution was considered or declared. What was considered was the uses for which taxation generally, taxation by any government, might be authorized, and particularly whether the construction and maintenance of a railroad, owned by a corporation is a matter of public concern. It was asserted (what nobody doubts) 'that the taxing power of a State extends no farther than to raise money for a public use, as distinguished from private, or to accomplish some end, public in its nature; and it was decided that building a railroad, if it be constructed and owned by a corporation, though built by authority of the State, is not a matter in which the public has any interest of such a nature as to warrant taxation in its aid. For this reason it was held that the State had no power to authorize the imposition of taxes to aid in the construction of such a railroad, and therefore that the statute giving Fond du Lac county power to extend such aid was invalid. This was a determination of no local question, or question of statutory or constitutional construction. It was not decided that the Legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes for any public use. Now, whether an use is public or private, is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other State as it has to the State of Wisconsin. Its solution must be sought, not in the decisions of any single State tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no State court can conclusively determine for us. This consideration alone satisfies our minds that Whiting v. Fond du Lac County furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect.

There is another consideration that leads directly to the same conclusion. This court has always ruled that if a contract, when made, was valid under the constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the Legislature or the judiciary will be regarded by this court as establishing its invalidity. Havemeyer v. Iowa City, 3 Wallace, 294; Gelpcke v. The City of Dubuque, 1 Wall. 175; Ohio Life and Trust Company v. Detroit, 16 How. 432. Such a rule is based upon the highest principles of justice. Parties have a right to contract, and they do contract, in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule. If, then, the doctrine asserted in Whiting v. Fond du Lac County is inconsistent with what was the recognized law of the State when the county orders were issued, we are under no obligation to accept it and apply it to this case. The orders were issued in February, 1869, and it was not until 1870 that the Supreme Court of the State decided that the uses for which taxation was authorized by the statute of April 10th, 1867, were not public uses, and, therefore, that the statute was invalid. Prior to 1870 it seems to have been as well settled in Wisconsin as elsewhere that the construction of a railway was a matter of public concern, and not the less so because done by a private corporation. That the State might authorize such an improvement, and exercise its right of eminent domain, therefore, was beyond question. Yet, confessedly, it could neither take property, or tax for such a purpose, unless the use for which the property was taken, or the tax collected, was a public one. And it was also the undoubted law of the State that building a railroad or a canal, by any incorporated company, was an act done for a public use, and thus the power of the Legislature to delegate to such a company, the State right of eminent domain, was justified. In Pratt v. Bowen, 3 Wis. 612, it was said by the Supreme Court of the State that the incorporation of companies for the purpose of constructing railroads or canals, affords the best illustration of the delegation of power to exercise the right of eminent domain by the condemnation and seizure of private property for public use upon making just compensation therefor. It is admitted that the only principle upon which such delegation of power can be justified, is that the property taken by these companies is taken for the public use. Similar language was used, and a decision to the same effect was made in Robins v. The Railroad Company, 6 Wis. 641. In Hasbrook v. Milwaukee, 13 Wis. 13, a case where the right to tax for the improvement of a harbor was under consideration, the court used this significant language:

The power of municipal corporations, when authorized by the Legislature to engage in works of internal improvement, such as the building of railroads, canals, harbors, and the like, or to loan their credit in aid thereof, and to defray the expenses of such improvements, make good their pledges by an exercise of the power of taxing the persons and property of their citizens, has always been sustained on the ground that such works, although they are in general operated and controlled by private corporations, are, nevertheless, by reason of the facilities which they afford for trade, commerce, and intercommunication between different and distant portions of the country, indispensable to the public interests and public functions. It was originally supposed that they would add, and subsequent experience demonstrated that they have added vastly, and almost immeasurably, to the general business, the commercial prosperity, and the pecuniary resources of the inhabitants of cities, towns, villages, and rural districts through which they pass, and with which they are connected. It is, in iew of these results, the public good thus produced, and the benefits thus conferred upon the persons and property of all the individuals composing the community, that courts have been able to pronounce them matters of public concern, for the accomplishment of which the taxing power might lawfully be called into action. It is in this sense that they are said to fall so far within the purposes for which municipal corporations are created, that such corporations may engage in, or pledge their credit for their construction.

So also in Soens v. Racine, 10 Wis. 280, where the validity of a law, authorizing a local tax to secure the lake shore was in question, the court discussed at length the nature of a public use for which taxation was lawful, and ruled that the use was a public one, though only the property of some inhabitants of the city was saved, remarking that to determine whether a matter is a public or merely private concern, we have not to determine whether or not the interests of some individuals will be directly promoted, but whether those of the whole or the greater part of the community will be. And again, in Brodhead v. Milwaukee, 19 Wisconsin, 652, the court said:

The Legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. It cannot, in the form of a tax, take the money of a citizen and give it to an individual, the public interest or welfare being in no way connected with the transaction. The objects for which the money is raised by taxation must be public, and such as subserve the common interest and well-being of the community required to contribute. * * * *

To justify the court in arresting the proceedings and declaring the tax void, the absence of all possible public interest in the purpose for which the funds are raised must be clear and palpable; so clear and palpable as to be perceptible by every mind at the first blush.

See also Clark v. Janesville, 10 Wis. 136, and Bushnell v. Beloit, Ib. 195.

All these expositions of the law of the State were made by the highest court before the county orders now in suit were issued. They certainly did assert that building a railroad, whether built by the State or by a corporation created by the State for that purpose, was a matter of public concern, and that, because it was a public use, the right of eminent domain might be exerted or delegated for it, and taxation might be authorized for its aid. It was the declared law of the State, therefore, when the bonds now in suit were issued, that the use of railroads, though built by private corporations, were public uses, such as warranted the exercise of the public right of eminent

domain in their aid, and also the power of taxation. We are not then, concluded by a decision, made in 1870, that such public uses are not of a nature to justify the imposition of taxes. We are at liberty to inquire what are public uses, and what restrictions, if any, are imposed upon the State's taxing power.

It is not claimed that the constitution of Wisconsin contains any *express* denial of power in the Legislature to authorize municipal corporations to aid in the construction of railroads, or to impose taxes for that purpose. The entire legislative power of the State is confessedly vested in the General Assembly. An implied inhibition only is asserted. It is insisted that as the State cannot itself impose taxes for any other than a public use, so the Legislature cannot empower a municipal division of the State to levy and collect taxes for any other than such an use, and it is denied that taxation to enable the county of Fond du Lac to aid in the completion of the Sheboygan and Fond du Lac Railroad, is taxation for a public use. No one contends that the power of a State to tax, or to authorize taxation, is not limited by the uses to which the proceeds may be devoted. Undoubtedly, taxes may not be laid for a private use. But is the construction of a railroad by a company incorporated by a State for the purpose of building it, and endowed with the State's right of eminent domain, a thing in which the State has, as such, no interest? That the Legislature of Wisconsin may alter or repeal the charter granted to the Sheboygan and Fond du Lac Railroad Company, is certain. This is a power reserved by the constitution. The railroad can, therefore, be controlled and regulated by the State. Its use can be defined; its tolls and rates for transportation may be limited. Is a work made by authority of the State, subject thus to its regulation, and having for its object an increase of public convenience, to be regarded as ordinary private property?

That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a State's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that a State Legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean, if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has always been held a public one, is that such a road is an highway, whether made by the government itself, or by the agency of corporate bodies, or even individuals when they obtain their power to construct it from legislative grant. It would be useless to cite the numerous decisions to this effect which have been made in the State courts. We may, however, refer to two or three which exhibit fully not only the doctrine itself, but the reasons upon which it rests. Beekman v. The Saratoga and Schenectady R. R. Co., 3 Paige, 45; Blodgett v. Mohawk and Hudson R. R. Co., 18 Wendell, 1; Worcester v. R. R. Co., Met. 556.

Whether the use of a railroad is a public or a private one, depends in no measure upon the question who constructed it, or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State. Though the ownership is private, the use is public. So turnpikes, bridges, ferries, and canals, although made by individuals, under public grants, or by companies, are regarded as *publici juris*. The right to exact tolls or charge freights is granted for a service to the public. The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used. Charles River Bridge Company v. Warren, 7 Pick. 495. That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the Legislature is the exclusive judge. Cooley's Const. Lim.

It is unnecessary, however, to pursue this branch of the inquiry further, for it is not seriously denied that a railroad, though constructed and owned by a private corporation, is a matter of public concern, and that its uses are so far public that the right of eminent domain of the State may be exerted to facilitate its construction. But it is contended that though the purpose and use may be public, sufficiently to justify taking private property, they are not public when the right to impose taxes is asserted. It is argued that there are differences between the power of taxation and the power of taking private property for a public use, and that because of these differences it does not follow that wherever the one power may be exerted the other can. We do not care to inquire whether this is so or not. The question now is whether if a railroad, built and owned by a private corporation, is for a public use, because it is an highway, taxes may not be imposed in furtherance of that use. If there be any purpose for which taxation would seem to be legitimate, it is the making and maintenance of highways. They have always been governmental affairs, and it has ever been recognized as one of the most important duties of the State to provide and care for them. Taxation for such uses has been immemorially imposed. When, therefore, it is settled that a railroad is an highway for public uses, there can be no substantial reason why the power of the State to tax may not be exerted in its behalf. It is said that railroads are not public highways per se; that they are only declared such by the decisions of the courts, and that they have been declared public only with respect to the power of eminent domain. This is a mistake. In their very nature they are public highways. It needed no decision of courts to make them such. True they must be used in a peculiar manner, and under certain restrictions, but they are facilities for passage and transportation, afforded to the public, of which the public has a right to avail itself. As well might it be said a turnpike is an highway, only because declared such by judicial decision. A railroad built by a State, no one claims, would be anything else than a public highway, justifying taxation for its construction and maintenance, though it could be no more open to public use than is a road built and owned by a corporation. Yet it is the purpose and the uses of a work which determine its character. And if the purpose is one for which the State may properly levy a tax upon its citizens at large, its Legislature has the power to apportion and impose the duty, or confer the power of assuming it upon the municipal divisions of the State. Cooley's Const. Limitations, 226. And surely, it cannot be maintained that ownership by the public, or by the State of the thing in behalf of which taxation is imposed, is necessary to justify the imposition. There are many acknowledged public uses that have no relation to ownership. Indeed, most public expenditures are for purposes apart from any proprietorship of the State. A public use may, indeed, consist in the possession, occupation, and enjoyment of property by the public, or agents of the public, but it is not necessarily so. Even in regard to common roads, generally, the public has no ownership of the soil, no right of possession or occupation. It has a mere right of passage. While, then, it may be true that ownership of property may sometimes bear upon the question whether the uses of the property are public, it is not the test.

The argument most earnestly urged against the constitutionalty of the act is that it attempted to authorize Fond du Lac county to assist the railroad company by a donation. It stoutly contended that the Legislature could not authorize the county to impose taxes to enable it to make a donation in aid of the construction of the railroad, even if its ultimate uses are public. But why not? If the county can be empowered to aid the work because it is a public use, what difference can it make in what mode the aid be extended? It is conceded that in Wisconsin, municipal corporations may be authorized to become subscribers to the stock of private railroad companies, and to raise money by taxation to meet bonds given in payment of the subscriptions. This has been decided by the highest court of the State. Clark v. Janesville, 10 Wis. 136; Bushnell v. Beloit, Ib. 195. And the reasons given for the decision are, not that the municipal bodies acquired property rights by their subscriptions, or that they thereby obtained partial control of the railroad companies, but that subscriptions to the stock were a mode of aiding a work in which the public had an interest, a work of such a nature that it might properly be aided by taxation. Never was the right to tax supposed to rest in any degree upon anything else. Whether the stock had value or not was not even considered. Equally with the taxation, the municipal subscription could be justified only because it was for a public use. If taxation is invalid because laid for a private use, the nature of the use cannot be changed by receiving stock for the money raised. There is no substantial difference in principle between aid given to a railroad company by subscription to its stock, and aid given by donations of money or land. The burden upon the country may be the same in whichever mode the aid is given, and the uses promoted are precisely the same. And the courts have never attempted to make any distinction in the cases; certainly not until the case of Whiting v. Fond du Lac, and even then no real difference is shown. On the other hand, the power to tax for the purpose of making donations in aid of railroads built by private corporations has been affirmed. Gibbons v. Mobile and Great Northern R. R. Co., 36 Ala. 410; Davidson et al. v. Commissioners of Ramsey County, Minn. We have, however, considered this subject in the case of the Chicago, Burlington and Quincy R. R. v. The County of Otoe, and nothing more need be said. What we have already remarked is sufficient to show that in our opinion the act of the Legislature of Wisconsin, approved April 10th, 1867, was a constitutional exercise of legislative power, and consequently that the Circuit Court erred in instructing the jury that it was unconstitutional and void, and in directing a verdict for the defendants.

The judgment is reversed, and the record is remitted, with instructions to award a *venire de novo*.

PARTRIDGE v. THE INSURANCE COMPANY.

1. An agent of an insurance company who had been engaged in a State different from that where it was situated, in soliciting business for it, and getting fixed commissions on all premiums which actually came into his hands—his right to all which was not questioned in the suit—being a little put out at other agents being sent into the same State, inquired of the company by letter what his "*status*" was, "if the State agency is open to the trial of candidates?" To this the company replied in writing: "Your *status* is simply this—you are working up a business for yourself, and are paid the highest commissions which we pay." *Held*, the agent being afterwards discharged from the company's service, that he could not prove by witnesses that the phrase in the company's letter had a technical meaning, and that there was an usage between insurance companies and their agents in the place where the agency was, that all agents should have the right to solicit and cause policies to be issued according to the published rules of the company, and to collect all premiums on renewal thereof during the time the policy was in force, and that if the agent was discharged without sufficient cause, and against his will, he was entitled to be paid immediately the present value of his commissions, calculated by the actuarial rule used to value policies. The ground of the holding was that the language of the letter was neither ambiguous nor technical, and that to suffer such evidence to go in would have established by a parol a new term to a written contract.
2. Where, in proceedings in State courts, the laws of a State allow a set-off pleaded to be interposed and tried in the same suit with the claim against which it is pleaded, the same thing may be done when the suit is brought or transferred into the Federal courts from them.

Error to the Circuit Court for the District of Missouri; the case apparently having been thus:

In January, 1867, one Winslow being agent for the State of Missouri of the Phœnix Mutual Life Insurance Company of Hartford, Connecticut, in the business of soliciting persons to insure and keep insured in that company, Partridge made an arrangement with him to go into

partnership with him in the agency; and Winslow having written to the company accordingly, the company in reply tell him that there was a Mr. Jones—"now the company's agent for Minnesota, and a man second to none in the West for energy and sound judgment"—who was very sanguine that *he* could make arrangements with him, Winslow, for a systematic and thorough "working" of the two States, which would prove mutually beneficial. And that "without meaning to be understood as saying one word against Mr. Partridge—on the contrary, not seeing why matters cannot be arranged so as to have *him* also as one of the workers for the company—the company would advise Winslow to hold on and wait a little before making any permanent arrangement."

Jones coming to St. Louis soon after this, he, Winslow, and Partridge entered into an arrangement by which Winslow retired, leaving Jones and Partridge partners in the State agency. Jones in a short time went to Hartford, and was sent by the company on business in Iowa, &c., leaving Partridge alone in Missouri. Partridge went on as he had been going on from his first arrangement with Winslow, in soliciting people who had not previously been insured to insure themselves in the company and in getting renewals of such policies as had been made previous to his coming in and had now run out.

On all first insurances he received 20 per cent. of the premium, and on all renewals 7½ per cent. About his right to these, or to his having actually received them, there was no dispute.

In September, 1867, the company having written to Partridge about persons who had applied for an agency in Missouri, he writes to the company, responding civilly to some inquiries, but says—

"I am free to confess a little surprise at your remarks, coupling the persons you speak of with the general agency of the State of Missouri. I supposed it was settled that Mr. Jones and myself were to occupy the position of State agents. *And just here permit me to inquire what my status is,* if the State agency is open to the trial of candidates."

To this the company, by a letter dated September 7th, 1867, reply:

"Concerning your status in Missouri, it is simply this: You are there working up a business for yourself, and are paid the highest commissions which we pay, and in any arrangements which we may make for the State, will not overlook your interests, but we had no idea of giving you the exclusive control of a State which it will require a most experienced agent to take charge of and work up."

"After I received this letter of the 7th of September," said Partridge, in speaking of it, "I understood it, and was satisfied with it, and continued on as agent, soliciting policies, collecting premiums and renewals, and reporting as required by the rules of the company."

In December, 1867, the company sent out a Mr. Dye to St. Louis, telling Partridge that it is with a view to his procuring the company a greater amount of business out of the State; that Dye's efforts would not conflict with his, and that he, Partridge, "can proceed in his own way on his own account."

Difficulties, however, soon occurred in consequence of Dye's coming out, and on the 15th of February, 1868, a little more than a year after his agency began, Partridge was discharged by the company, he having at this time a sum of $1772 in his hands, collected for premiums. He now brought suit in one of the State courts of Missouri against the company. The company removed the case into the Federal court, under the act of Congress of 1866, and that of 1867, amendatory thereof. These enact that after a suit removed from a State court has been entered in the Federal court, it shall proceed in the same manner as if it had been brought there by original process, and the pleadings have "the same force and effect, in every respect, and for every purpose, as the original pleadings would have had by the laws and practice of such State, if the cause had remained in the State court."

On the trial the plaintiff admitted that he had received 20 per cent. commission on all first premiums, and 7½ per cent. commissions on all renewal premiums that had been actually collected by him, and that there was in his hands at the time of his discharge, $1772 in money, the property of the company, if they were not liable to him for the value of future commissions to accrue on the policies.

It was then announced by him that the real point of dispute in the cause was this, viz.: That, under the facts and circumstances of his employment and service, the letters and correspondence had with him by the company, and particularly by the terms of the aforesaid letter of September 7th, 1867, and by force and virtue of a general usage existing in St. Louis at that time, in regard to the business of life insurance companies and their agents, he was entitled to retain the agency, and, in case of his removal against his will, and without sufficient cause, was entitled to be paid a commutation equal to the present value of his commissions, computed by the actuarial rule for computing the present value of policies.

The defendant maintained that they were not bound by any usage except that of their own company; that the plaintiff was their agent only, at the will of the company, and might be discharged at any time without cause, and was not entitled to any payment or commutation on policies solicited during his agency, except his commission actually accruing during his agency, which, as he admitted, he had received.

They pleaded further their set-off; to their pleading which no objection was made by the plaintiff.

The plaintiff then propounded to a witness the following question, the witness having first qualified himself as an expert in insurance matters, terms, and language:

"Is there in the phrase contained in the letter of defendant of September 7th, 1867, to wit:

"'Concerning your status in Missouri, it is simply this: You are there working up a business for yourself, and are paid the highest commissions which we pay—

"Any peculiar or technical meaning as used by men engaged in life insurance, and as applied to the business of life insurance, different from the ordinary meaning of these terms?"

In answer to which question the plaintiff offered to prove by this witness, and by many others experienced in life insurance, that the said phrase did have a peculiar meaning in that regard, well understood by men in the business of life insurance, and not well understood by those not familiar with the business, that its meaning, as understood in that business, was that the agent should have the right to solicit and cause policies to be issued according to the published rules and rates of the company, and should have the right during the life and force of such policies to collect all renewal premiums thereon, and have commissions on such renewals, and that if he was discharged by the company without sufficient cause, he was entitled to be paid immediately, the present value of his commissions, to be computed by the actuarial rule used by such companies to value policies.

The question offered to be put was objected to by the defendant, and the objection was sustained by the court, on the ground that the language referred to was plain and intelligible, and required no explanation, and that such evidence as was offered would vary the contract between the parties. To this ruling the plaintiff excepted.

The jury found a verdict for the company, $1772 on the counter claim, and judgment was entered accordingly. The plaintiff now brought the case here.

Messrs. *T. W. B. Crew*, and *J. F. Hardin*, for the plaintiff in error.

1. The question was what an agent's "working up" the business of life insurance means? Now, on their face, have those words in connection with that business, a full, plain, unquestionable meaning, known to all who hear them? We offered to prove by persons in the business that they had not such a meaning, but contrariwise had a technical and peculiar meaning, understood only by persons in the business, and we offered, moreover, to show exactly what that meaning was. Yet, thus to show the true meaning of the contract, the court held would vary its true meaning, and that though we offered to prove it on its face ambiguous, it was on that same face without the possibility of two meanings.

2. The court erred in entering judgment for the $1772. Even if by the laws of the State and practice of its courts, such a thing had been allowable (which we do not concede), when the company elected to remove the cause to the Federal court it abandoned all rights under the State laws and practice, and was bound to conform to the rules of practice in the Federal courts. These are common law rules, and set-off does not prevail.

Mr. *N. P. Chipman*, contra.

Mr. Justice MILLER delivered the opinion of the court.

The question did not arise whether the custom which the plaintiff offered to prove could have been proved as the measure of his compensation, in the absence of any express contract, because the plaintiff had introduced in evidence a letter from the defendant in reference to this compensation, under which he said he had acted in taking the policies for which he now claimed the additional commission. There was no question as to the amount of percentage, or premium which was to be paid under this letter. The plaintiff stated that he had retained a certain percentage, which was that allowed by the company.

The testimony was not offered to show what was the highest commission paid by the company.

It appears to us, as it did to the Circuit Court, that the testimony offered would have established a new and distinct term to the contract. It would have established a contract very different from the written one introduced by plaintiff. The language of the letter was neither ambiguous nor technical. It required and needed no expert, no usage to discover its meaning. To have admitted the usage offered in evidence in this case, would have been to make a contract for the parties differing materially from the written one under which they had both acted for some time.

The tendency to establish local and limited usages and customs in the contracts of parties, who had no reference to them when the transactions took place, has gone quite as far as sound policy can justify.

It places in the hands of corporations, such as banks, insurance companies, and others, by compelling individuals to comply with rules established for the interests alone of the former, a power of establishing those rules as usage or custom with the force of law. When this is confined to establishing an *implied* contract, and the knowledge of the usage is brought home to the other party, the evil is not so great. But when it is sought to extend the doctrine beyond this, and incorporate the custom into an express contract whose terms are reduced to writing, and are expressed in language neither technical nor ambiguous, and, therefore, needing no such aid in its construction, it amounts to establishing the principle that a custom may add to, or vary, or contradict the well expressed intention of the parties made in writing. No such extension of the doctrine is consistent either with authority or with the principles which govern the law of contracts.

A question is raised in this court not raised in the Circuit Court as to the right of the defendant to recover, by way of set-off or cross-action against the plaintiff, a sum of money in his hands as agent of the plaintiff, which was admitted to be due, if plaintiff's claim was not established. The amount was admitted by plaintiff, and no objection was made to pleading it as a set-off. Therefore, none can be made here. But if the point were open to inquiry, it is settled by the case of West v. Aurora City, 6 Wallace, 139, that defendants in the Circuit Courts of the United States can avail themselves of the laws which prevail in the State concerning the right of set-off generally. It would be a most pernicious doctrine to allow a citizen of a distant State to institute in these courts, a suit against a citizen of the State where the court is held, and escape the liability which the laws of the State have attached to all plaintiffs of allowing just and legal set-offs and counter claims to be interposed and tried in the same suit and in the same form.

Judgment affirmed.

Legal Gazette.

REPORTS OF CASES

DECIDED IN THE

UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA; THE SUPREME COURT OF PENNSYLVANIA AT NISI PRIUS; THE DISTRICT COURT, COURTS OF COMMON PLEAS, QUARTER SESSIONS, OYER AND TERMINER AND ORPHANS' COURTS OF PHILADELPHIA;

AND IN THE COURTS OF THE THIRD, EIGHTH, NINTH, ELEVENTH, TWELFTH, TWENTY-SIXTH, TWENTY-EIGHTH, AND TWENTY-NINTH JUDICIAL DISTRICTS OF PENNSYLVANIA.

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BY JOHN H. CAMPBELL.

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RECOMMENDATIONS.

From HON. JAMES THOMPSON,
Chief Justice, Supreme Court, Pa.

"I have examined the Legal Gazette Reports which you did me the favor to send me, with great satisfaction. It is well gotten up, and neatly printed and bound. The variety of matter contained in it, emanating indiscriminately from courts in every portion of the State, renders the volume useful in every section to both lawyers and judges, and to them I cheerfully commend it." March 1st, 1872.

From HON. WM. S. PEIRCE,
Court of Com. Pleas, and Orphans' Court, Phila.

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Philada., March 1st, 1872.

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District Court, Phila.

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1873.

April 26, The Penna. Life Ins. Co., &c., Executors of THOMAS D. NANCREDE, dec'd.
" 26, Edward G. Lee, Administrator of SAMUEL BROWN, dec'd.
" 28, Mary Dillon, Administratrix of JOHN A. DILLON, dec'd.
" 29, Mary McGuigan, Administratrix of TERRENCE McGUIGAN, dec'd.
" 29, David Teller, Administrator of GEO. KONECKE, dec'd.
" 29, Charles H. Martin, Administrator c. a. of EMMA MARTIN, dec'd.
" 30, Hugh Fitzpatrick, Executor of JAMES & MARGARET WELSH, dec'd.
" 30, William F. Milligan, Administrator of GEORGE A. MILLIGAN, deceased.
" 30, S. Weir Lewis, Guardian of JOHN BARCLAY, late minor.
" 30, Thos. Cadwallader, Executor and Trustee of the last will and testament of JAMES HAMILTON, deceased.
May 2, Edward Ingersoll, Executor of ELIZABETH J. FISHER, dec'd.
" 2, Ann Maria Sharpless, Executrix of JOSEPH J. SHARPLESS, dec'd.
" 2, Geo. Brooke, Administrator d. b. n. c. t. a. of STEPHEN BALDWIN, dec'd.
" 2, Thomas Smith et al., Trustees under the will of EDWARD SMITH, deceased.
" 6, William Anson et al., Executors of JOHN ANSON, dec'd.
" 6, William Brown et al., Executors of MARY SINCLAIR, dec'd
" 7, Peter W. Hall, Executor of MARY P. FLEETWOOD, dec'd.
" 7, William Francis, Administrator of ELLEN WHITMAN, dec'd.
" 9, R. C. McMurtrie, Administrator of FREDERICK OSWALD BOHLEN, dec'd.
" 10, John F. Orne, Administrator of ELIZA J. McWATTERS, dec'd.
" 12, Rhoda M. Levy, Executrix of FELIX H. LEVY, dec'd.
" 13, Robert Scott, Surviving Executor of WILLIAM WHITE, dec'd.
" 13, Susannah Biggs, Administratrix of SARAH B. SCHULTZ, late INGLES, dec'd.
" 13, Robert McNairy et al., Executors of JOHN NEITHERCOT, dec'd.
" 13, Robert Scott, Administrator of ELEANORA WHITE, dec'd.
" 13, Nancy M. Grigg, Administratrix of JOHN GRIGG, dec'd.
" 14, Watson Comly, Executor of CYNTHIA GREEN, dec'd.
" 14, Andreas Hardel, Administrator of JOSEPH RIPKA, dec'd.
" 14, Andreas Hartel, Administrator of ALFRED RIPKA, dec'd.
" 14, William M. Thomas et al., Executors of SAMUEL THOMAS, dec'd.
" 15, Martha Dillon, Administratrix of EDWARD DILLON, dec'd.
" 15, George A. Twibill, Administrator of JOHN DENNING, dec'd.
" 15, James McCann, Guardian of ELLEN QUINN, otherwise known as ELLEN FOLEY, dec'd.
" 15, John C. Stockton, Administrator of ANN L. NANCREDE, dec'd.
" 19, Thomas Holt, Executor of SUSANNAH BOOTH, dec'd.
" 19, The Philada. Trust, Safe Deposit Co., &c., Administrators c. t. a. of GEO. LEYENBERGER, dec'd.
May 19, Geo. W. Steever et al., Executors and Trustees under the will of ROBERT S. JOHNSON, dec'd.
" 19, Philip H. Brice et al., Guardians of EMILY LE FOLL (formerly MERCER).
" 20, Solomon Rothschild, Guardian of FLORA ARNOLD, minor.
" 20, Solomon Rothschild, Guardian of LEON ARNOLD, minor.
" 20, William Myers, Administrator c. t. a. of GERHARD GRAEVE, dec'd.
" 20, Edmund Carpenter et al., Executors of MARY LINCOLN, dec'd.
" 21, Adolph Fischer, Administrator c. t. a. of CHRISTIANA FISCHER (formerly ELLWANGER), dec'd.
" 22, Lucinda E. Leu, Administratrix of GEORGE H. LEU, dec'd, as filed by William G. Stocker et al., Executors of LUCINDA E. LEU, deceased.
" 22, Samuel C. Brinckle, M. D., Guardian of JOHN C. MILLER, dec'd.
" 23, Philip M. Wheaton, Executor of SILAS WHEATON, dec'd.
" 23, William W. Ball et al., Executors of SARAH GRAHAM, dec'd.
" 23, Hannah L. Heaton et al., Executors of JOSEPH HEATON, dec'd.
" 23, Mary Ann Levy et al., Executors of JOHN P. LEVY, dec'd.
" 24, Susan N. Streper, Administratrix of OTTINGER G. STREPER, dec'd.
" 24, Benjamin J. Douglass, Executor and Trustee under the will of RICHARD H. DOUGLASS, dec'd.
" 26, William Yonker, Guardian of MARIA T. S. WILSON, late minor.
" 26, Sarah C. Bangs, Executrix of WM. P. BANGS, dec'd.
" 26, James W. Carson, Guardian of MILLARD F. LOGAN, minor.
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" 26, Anthony Groves, Jr., Administrator of WILLIAM M. GROVES, dec'd.
" 26, Alfred Smith, Guardian of WILLIAM C. SMITH, late minor.
" 28, Howard Kirk et al., Administrators of HIRAM G. COOPER, dec'd.
" 28, James Johnson et al., Executors of PATRICK GIBSON, dec'd.
" 28, Edward S. Campbell, Executor of SUSANNA E. LEIDY, dec'd.
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" 28, Ellen Emery, Administratrix of DAVIS EMERY, dec'd,
" 28, Caroline Vendig et al, Administrators of RAPHAEL VENDIG, deceased.
" 28, Henry Gormley et al., Executors, &c., of JOHN GORMLEY, dec'd.
" 28, James F. C. Sickle, Administrator c. t. a. of WILLIAM CRISPIN, deceased.
" 28, Jas. H. Grier, Administrator of JANE K. ROSS, dec'd.
" 29, Jane B. Colahan, Guardian of JOHN J. O'DONNELL, minor.
" 29, Bridget Curry, Administratrix of EDWARD CURRY, dec'd.
" 29, Caroline E. Smith et al., Executors of ISAAC R. SMITH, dec'd.
" 29, Caroline Clark, Administratrix of MARY or MARIA THOMAS, deceased.
" 29, Jane G. Stanhope et al., Executors of HIRAM STANHOPE, dec'd.
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" 29, John B. Kelley, Executor of SARAH HARDIMAN, dec'd.
" 29, Sarah R. Scattergood, Executrix of JOSEPH R. SCATTERGOOD, deceased.
" 29, Joseph Campbell, Guardian of MARY FOSTER, minor.
" 29, John Ashbridge, Guardian of ELLEN A. STEPHENSON, late HARWOOD, minor.
" 29, John Ashbridge, Guardian of MARTHA FLORENCE WEED, late a minor.
" 29, James V. Watson, Administrator of ELIZABETH WATSON, dec'd.
" 29, Franklin Smith et al., Executors of JOHN M. SMITH, dec'd.
" 29, Francis E. Seal et al., Executors of BENJAMIN SEAL, dec'd.

WILLIAM M. BUNN,
May 30-4t Register.

LAW ASSOCIATION.

NOTICE.—An Adjourned Meeting of the Law Association of Philadelphia, will be held on Saturday, the 21st inst., at one o'clock P. M., at the Library Room, to consider certain proposed amendments to the charter.

June 11, 1873. EDWARD HOPPER.
Jun 13-2t Secretary.

Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, JULY 4, 1873. No. 27.

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TWELFTH JUDICIAL DISTRICT.

Court of Common Pleas of Dauphin County.

In re SALE OF REAL ESTATE OF A. P. ERB.

Three adjoining brick houses were sold by the sheriff, subject to one mortgage, which was a lien on one house and half of the adjoining one, and subject to another mortgage, which from its description was uncertain as to its being a lien. The sheriff offered the houses for sale separately, and failed, on account of the uncertainty of the mortgages, and the fact that they were liens on portions of the houses, to obtain a fair price for any of them. He then offered them together or in a lump, and obtained a much larger price. On exception to the confirmation of the sheriff's deed to the purchaser, *Held*, to be a valid sale, and the court confirmed the deed.

Exceptions to confirmation of sheriff's deed.

Opinion by PEARSON, J. Delivered June, 1873.

On the 15th day of September, 1864, Mr. Erb purchased two lots in this city, and took one deed therefor. There was at the time of his purchase three brick houses erected on the lots. Judgments were subsequently recovered against Erb, which were liens on all three of the houses. Prior to entering the judgments, a mortgage was recorded, which bound one and a half house, and another mortgage intended, and which was expected to cover the residue of the property, but from misdescription failed, most probably, to bind any portion of it. A *fi. fa.* issued on one of the judgments, which was levied on the three houses and two lots as an entirety, inquisition and condemnation. A *ven. ex.* was afterwards issued following the description in the *fi. fa.* and levy. A *fi. fa.* was also issued, on another judgment, levy made on each house separately, describing the ground on which it was erected, inquisition and condemnation, followed by a *ven. ex.* in like form. The sheriff had both writs in his hands at the same time. The property was advertised as three houses, and the lots described. The sheriff set up the houses separately. After several trials the highest bid for the houses separately was $700 for the one, and $750 for each of the others. They were also set up in the lump, and had bidden for them $2,900. The highest sum in all bidden the first time, separately, was $2,000, and when put up jointly $2,800. On the second trial the bidding was as already stated. It would thus appear, that on full trial, the property brought more by $700 or $800 when offered jointly, than when separately. This probably arose from the situation of the mortgages, the one covering a house and part of another, and it being uncertain what was bound by the other, or whether it covered any part of either. The person to whom the property was struck down, who has paid his bid, and now demands a deed from the sheriff, had no connection with the sales either as attorney or owner of any of the liens. Exceptions have been filed to the sheriff's deed, the most of which are unsupported by proof, but the only ones of any substance are: 1. The inadequacy of price. 2. The sale by the lump. 3. The imperfect notice of the character of the mortgages as attached to the writ, or given by the sheriff; and 4. Bidders did not attend, because Mr. Erb considered he could get the debts arranged, and thus avoid a sale.

Nothing is better settled than the principle that inadequacy of price is no ground whatever for setting aside a sheriff's sale, if fairly and legally made. If authority is wanted for this, we need only refer to 6 Watts, 146, and the cases there cited; see also 3 Y. 405; 3 M. C. C. R. 557; 4 Dal. 218.

It is not the business or duty of the sheriff to give any notice whatever of the mortgages, their nature or character. The purchasers must examine for themselves, and if the defendant knows of any payments or peculiarities in the mortgage, it is his business, or that of the lien creditors to make it known. The rule as to the purchaser is *caveat emptor*. The plaintiff in the judgment is not bound to give any such information. 6 Watts, 140, 144. Notice to the sheriff is not notice to bidders; he is not their agent. 8 S. & R. 327.

The mistake of Mr. Erb as to getting his debts arranged, and therefore avoiding the sale, is no the slightest ground for the court's interference. The bidder is not to be affected by such acts on his part. As the witnesses prove, it is but a weak and lame excuse. He was there until after the property had been set up and cried, knew as well as any one the situation of the mortgages, what was due on them, and what they bound, yet said nothing. His own mistake in keeping away bidders, cannot now be taken advantage of by himself. Nor can the creditor, for whom the counsel say they appear in part, as well as for Erb, urge the matter with much better grace, as they gave the business no attention whatever. The property was duly advertised, yet they did not appear in person or by counsel on the ground. That point has no merit in law or in fact. It is conceded that the other exceptions are not proved, and probably have no existence. It comes, then, to consider the second exception, which has been passed over to the last, as the only one of any legal import.

That a lumped sale of several pieces of real estate is entirely irregular, is decided in 1 Philadelphia Reports, top p. 136; also same book, top p. 3, bottom 133; unless it clearly appear that it is for the interest of all that it should be so sold. 3 Philadelphia Reports, top page 34; vol. 1, part 2, Pennsylvania Practice. The same doctrine is clearly held in 7 Wright, 219. In Klopp v. Witmayer I was of the opinion that such a sale was entirely irregular, but not void, and could not be treated as a nullity. The Supreme Court declared it utterly void, although in an after case they held it capable of confirmation. Same case and book, p. 226. It is pretty evident that they would apply this rule to real estate.

In 6 Watts, 144, already cited, it is doubted whether either the sheriff or creditor can direct property to be sold in a different manner from that prescribed by law. In Rowley v. Webb, 1 Binn. 61, it was held, that even a joint ground rent existing against several pieces of land, was no good reason for a lumped sale, which was set aside as tending to sacrifice the property of unfortunate debtors. It is there said, that there may be good reasons for deviating from the general rule, but they must be satisfactorily shown. On the other hand, it is provided by statute, that in making sales the land shall not be divided, and not less than a whole tract can be levied on and sold. Where several tracts of land are purchased at different times, yet held by the owner for a joint purpose, as in case of water power, iron works, and even a farm, it should be sold as an entirety, else its value would be destroyed. In the present case this property, consisting of two lots, and containing three houses, was purchased at the same time by one deed. The houses were apparently built to rent separately, and had always been so rented. A difficulty existed as to one of the mortgages covering one house, and the half of the other. The other mortgage probably being intended to embrace the other house and a half. This *per se* we would say was not sufficient reason for selling separately, as held in 1 Binney, already cited. But the reason of the law here ceases. All of the cases say that the danger is that the property will be sacrificed. Here it was first offered separately. The highest price bidden for the three houses when added together, amounted to $2,000. When offered together a bid of $2,800 was procured. After some interval the houses were again set up separately, when the bids were somewhat increased, amounting in all to $2,200, but when offered jointly, $2,900 was offered, and the property struck down at that bid.

We are of the opinion that when real estate is purchased and held as in this case by a joint deed, and after a full trial it is proved that it will command a higher price when sold together than separately, it is lawful to so sell it. Nothing short of a fair trial and full proof that it will so sell to more advantage, will justify the officer in thus making sale.

The effort so made takes it out of the general rule which then ceases. We are of the opinion that this sale is regular, under the circumstances. Has the court a discretionary power to set aside the sale on account of inadequacy of price, on a larger offer being made? The cases decided pretty conclusively show that the purchaser has a vested interest in the property, which cannot be disturbed or overlooked. See 3 Yates, 405. This is repeated in 2 Pennsylvania R., 382. And even the payment of the debt before sheriff's deed acknowledged, which was held good in many counties, will not justify the court in setting aside the sale. *Idem* per Ross, J. A judgment against the purchaser before deed made, binds the estate. As he has a vested interest therein, so he must be the loser, if the property is destroyed by fire or flood. 1 Id. 304. The court is therefore obliged to receive the acknowledgment of the sheriff's deed, and has no legal discretion.

H. Murray Graydon, and *Wallace DeWitt, Esqs.*, for the confirmation of the deed.

D. Mumma, Esq., contra.

[Reported specially for the Legal Gazette.]

Supreme Court United States.

POLICE JURY v. BRITTON.

The trustees or representative officers of a parish, county, or other local jurisdiction, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have no implied authority to issue negotiable securities, payable in future, of such a character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous debt.

Error to the Circuit Court for the District of Louisiana.

Messrs. *E. T. Merrick* and *G. W. Race*, for the plaintiff in error.

Messrs. *T. J. Semmes* and *W. A. Meloy*, contra.

Mr. Justice BRADLEY stated the case, and delivered the opinion of the court.

Britton and Koontz brought an action in the court below against the police jury of the parish of Tensas, Louisiana, to recover the amount of four hundred and sixty coupons, for $6 each, due on the 1st of July, 1870, for one year's interest on four hundred and sixty bonds of $100

each. The following is a copy of one of the bonds, and they were all of the same date and form, differing only in number:

$100. STATE OF LOUISIANA. No. 423.

ST. JOSEPH, July 1, 1869.

THE PARISH OF TENSAS will pay to bearer, six years after date or sooner, at the pleasure of the parish, one hundred dollars, with six per cent. interest thereon, payable annually at the office of the parish treasurer, as per coupons attached. This obligation is issued to fund the debt of the parish, in accordance with an ordinance passed by the police jury, on the 18th day of January, 1869.

ELI TULLIS,
President Police Jury.

REEVE LEWIS,
Clerk Police Jury.

The defendants put in an answer denying the validity of the bonds, of the ordinance under which they were issued, and of the drafts or orders for which they were substituted.

The cause was tried by a jury, and a verdict found for the plaintiffs. The case came here upon a number of exceptions taken at the trial, which, under the view we have taken of the case, it is not necessary to examine in detail.

The substantial facts of the case were, that in December, 1860, and January, 1861, the levee inspector of the parish of Tensas issued to certain persons by the name of Kennedy and Maxwell, five "levee warrants" (as they are called) for work done on the levees in ward No. 3 of said parish, amounting in the aggregate to over fifteen thousand dollars. They were all sight drafts drawn by Charles B. Tenny, as levee inspector of the parish, on one Snyder, treasurer of the levee fund of the parish, in favor of Kennedy and Maxwell, or order, and expressed as "being for amount due them for and on account of work done on levees in ward No. 3 this day."

These warrants seem to have been issued in regular course, according to the laws then in force on the subject. Originally the levees were made by the riparian owners, who received their lands upon this condition; and, if they neglected their duty, the police juries of the several parishes (who are the local boards representing them) were required to have the work done, and to collect the expense from the delinquent landowner. Modifications of this system have from time to time been made by various acts of the Legislature. The law under which the levee warrants above referred to were issued was passed in 1848, with amendments, passed in 1850 and 1852. It related to the parish of Tensas alone; and the substance of it, so far as is necessary for our purpose, was, that the police jury of that parish should appoint a levee inspector, whose duty was to direct and superintend the construction and repairs of all levees in the parish in accordance with the requisition of the police jury; to survey the levees, and where work was required to let it out to the lowest bidder; and, after the work was finished on any particular section, the statute directed as follows:

"Then the inspector shall issue a warrant, payable to the contractor which shall be a legal order upon the treasurer of the levee fund for the amount therein specified."

The statute then provided for the levee fund, as follows:

"The police jury are authorized to levy and collect, in the same manner that the State and parish taxes are now collected, an annual tax upon the assessed value of real estate, as returned by the assessors of the State taxes. Said tax, when collected, shall form a special fund for levee purposes alone."

We have quoted these specific directions for the purpose of showing how carefully the Legislature has prescribed the duties of all parties in relation to this matter. Not a word is anywhere said authorizing the parish jury to issue any bonds, or create any other evidences of debt, for work on the levees.

The general powers of the police juries of the State are carefully and particularly laid down in a statute on that subject, passed in 1813, with some amendments in subsequent years. They are enumerated under eighteen distinct heads. Revised Statutes of Louisiana, title "Police Jury." The section conferring powers commences as follows:

"The police juries shall have power to make all such regulations as they may deem expedient:

"1st. For the police of slaves in their respective parishes, and the pursuit of runaways, &c.

"2d. As to the proportion and direction, the making and repairing of the roads, bridges, causeways, dikes, levees and other highways

"3d. To lay such taxes as they may judge necessary to defray the expenses of their several parishes."

Other heads relate to clearing the Mississippi and other streams from obstruction, to the height of fences, the marking of cattle, the regulating of taverns, the establishment of ferries and toll bridges, &c., &c.

In restraint of the power of police juries and all other municipal bodies of the State to incur expenditures, the Legislature in 1853 passed the following act:

"The police juries of the several parishes, and the constituted authorities of incorporated towns and cities in this State, shall not hereafter have power to contract any debt or pecuniary liability without fully providing in the ordinance creating the debt, the means of paying the principal and interest of the debt so contracted."

And it is declared that such ordinance shall remain in force until the debt and interest is paid. Revised Statutes of 1856, p. 345. Nothing of the kind was done in this case, and the defendants insist that the bonds are void on this account. But this provision can hardly be said to apply to the proceedings of the inspector of levees, acting under the special statutes above mentioned; though we do not see why it is not applicable to the police jury, when that body attempts to charge the parish with a new set of securities payable at a distant day, with regular interest warrants, and negotiable from hand to hand; even though such securities were issued to fund a previous liability. But waiving this point, we proceed to other aspects of the case.

As bearing on the question of authority, it is pertinent to notice that, in 1860, the Legislature passed an act expressly authorizing the police jury of the parish of Tensas "to issue their bonds for a sum not to exceed $200,000, not having more than five years to run, and payable at one of the banks of the city of New Orleans, and not to be for less than one thousand dollars each." Other specific directions and conditions are contained in the law. It is not pretended that the bonds in question were issued in accordance with this act, and no other act is referred to giving any such power. This instance, however, goes to show that special legislative authority was deemed requisite to enable the police jury to issue bonds when such securities were required for raising money to meet the necessities of the parish.

It thus appears that the police jury had no express authority to issue the bonds in question, and that if they had any authority it must be implied from the general powers of administration with which they were invested. We have, therefore, the question directly presented in this case, whether trustees or representative officers of a parish, county, or other local jurisdiction, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have an implied authority to issue negotiable securities, payable in future, of such a character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous indebtedness?

This subject as applied to various municipal bodies has been much discussed in the courts of this country, and various conclusions have been reached, depending sometimes upon the peculiar character and statutory powers of the corporation, sometimes upon the character of the objects to be attained, and sometimes upon the naked implication of power supposed to arise from the express power to make expenditures. A collection of the cases may be found in Dillon on Municipal Corporations, section 407, note. That a municipal corporation, which is expressly authorized to make expenditures for certain purposes, may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness, and issue proper vouchers therefor, is not disputed. This is a necessary incident to the express power granted. But such contracts, as long as they remain executory, are always liable to any equitable considerations that may exist or arise between the parties, and to any modification, abatement, or rescission in whole or in part that may be just and proper in consequences of illegalities, or disregard or betrayal of the public interests. Such contracts are very different from those which are in controversy in this case. The bonds and coupons on which a recovery is now sought, are commercial instruments, payable at a future day, and transferable from hand to hand. Such instruments, transferred before maturity to a *bona fide* purchaser, leave behind them all equities and inquiries into consideration and the conduct of parties; and become, in the hands of an innocent holder, clean obligations to pay, without any power on the part of the municipality to demand any inquiry as to the justice or legality of the original claim, or to plead any corrupt practice of the parties in obtaining the security. This characteristic of commercial paper, which no court has more faithfully enforced than this, raises the doubt whether the power to issue it can be implied from the ordinary powers of local administration and police, which are conferred upon the boards and trustees of political districts. The power to issue such paper has been the means in several cases, which have recently been brought to our notice, of imposing upon counties and other local jurisdictions burdens of a most fraudulent and iniquitous character, and of which they would have been summarily relieved, had not the obligations been such as to protect them from question in the hands of *bona fide* holders. As such, we have been reluctantly compelled to sustain them, but only on the ground that the power to issue them had been expressly, or by necessary implication, conferred by the Legislature. The power to issue such obligations, and thus irretrievably to entail upon counties, parishes, and townships a burthen for which perhaps they have received no just consideration, opens the door to immense frauds on the part of petty officials and scheming speculators. It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justness and validity of which may always be inquired into. It is a power which ought not to be implied from the mere authority to make such improvements. It is one thing for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations which may be multiplied to an indefinite extent. If it be once conceded that the trustees or other local representatives of townships, counties, and parishes have the implied power to issue coupon bonds, payable at a future day, which may be valid and binding obligations in the hands of innocent purchasers, there will be no end to the frauds that will be perpetrated.

We do not mean to be understood, that it requires, in all cases, express authority for such bodies to issue negotiable paper. The power has frequently been implied from other express powers granted. Thus, it has been held that the power to borrow money, implies the power to issue the ordinary securities for its repayment, whether in the form of notes, or bonds payable in future. So, the power to subscribe for stock in a railroad, or to purchase property for a market house, and other like powers, which cannot be carried into execution without borrowing money, or giving obligations payable in the future, have been held sufficient to raise the implied power to issue such obligations. But in our judgment these implications should not be encouraged, or extended beyond the fair inferences to be gathered from the circumstances of each case. It would be an anomaly, justly to be deprecated, for all our limited territorial boards, charged with certain objects of necessary local

administration, to become the fountains of commercial issues, capable of floating about in the financial whirlpools of our large cities.

In the case before us, where was the necessity of funding the levee warrants held by the contractors? If it was desired to avoid the danger of prescription, an acknowledgment authorized by the police jury would have had all the effect which a new security could give. Where, among all the powers given to the police jury, can the power be found or fairly inferred, of funding the indebtedness of the parish, by issuing six or ten year bonds, payable to bearer, with the regular apparatus of coupons—securities specially framed and contrived for distant and diffusive circulation? When the Legislature deemed it desirable for the parish to issue such paper to enable it to raise money, the power was expressly given, with proper safeguards and limitations. This very fact indicates the legislative understanding, that no general and indefinite power of the kind had any existence.

In our opinion, the police jury had no authority to issue the bonds and coupons in question; and, therefore, the judgment must be reversed.

Recent Decisions.

PENNSYLVANIA.

[Our thanks are due to P. F. Smith, Esq., State Reporter, for advance sheets of Vol. 20 of his reports (Vol. 70 Pa. State Reports). We make the following selections from them.]

McABOY v. JOHNS and Wife.

1. A purchaser agreed to pay a wife $500 if she would execute a deed for land sold by her husband; she executed the deed. *Held*, that she could recover the money from the purchaser.

2. The contract between the purchaser and the wife was that he was to give her a writing for the payment of the money. He gave her a paper which she could not read, and represented that it contained the contract; she thereupon executed the deed. The paper did not contain the verbal agreement. *Held*, that she might recover on the verbal promise.

October 5th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Allegheny county: No. 42, to October and November Term, 1870.

COOK et al. v. MACKRELL et al.

1. Johnson, wishing to be appointed a sequestrator, employed Mackrell, a lawyer, to conduct the proceedings in the Common Pleas. The petition was signed by a number of others, some of whom spoke to Mackrell and urged him to press the proceeding. *Held*, that this was not evidence of a promise on the others to pay.

2. Mackrell declared against seven on a joint contract; there was *no* evidence in relation to three. *Held*, that the action could not be maintained.

3. In answer to a point that under the pleadings the plaintiffs could not recover, the court charged, "We leave the liability or non-liability of these defendants to be discovered and determined by the jury from all the facts of the case." *Held*, that this left to the jury to determine both the law and the facts, and therefore was error.

October 11th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the District Court of Allegheny county: No. 131, to October and November Term, 1870.

THE EMPIRE TRANSPORTATION CO. v. STEELE.

1. Thompson, in Pennsylvania, shipped oil by a transportation company to Saxton, in New York, and received bills of lading which were endorsed to Steele as security for money advanced to Thompson, on his drafts on Saxton. The drafts were dishonored; the company refused to deliver the oil to Steele, because Saxton owed them freight. *Held*, in a suit by Steele against the company, evidence that the oil was Saxton's was admissible.

2. Steele, by endorsement of the bills, took only the title to the oil which Thompson had.

3. Secondary evidence insufficient in this case to admit proof of the contents of a writing.

November — 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Forest county: No. 1, to October and November Term, 1871.

MASSON AND BESANSON'S APPEAL.

1. When a court of equity has jurisdiction, if the relief prayed for cannot be granted, compensation in damages may be awarded in lieu thereof.

2. Parties agreed to erect a party-wall, each to build a portion specified; one refused, and the other erected the whole wall; the one then commenced to use the party-wall for his building; the other brought a bill to restrain him; pending the dispute they agreed that the defendant might go on with his building, giving bonds for such sum as might be adjudged to the plaintiff, and the injunction was therefore withheld. *Held*, that as the specific relief asked, therefore, could not be granted, the court, "both inherently and by virtue of the agreement," had power to ascertain and award compensation.

3. The plaintiff having finished the wall under the agreement, it was his own until paid for, and the threatened act of defendant of breaking into the wall might be restrained.

4. Equity will restrain a trespass of a permanent nature; an action for damages in such case not being an adequate remedy, as in case of a temporary trespass.

October — 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Appeal from the Court of Common Pleas of Crawford county: In Equity: No. 174, to October and November Term, 1870.

VERNON TOWNSHIP ROAD.

1. A road was laid out and confirmed *nisi* at February Term, and absolutely at April Term. At the next term, and before the road was opened, a petition was presented setting out that part of it was inconvenient, &c., and asking a view to make alterations, which was granted. *Held*, 1. That it was a petition to change or vacate, and without authority before opening. 2. The petition should have been for review. 3. As a review, it was too late, not being at or before the next term after the first report.

2. The report of the second view changed the route. *Held*, that although the petition was signed by a majority of the original petitioners, it did not save the proceeding as upon an unopened road under 18th section of act of June 13th, 1836, or 1st section of act of May 3d, 1855, those acts authorizing only the annulling or vacating of the road, not reporting another.

3. Augusta Township Road, 5 Harris, 71, approved.

October — 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Certiorari to the Court of Quarter Sessions of Crawford county: No. 160, to October and November Term, 1870.

SCHENLEY'S APPEAL.

1. S. leased a lot in Pittsburg to M. for ten years, allowing M. to remove at the end of the term such improvements as he might make; the "buildings, improvements and other property on said premises (to be) subject to distraint in like manner as personal property for said rent * * * in case of removal, whether clandestinely or openly, of said buildings, improvements or other property, * * * said buildings, improvements or the material therefrom may be followed and distrained as if still on the premises." M. erected a building; mechanic's liens were filed, under which the leasehold was sold, and the building, &c., removed by the sheriff's vendee. *Held*, that S. was entitled to the rent due from the proceeds of the sale; and that the lien-creditor had no claim on the fund in court.

2. The act of February 27th, 1868, extending the mechanic's lien act of 1836 to improvements, engines, &c., for oil or other refineries, does not apply to leases for the ordinary purposes of residence, &c.

3. Under the act of 1836, and its supplements, a mechanic's claim does not lie against a leasehold or the building erected on it by a tenant for years.

4. The act of April 28th, 1840, providing that no greater estate shall be sold under a mechanic's lien, than is vested in the person in possession, does not enlarge, but restrains the right of the mechanic's lien creditor.

5. Act of February 17th, 1858, relating to improvements, &c., "on lands of others," in Luzerne and Schuylkill counties, extended by act of March 21st, 1865, to Westmoreland and Allegheny counties, construed and applied.

6. "Improvements" in all *these acts* does not mean ordinary houses; but works on colliery, oil leases, &c.

7. Dame, Seymour & Co.'s Appeal, 12 P. F. Smith, 417, distinguished.

November 4th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Appeal from the decree of the Court of Common Pleas of Allegheny county: No. 25, to October and November Term, 1871.

VANCE v. NOGLE.

1. Nogle contracted to sell land to a married daughter, with the consent of her husband, for $2,500 in instalments, and a portion of the products during his own and his wife's life; the daughter made the first payment, and entered into possession; the father died, bequeathing all his estate to his wife, who for some years received the products from the daughter, who also tendered the instalments as they became due. *Held*, that the contract was binding on the vendor, notwithstanding the coverture of the vendee, she having performed the conditions.

2. A wife may acquire separate property in equity, by agreement with her husband, without the intervention of trustees.

3. A contract between a vendor and feme covert, cannot be rescinded by him, except by her refusal to perform the conditions.

4. Walker v. Coover, 15 P. F. Smith, recognized.

November 17th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Lawrence county: No. 31, to October and November Term, 1871.

SOUTH'S ADMINISTRATORS v. SOUTH.

R. and A. agreed "to submit the settlement of our accounts" to three referees, who awarded that they found W. indebted to R. "$500, including two notes, &c., and W. to deliver up to R. and A. the eighteen head of cattle that divided and fell to their share," &c. R. declared on an award for $500. *Held*, that the award, as far as sued on, was within the submission. The remainder not being covered by the submission, the award was void only *pro tanto*.

November — 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Greene county: No. 126, to October and November Term, 1871.

STALL v. MEEK.

1. Stall, in 1857, about leaving home, left claims due him, with Meek for collection, and from the proceeds to pay a debt due Braden, and the remainder to Stall's wife. This constituted the wife Stall's agent.

2. During Stall's absence Braden brought suit; the wife asked Meek for money to pay; he said it should not trouble her; he would pay Braden; he afterwards told her he had paid. Braden recovered judgment, which Stall, on his return in 1867, was compelled to pay. In 1869 he sued Meek, who pleaded the statute. The court charged: "Unless there was fraud on plaintiff in concealing the receipt of money, the statute would be a bar; anything said to the wife not communicated to plaintiff, would not be such fraud as would prevent the bar; the concealment must be practiced on the husband, or his constituted agent." *Held*, to be error, being calculated to mislead the jury as to the agency of the wife.

November 14th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Greene county: No. 119, to October and November Term, 1871.

LEGAL GAZETTE.

Friday, July 4, 1873.

JOHN H. CAMPBELL,
EDITOR.

THEODORE F. JENKINS,
ASSOCIATE EDITOR.

THE JUDICIARY ARTICLE ON SECOND READING.

The Constitutional Convention upon Monday last resumed the consideration of the judiciary article of the new constitution, passing it upon second reading in the following shape. The sections in reference to the Philadelphia courts will be of interest to our city readers. We think they are improvements on the present provisions.

ARTICLE —.

SECTION 1. The judicial power of this commonwealth shall be vested in a Supreme Court, in Courts of Common Pleas, in Courts of Oyer and Terminer and General Jail Delivery, in Courts of Quarter Sessions of the Peace, in Orphans' Courts, in justices of the peace, and in such other courts as the Legislature may from time to time establish.

SECT. 2. The Supreme Court shall consist of seven judges, who shall be elected by the qualified voters of the State at large. They shall hold their offices for the term of twenty-one years, if they so long behave themselves well, but shall not be eligible to re-election. The judge whose commission will first expire, shall be chief justice, and thereafter each judge whose commission shall first expire, shall in turn be chief justice.

SECT. 3. The jurisdiction of the Supreme Court shall extend over the State, and the judges thereof shall by virtue of their offices be justices of oyer and terminer and general jail delivery in the several counties. They shall have original jurisdiction in cases of injunction where a corporation is a party defendant, of habeas corpus, and of mandamus to courts of inferior jurisdiction, and in case of quo warranto as to all officers of the commonwealth whose jurisdiction extends over the State, but shall not exercise any other original jurisdiction. They shall have appellate jurisdiction by appeal, certiorari, or writ of error, in all cases, as is now or may hereafter be provided by law.

SECT. 4. Until otherwise directed by law, the Courts of Common Pleas shall continue as at present established, except as herein changed. Not more than four counties shall at any time be included in one judicial district organized for said courts.

SECT. 5. In the city of Philadelphia, and in the county of Alleghany, all the jurisdiction and powers now vested in the District Courts, and the Courts of Common Pleas, or either of them, in said city and county, subject to such changes as may be made by this constitution or by law, shall be in the city of Philadelphia vested in four, and in the county of Alleghany, in two distinct and separate courts of equal and co-ordinate jurisdiction, composed of three judges each, and in such additional courts of the same number of judges and of like jurisdiction as may from time to time be by law added thereto. The said courts in the city of Philadelphia shall be designated respectively as the Court of Common Pleas, number one, number two, number three and number four, and in the county of Alleghany as the Court of Common Pleas, number one and number two; but the number of said courts may be by law increased from time to time, and shall be in like manner designated by successive numbers. And the Legislature is hereby prohibited from creating other courts to exercise the power vested by this constitution in said Courts of Common Pleas and Orphans' Courts. The number of judges in any of said courts, or in any county where the establishment of an additional court may be authorized by law, may be increased from time to time, and whenever such increase shall amount in the whole to three, such three judges shall compose a distinct and separate court as aforesaid, which shall be numbered as aforesaid.

SECT. 6. Each court shall have exclusive jurisdiction of all proceedings at law and in equity, commenced therein, subject to change of venue, as may be provided by law.

SECT. 7. For the city of Philadelphia, there shall be one prothonotary's office, and one prothonotary for all said courts, to be appointed by the judges of said courts, and to hold office for three years, subject to removal by a majority of the said judges. The said prothonotary shall appoint such assistants as may be necessary and authorized by said courts, and he and his assistants shall receive fixed salaries, to be determined by law and paid by said city; and all fees collected in said office, except such as may be by law due to the commonwealth, shall be paid by such prothonotary into the city treasury. Each court shall have its separate dockets, except the judgment docket, which shall contain the judgments and liens of all the said courts as are or may be directed by law.

SECT. 8. The said courts in the city of Philadelphia and county of Alleghany, respectively shall from time to time in turn detail one or more of its judges to hold the criminal courts of said district, in such manner as may be directed by law.

SECT. 9. Every judge of the Court of Common Pleas shall by virtue of his office and within his district, be a judge of oyer and terminer and general jail delivery, for the trial of capital and other offenders therein, and shall be a justice of the peace therein as far as relates to criminal matters, and shall be competent to hold the Court of Quarter Sessions of the Peace, and the Orphans' Court thereof.

SECT. 10. The judges of the Court of Common Pleas within their respective counties, shall have power to issue writs of certiorari to the justices of the peace, and other inferior courts not of record, and to cause their proceedings to be brought before them, and right and justice be done.

SECT. 11. Justices of the peace or aldermen shall be elected in the several wards, districts, boroughs and townships, at the time of the election of constables, by the qualified voters thereof, in such manner as shall be directed by law, and shall be commissioned by the governor for a term of five years. No township, ward, district or borough, shall elect more than two justices of the peace or aldermen, without the consent of a majority of the qualified electors within such township, ward or borough. No person shall be elected to such office unless he shall have resided within the township, borough, ward or district, for one year next preceding his election.

SECT. 12. In the city of Philadelphia for each thirty thousand inhabitants, there shall be established in lieu of the office of alderman and justice of the peace, as the same now exists, one court not of record, of police and civil causes, with jurisdiction not exceeding one hundred dollars. Such court shall be held by magistrates, whose term of office shall be five years, and they shall be elected on a general ticket by all the qualified voters of said city; and in the election of the said magistrates, no voter shall vote for more than two-thirds of the number of persons to be elected, where more than one are to be chosen. They shall be compensated only by fixed salaries to be paid by said city, and shall exercise such jurisdiction, civil and criminal, except as herein modified, as is now exercised by aldermen and justices of the peace, subject to such changes, not involving an increase of civil jurisdiction, or conferring political duties, as may be made by law. All fees on the business of such courts, and all fines and penalties, shall be paid into the city treasury.

SECT. 13. In all cases of summary conviction, or of judgment in suit for a penalty before a magistrate or court not of record, either party shall have the right to appeal to such court of record as may be prescribed by law.

SECT. 14. All judges required to be learned in the law, except the judges of the Supreme Court, shall be elected by the qualified electors of the respective districts over which they are to preside, and shall hold their offices for the period of ten years, if they shall so long behave themselves well; but for any reasonable cause which shall not be sufficient ground for impeachment, the governor may remove any of them on the address of two-thirds of each branch of the Legislature.

SECT. 15. Whenever two judges of the Supreme Court are to be chosen for the same term of service, each voter shall vote for one only, and when three are to be chosen, he shall vote for no more than two, and candidates highest in vote shall be declared elected.

SECT. 16. Should any two or more judges of the Supreme Court, or any two or more judges of the Court of Common Pleas for the same district, be elected at the same time, they shall as soon after the election as convenient, cast lots for priority of commission, and certify the result to the governor, who shall issue their commissions in accordance therewith.

SECT. 17. The judges of the Supreme Court and the judges of the several Courts of Common Pleas, and all other judges required to be learned in the law, shall at stated times receive for their services an adequate compensation, which shall be fixed by law and paid by the State, and which shall not be diminished during their continuance in office. They shall not receive any other compensation for their services from any source, nor any fees or perquisites of office, nor hold any other office of profit under this commonwealth, nor under the United States or any other State.

SECT. 18. The judges of the Supreme Court during their continuance in office, shall reside within this commonwealth, and the other judges during their continuance in office, shall reside within the district or county for which they shall be respectively elected.

SECT. 19. The several Courts of Common Pleas, besides the powers herein conferred, shall have and exercise within their respective districts such powers of a court of chancery as are now vested by law in the several Courts of Common Pleas of this commonwealth, or as may hereafter be conferred upon them by law.

(The remaining sections we will print in our next issue.)

JULY 1776—JULY 1876.

Everything we suppose for three years to come will partake of Centennialism, if, indeed, all things will not become absolutely and quite "Centennial." We see centennial hats and centennial coats advertised already. Centennial breeches will follow of course, and we suppose that before long the reproach which has hitherto attended old fashioned affairs, will become their greatest glory. Centennial beauties may even come in fashion. We feel bound to imbibe the infection, and shall at least from time to time, until 1876, give a little revolutionary stuff. We do not mean stuff savoring of revolution against the government that now is, but stuff that savors of the men and things of 1776. We give to-day two very interesting letters of the well known Judge Richard Peters, than whom no man was better able to speak on topics connected with those times.

One is a letter in connection with the authorship of the Declaration of Independence. It is addressed in July, 1826, to his son, the late Richard Peters, long the reporter of the Supreme Court of Washington, who had asked him to go with him to a fashionable watering place hotel. The other is a letter to the late Robert Walsh, Esquire, then editor of the National Gazette, who it would seem had printed in his paper a letter of the venerable judge speaking (as many of the best judges of the day also did) of Peale's portrait of Washington (the *pater patriæ* portrait), painted chiefly from memory. The judge in writing to Peale had said as follows, though apparently he did not design to have what he wrote printed:

"I have seen all or most of the portraits of this venerated father of our country. The painters of several were respectable as artists, but they have failed in the *likeness*, and I have never been satisfied with any of them. I was therefore most sensibly impressed with the superiority in this regard of your portrait, which I think places all others in the shade."

Upon seeing his letter blazoned forth in the newspaper, he sent apparently to

Mr. Walsh, and asked for the original, or a copy from which the thing had been printed. It, perhaps, had, in some part, a latin quotation which the judge supposed had been incorrectly given.

In sending to Judge Peters the copy of his letter, Mr. Walsh, it would seem, had rather indiscreetly asked the judge his opinion as to whether Washington was really a great man, and how he compared with certain other persons. But the old farmer of Belmont was not to be trapped by master Bob in that way. He gives him the neatest reply which we remember to have seen to a question more free than delicate.

The remaining paper is a biographical sketch of a gallant old soldier, whose name was long connected with this city, a man deserving "centennial" place for merits all his own, and possessing some relation even to the bar, as the father of one of the purest and most accomplished men of the days of Washington. The Bradford of whom we give the memoir was father to the second attorney general of the United States, who died A. D. 1795.

BELMONT, 12th July, 1826.

DEAR RICHARD:

I have a complaint which would forbid exposure at this hot season in any conveyance, but would be highly inconvenient in a crowded passage boat. But were I perfectly well, I should decline the jaunt you propose, very kindly, but against all the prejudices of my life. I never relished the assemblages of heterogenous people at a watering place. I think such promiscuous society a nuisance, and if I were compelled to choose one or the other, I would prefer the musquitoes of Cape May to the company generally frequenting an insipid coast, as this certainly is.

The deaths of Adams and Jefferson on the day of our birth as a nation, to which they so eminently contributed, is really a most extraordinary coincidence. It would take much time and trouble to set down the thousands of circumstances and sentiments immediately preceding and following that illustrious day. Some of them would prove what I do not wish to show, that Jefferson was the penman, and not the sole author of the celebrated declaration, attributed to him solely. I *know* the *materials* were collected by a caucus of friends to the measure, and he held the pen, contributing at the same time no small proportion of the materials. I have often wondered that it has been so generally taken for granted, that Mr. J. was the *author* and every body else the idle witnesses of a measure which cost *us* many an anxious day and sleepless night, and many an investigation as to the grounds and reasons which we should assign for abandoning our allegiance. I was in the confidence of the leaders in the measure, and know that every one of at least a dozen patriotic and eminent men contributed to the declaration, whereof Mr. J. has the exclusive merit. I do not mean to deduct from his merit, but I think it unjust in relation to sharers in the measure, to attribute to him *all* the merit. Such a State paper most justly reflects with brilliant credit on all who contributed to its formation.

Adams was the most distinguished promoter of the measure, sometimes spoke as if inspired. Jefferson had no faculty of speaking in public, but was most highly meritorious in his public, as well as private character. No men ever lived or died to whom a country is more indebted for the blessings we enjoy. I knew them both intimately, and can attest their claims to disinterested patriotism, unmixed with sordid pursuits, which are much in fashion at this period.

Yours affectionately,

RICHARD PETERS.

R. PETERS, JR., ESQ.

BELMONT, July 10th, 1824.

DEAR SIR:

I return the copy of my letter to Mr. Peale. I had no doubt of your *latinity*, or accuracy; but compositors are a kind of animated machines, and proof readers often *racers*. I was unwise not to foresee that *Peale* would publish my very warm, but very sincere testimony. I do not retract a word of it, as to my real feeling and sentiment; but I should in prudence have omitted what I have marked in the margin.*

It will, undesignedly by me, give offence to worthy but sensitive artists; and draw down on me the anathemas of connoisseurs, amateurs, and picture-holders. I will, however, *force* from them an unanimous vote, by acknowledging that I have but a moderate (if any) taste in *painting*. In this they will not differ with me. Many of them have more pretensions than reality, in their *profundity* of *judgment*. I shall not gainsay anything they opine or say.

R. Peale, many years ago, was engaged in drawing a portrait of me. *He* was deeply mortified, and *I* excited to a burst of laughter when two of these *tyros* exclaimed: "Well, Mr. Peale, this a most wonderful likeness, indeed! Old Doctor Shippen, in every line and feature!!" Now *old* Dr. Shippen had no more resemblance to me, than I to Hercules. They may apply this occurrence to *me* or to *themselves*, as, in their great wisdom, seemeth best unto them.

Your question, as to General Washington, is one appearing to me, very unnecessary at this time of day to be brought into discussion. All the happiness we enjoy, and every prosperity our country possesses, are testimonies of his virtues and talents. To judge of *military talents*, a *critic* must erect himself into a *superior* military character. I admired and witnessed a wonderful share of the talents, without which our revolution could not have been achieved, and this was enough for me, and enough for a grateful country. Without the many and most worthy patriots who bore the difficulties and dangers we encountered, *he* could have performed little, and without *him* (for he had not—take him for all in all—his equal) *they* would have done nothing. I enter into no controversies; having no animosities, political, or personal, to gratify on the subjects you allude to. General Washington seemed to be formed by a kind of providence, for the great purpose in which he was employed. I make no comparisons with other military characters,—and whensoever any such comparisons (seldom, indeed) are made, I recollect the passage in Moore's "View of Society, and Manners;" where Moore asked the French ambassador, Laval, in the gardens of Eterhasie, how they stood in his opinion, compared with those of Versailles. "Monsieur, Versailles etait fait expres pour n'être comparé á rien." So, I think, Washington "*etait fait expres pour n'etre comparé á rien.*"

Always very sincerely and faithfully yours, R. P.

* The part we quote above.—Eds. Legal Gazette.

COL. WILLIAM BRADFORD.

William Bradford the 3d, or "Col. William Bradford," as in his day he was commonly called, was the son of William Bradford of the City of New York, and grandson of that William Bradford by whom the art of printing was introduced, A. D. 1684, into the middle colonies of America. Of his more remote ancestors, as well as of his wife Elizabeth, the daughter of Andrew Sowle, our knowledge is sufficiently full. But of the more immediate parentage of Colonel Bradford, the details are scanty. His father was born probably towards the close of the 17th century. His death we know was not earlier than 1755.*

He was extensively engaged in navigation, and owned at one time a vessel named the Droitwich. Of the mother of Colonel Bradford we know even less than this. Some indications lead to the idea that her family name was Van Horne; with which ancient Dutch family a relationship, through some source not otherwise discovered, is understood to have existed on the part of her descendants. Other indications would suggest that it may have been Schuyler, or Stafford. The residence of the family was in Hanover square, New York, not then as now abandoned to depots and storing houses; and both parents it is supposed were parishioners of Trinity Church. Here our knowledge ends. How little record, this, of the lives—perhaps the long and busy lives of two people once well known. But who shall rescue from "dumb oblivion" its prey?

William Bradford, the subject of our notice, was born in New York, on the 19th of January, 1720, 21, but came to Philadelphia at an early age, in order to be instructed in his ancestral profession by an uncle, Andrew Bradford, resident here; who being without any son had expressed an intention to provide with liberality for him. He remained in the office of his kinsman during the customary term, and in December, 1739, was taken into partnership with him. This connection lasted but a year, being dissolved in December, 1740. On arriving in 1741, at his majority, he went to England, where he visited his relations and spent some time in travelling through the country and making himself acquainted with its institutions and men, and particularly with the mechanism of his profession. Having purchased in England, and transmitted to America, all the improved forms then known of the apparatus of a printing office, he returned after an absence of a year. On the 15th July, he announced in his uncle's paper, the establishment of his "new printing office in the house where Mr. Andrew Bradford formerly lived, in Second street:" and having subsequently on the 18th of August, 1742, united himself by marriage to Rachel, the daughter of Thomas and Deborah Budd, a lady of good family in New Jersey, and of uncommon refinement, education and domestic worth, he issued on the second of December following, on the death of his uncle, the first number of his own newspaper, "The Pennsylvania Journal," one of the best printed papers of that time. This paper was continued by himself and his successors for nearly sixty years. The editorial duties during his connection with it were discharged entirely, it is believed, under his own eye; and he is also styled by the critical typographer, Mr. Thomas, "a very respectable printer." This Pennsylvania Journal, of which a copy is still preserved in the public Library of Philadelphia, exercised a most effective influence upon all the colonial interests from the date of its establishment to the close of the war of our Revolution. It was the channel through which the best minds of this region of country were brought to bear upon the common welfare; and in its columns were found the earliest authentic intelligence of everything at home or abroad which concerned the American policy and interests. In it were early announced the true principles of English constitutional liberty in their application to the concerns of the colony; and on them, as settled at the epoch of 1688, by Somers and Talbot, and the "old Whigs" of England, the cause of American rights was steadfastly maintained throughout the war of our Revolution.

"There breathed throughout it," says an intelligent writer of the present day,* "a sentiment of patriotism, a detestation of oppression, an hostility to tyranny, and a love of liberty and freedom of the press, as deep and fervid as exists anywhere at the present day." And he justly says that "it is to that sentiment, to that unconquerable spirit of freedom and independence, we owe our present nationality and liberal institutions."

Though the concerns of his journal, united with other operations of his office—which for a long time was very extensively engaged in all departments of typographical industry—might have well exhausted his powers and attention, Bradford found time in 1757 to put into execution a design which his uncle had formed in 1741, of a periodical journal more permanent in its character, and more select in its combinations than was suited to the nature of a popular sheet. In the month of October, 1757, he issued the first number of "The American Magazine and Monthly Chronicle for the British Colonies," one of the earliest literary and philosophical journals of our country. The work here deserves a record, both in respect of its liberal design, its judicious arrangement and its literary contents. And in connection with the subject of our notice, it is no small praise to add that the exterior execution was considerably beyond what was then common in America. The journal, during its continuance, was conducted with great order, accuracy,

* This is certain, since his grandson, the Honorable William Bradford, born A. D. 1755, by a will made in 1778, when twenty-three years old, makes a bequest of his, "gold sleeve buttons which were bequeathed to *me, by my grandfather, William Bradford.*"

* P. E. Freas, Esq., Editor of the Germantown Telegraph. See that journal, vol. xxiii, No. 38; paper of December 8th, 1852.

comprehension and spirit. It is probable, however, that the day of American magazines was not yet at hand, and that Bradford, in 1757, was somewhat in advance of the education and sympathies of his time. A hundred years ago, when "a whisper was almost sufficient to have negotiated all our internal concerns," the population of Pennsylvania was unable to sustain of itself any journal not essentially useful; and ephemeral literature was not then scattered as now, a thousand miles from its place of issue. The work having been conducted to a handsome volume of 556 pages, and to the close of a year, brought itself to a graceful termination before its interests began to flag with its readers, or its cessation became matter of necessity to its author. The work may yet be seen in a few select libraries, and the value of its contents is well attested by references yet occasionally made to them at the distance of a century after their date of publication.

In 1754, Bradford established in Philadelphia, at the southwest corner of Front and Market streets, the well known "London coffee house, for merchants and traders." From a series of sketches by Mr. J. A. McAllister, entitled the "Historic Houses of Philadelphia," we are enabled to give an account of this ancient exchange, and we doubt not that our readers will welcome from such a pen the narrative, though it includes as much the history of the old exchange itself, as of Col. Bradford's immediate connection with it. Thus Mr. McAllister proceeds:

"The earliest history of this curious edifice rests in obscurity. From the most authentic information we can obtain upon the subject, it appears, that the old building was built by Charles Read, eminent as judge of the vice admiralty in Pennsylvania, and for other honors, about the year 1702. The lot was a section from a good part of a square of ground which had, not long before, been given by William Penn to his daughter Letitia, in connection with her handsome mansion, still standing in a very dilapidated condition, on the west side of Letitia court. About the year 1701, this ground was cut up into building lots, and Mr. Read became the purchaser of the corner one, on which the celebrated edifice stands.

The building was doubtless used as a private residence until the year 1754, in which year Col. Bradford, who probably was then occupying it as his residence, turned it into a 'coffee house for the benefit of merchants and traders.' The printing office and book store of Col. Bradford —both on a considerable scale—being close to it on the rear, in Market street, it is probable that his object was rather to increase his connections in business, than to derive much profit from the place as an independent establishment. The main house, in its best estate, consisted, as is obvious from looking at it, of but two rooms; one below, which was used, probably, for more common resort, the other above, for more secret consultations. Still it became a historic spot in the annals of the colony, and especially of the Revolution.

In this place a century ago, was conducted all manner of commercial negotiations and public sales. Here was received the earliest and most authentic intelligence of every sort, from every quarter, military and civil, foreign and domestic. Here were to be found the names and references of all strangers of distinction.

Here, too, in the days of the Revolution, and during the period of intense anxiety which preceded the actual commencement of hostilities, the various committees of safety, and other public bodies, which were called into existence by the emergencies of the crisis, held most of their official meetings. It was here the leading men of the day assembled to talk over the momentous concerns of the times. Here the stamp act, and its repeal—the Boston port bill — and other acts of the British ministry—were discussed. Here, too, the assembling of the Continental Congress, and its patriotic resolves, were the subject of much debate—while it was in this place also that the first gun from Lexington, the din of the struggle at Bunker Hill, and the adoption of the Declaration of Independence found a response in the hearts of the patriots who daily met here to talk anxiously over events which made brave men turn pale with apprehension for the result.

It was in the hands of its originator, at the London coffee house, that subscription papers were left for the signatures of those who were disposed to aid by their means in the establishment of manufactories in the united colonies, at a time when it was so desirable that they should be independent, in all things, of their unreasonable parent. It was here that in 1771 the first piece of broadcloth ever made in America was triumphantly exhibited as the product of the only loom then in existence in the colonies. The old edifice was the great headquarters of the leading men of the day, and many of the important measures which made their mark upon the period were first put in shape within its walls.

Its great superiority, as an architectural effort, to the buildings of that day, is attested by the fact, that while in every direction around it the edifices of all sorts have given away to the demands of improvement, the London coffee house still remains — in 1870 — untouched; a well-built and venerable, but now solitary monument of a style and strength of edifice which has defied alike the corrosions of time and the levelling hand of trade.

It is a matter of history, that in the early days of the Revolution the sister colonies of Pennsylvania were fearful that the non-resistant principles of the Society of Friends, and that the interests of the merchants of the then great commercial emporium, would prevent co-operation in the war which was evidently inevitable. Some of the leading men of the time concerted a scheme to bring out the feelings of our quiet citizens. A meeting was called, and addressed by several eloquent speakers. Mr. Charles Thomson was so earnest and vehement in his advocacy of the popular cause, that he fainted, and was carried out of the room. This meeting was held in the old edifice that we now describe. Its effect was what was desired; the public heart leaped in response to the pulse which had made itself manifest at the meeting. The sequel is too well known to require comment.

We could fill pages, with extracts from the newspapers which were published during the Revolution, to show the important figure made by the London coffee house at that time; but we have, we fancy, furnished sufficient to weary if not fully to instruct our readers upon this point.

It is an incident which, in connection with the history of the edifice, and not less so with the history of its founder—one of the earliest vindicators of American liberty, and an officer of the Revolutionary army, distinguished by personal bravery —that Bradford's announcement of his intention to open this establishment, bears the date of 4th July, 1754.

How long Col. Bradford remained in connection with this ancient exchange of Philadelphia, does not appear. He left it probably before the close of the war. In February, 1783, as is evident by an advertisement of the 25th of that month, it had passed into the hands of Col. Eleazer Oswald, the well-known editor of the Pennsylvania Gazetteer, and a man of character and influence. Col. Oswald rescued the consecrated spot from the hands of a person named Dally (an Irishman probably), who had proposed to re-open it, setting forth as the ground of *his* claim to 'public favor,' that he had 'laid in a good stock of beer, wine, and other liquors of the best quality,' and would provide 'oyster and other suppers at shortest notice!' Col. Oswald brought it back to 'its *original* plan and *regulations*;' which are set forth in his own advertisement, as follows:

'ELEAZER OSWALD

Having rented The Coffee House (Front and Market), which for some time past has been shut up, purposes opening it again on Thursday next, for the accommodation of the citizens in general, *on its original plan and regulations*. He therefore thus publicly entreats that those gentlemen who have hitherto, from its first establishment, considered it a *change for commercial transactions*, &c., will return to their old accustomed place of resort, without the least regard to any party distinctions whatever. It will be his study to give general satisfaction, and to render it a repository of useful intelligence. All the various, newspapers, magazines, &c., both foreign and domestic, will be regularly filed in the public rooms for the information and amusement of the curious, and every attention paid that will have the greatest tendency to promote the happiness and welfare of the community.'

Col. Oswald redeemed his promise, and made the coffee house what it had been originally, a place of resort for the merchants and literary men of the city.

This famous old edifice continued to be a popular place of resort for the leading men of its time, until the growing city and the change of fashion made it inconvenient in point of size and accommodation. Its situation, too, became antique. It gradually sank into oblivion, until finally, the chosen resort of public characters, of men of fashion, of men of learning and taste, has become a mere assemblage of paltry shops. Alas! that we must make the record: one-half—the lower—is turned into a Jew's clothing store; the other half —the upper—into a barber's shop! To such base uses we return: 'The noble dust of Alexander' is found to stop 'a bung-hole.'

The merchants' coffee house was removed near the beginning of this century to Second street near Walnut. The very name, indicative of the simplicity of our English ancestors, and fragrant with memories of the Spectator, has now, *more Americano*, disappeared in the grander title and more imposing form of the Merchants' Exchange.

From an early date Bradford appears to have found time to indulge a natural taste which he possessed for military science. In the end of 1747, the French, who were then at war with England, had taken their station in Delaware Bay, and were about to make their attack on the city. 'It is past a doubt,' declares the Provincial Assembly in great alarm, 'that the city must be given up to the plunder of a cruel enemy, and the inhabitants left to the exercise of the brutal passions of a set of banditti, usually employed in the enemy's privateers, and to complete our misfortunes, the burning of our city will probably be the last act of the enemy.' The Society of Friends was 'principled against defence,' and would do nothing. The whole protection of the city and its inhabitants was left to others, on whom the burthen of it fell. These associated themselves into companies, and on the 1st of January, 1747-8, 'William Bradford, Gent,' was elected a lieutenant, 'William Bingham, Gent,' being ensign of his company. Their promptness, courage, and self possession were of infinite importance in such a moment, and with their well organized measures of defence, probably saved the city from capture and devastation. Minutes of the Provincial Council, vol. v, pp. 161, 173, 174. In 1756, our colonies being still at war, in behalf of Great Britain, with France, Bradford was promoted to the captaincy.

The return of peace leaving some leisure to a man of his active turn of mind, he opened, in 1762, along with Mr. Kydd, a marine insurance company, where it is recorded that 'much business was done' Events, however, were now approaching which gave more scope to his energetic and fearless temper. The policy of Great Britain was rapidly calling into life the military spirit of the country, and the subject of our notice partook actively in the conflict. An original letter from John Hancock, recently found among papers in the Historical Society of Pennsylvania, and well deserving to be framed and hung upon the walls of that noble institution, as a specimen of the handwriting of the great President of Congress, attests the very high confidence had in every way by our early patriots, in the virtues and intelligence of the subject of our memoir. Thus it reads:

'PHILADELPHIA, 7th June, 1776.

CAPTAIN WILLIAM BRADFORD:

Having delivered to your charge six boxes of money for the use of the army in Canada, I am to desire you will proceed with the guard under your command, and the wagons of money, with all possible despatch, to the city of New York, and wait upon General Washington, to whom you will deliver your charge, or take his orders respecting it. I must recommend you to have particular care of the money by night and day. I rely on your vigilance, and am

Your very humble servant,

JOHN HANCOCK, Pres't.

Army Canada.

No. 1 to 3. 3 boxes silver money.

No. 4 to 6. 3 do. paper dollars'

'Bradford,' says Mr. Thomas, History of Printers, vol. 2 p. 50 'was a warm advo-

cate for and a stanch defender of the rights of his country. He was one of the first in the city to oppose the British stamp act, in 1765, upon the formation of the sons of liberty, in 1766, to resist the stamp act . . . an association which comprised the names of William Paca, Samuel Chase and other eminent citizens. William Bradford and Isaac Howell, were the correspondents at Philadelphia.' Bradford's name is found, also, among the subscribers of the celebrated 'non-importation resolutions' of Philadelphia, in October, 1765, and as one of the 'committee (of safety probably) for the city and liberties of Philadelphia,' elected at the State House, in that city, August 16th, 1775. In 1765, he was a contributor to the building of the Pennsylvania Hospital, and he was equally hostile to the succeeding offensive measures of the British ministry. He took arms in an early stage of the Revolutionary war, and although he had reached the age at which the law exempts men from military service, he encountered the fatigues of a winter's campaign, and did duty as a major of militia in the memorable battle of Trenton. He shared the honors of the day at Princeton, and returned colonel of the regiment of which he went out major. He was at Fort Mifflin when it was attacked by the Hessians, and commanded at Billingsport, Red Bank and other engagements. A few days before the British troops took possession of Philadelphia, Bradford was entrusted by Governor Wharton with the command of the city, and the superintendence of removing the stores. Having performed this duty, he left the city as the enemy was entering it, and repaired to Fort Mifflin, where he remained until that fortress was evacuated. During this same time he discharged the responsible offices of chairman of the committee of safety, and president of the State navy board. He returned from the hazards of public service, with a broken constitution and shattered fortune. He soon lost his affectionate wife. Her death is announced in the Pennsylvania Packet of July 4th, 1780, as having taken place June 2?th, in the 60th year of her age. She is spoken of as 'a pious and amiable woman, exemplary in her discharge of every social and relative duty, beloved by her aquaintances, and blessed by the poor.' Age advanced upon him with hasty steps, and a paralytic stroke warned him of his approaching dissolution. After a few more feeble attacks, he calmly yielded to the king of terrors. Bradford literally complied with a resolve of the early revolutionists to risk his life and fortune for the preservation of the liberty of his country. After peace was established, he consoled himself under his misfortunes, and in his most solitary hours reflected with pleasure, that he had done all in his power to secure for his country a name among independent nations, and he frequently said to his children, 'though I bequeath you no fortune, I leave you in the enjoyment of liberty.' He died September 25th, 1791, aged 72. His body was interred (beside that of his wife,) in the Presbyterian church yard in Arch street, and his obsequies were attended by a large number of citizens, and particularly by those who were the early and steady friends of the Revolution. See Thomas' History of Printing, vol. ii, p. 50. The grave yard referred to by Mr. Thomas, was that of the Second Presbyterian Church. Arch above Fifth street.* A heavy oblong monument in those grounds bears the following inscription, derived apparently from the extract which precedes :

IN MEMORY OF

COLONEL WILLIAM BRADFORD,

Who died September 25th, 1791,

Aged 72 years.

He was born in New York
And came to this city at an early age,
Where he established a press,
And published a newspaper as early as the year 1742.
He was among the first
to oppose the British stamp act in this city.
And though
At an age which exempted him from military service,
He endured a winter's campaign
And was at the battles of Trenton and Princeton,
In the last of which he was colonel of the regiment.
He was in command at Fort Mifflin
When it was attacked by the Hessians,
And throughout the whole war,
Maintained the character of
A brave man and a firm patriot.

The following obituary notice is found in the Gazette of the United States, of Saturday, October 1st, 1791. Some indications have led to the suggestion that it was from the pen of Alexander Hamilton.

'On Saturday morning, departed this life, in the 73d year of his age, Mr. William Bradford, many years the editor of the Pennsylvania Journal, and colonel of a regiment of militia during the late war. He was descended from one of the first settlers in Pennsylvania, and was one of four generations of printers, who have universally distinguished themselves by devoting the press to the preservation and extension of the liberties of their country. This venerable patriot took an early and active part in every scene of difficulty and danger which recurred during the American Revolution. Fear had no place in his breast. Nor did he ever in a single instance betray or even disappoint the confidence which his fellow citizens placed in him, whether in the secret enterprises of the cabinet, or in the open dangers of the field. His remains were interred on Monday afternoon, in the Presbyterian grave yard, in Arch street, attended by a large concourse of the inhabitants of the city, and particularly by the early and steady friends of the Revolution, who can never recollect the important events of the years 1774, 1775 and 1776, without connecting them with the name of this patriotic citizen.'"

* The place has been recently *demortuarised*; and the remains of Bradford removed, we believe, to Laurel Hill

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE AMERICAN EXCHANGE BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to three million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled the INDEPENDENCE HALL BANK, to be located in Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE DRY GOODS BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE ARTISANS' BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE MARKET BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE DELAWARE RIVER BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE GROCERS' BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the conferring of the powers of a Bank of Deposit, Discount and Issue upon the Philadelphia Banking Company, incorporated in accordance with the Act of Assembly approved March 1th, 1870, and an increase of capital to five million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation, in accordance with the laws of the Commonwealth, of THE SECURITY BANK, to be located in Philadelphia, with a capital of fifty thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE THIRD STREET BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with a right to increase the same to twenty-five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE CHESTNUT HILL BANK, to be located at Philadelphia, with a capital of fifty thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE STATE OF PENNSYLVANIA BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to ten million dollars. jul 4-6m

JUST PUBLISHED. CASE OF CHRIST Church, Germantown, Philadelphia. Being a Report of the proceedings before the Board of Presbyters in reference to the application of a majority of the Vestry of said Church for a dissolution of the pastoral connection.

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Nos. 139 and 141, late 67 and 69 S. Fourth St.

REAL ESTATE SALE, JULY 8th.
Will include—

Mortgage, $1,000. Orphans' Court Sale—Estate of Mary McMennamin, dec'd.

Green, East of Germantown avenue, in the Village of Rising Sun—Desirable Lot, Dwellings and Stable. Trustees' Sale.

Lombard, No. 2234—Genteel Three-story Brick Dwelling.

Aspen, Nos. 4018, 4020 and 4022—3 Genteel Three-story Brick Dwellings—Assignees' Peremptory Sale.

Sycamore, Nos. 4025, 4021 and 4019-3 Genteel Three-story Brick Dwellings. Same Account.

Moyamensing avenue, No.—— Frame Dwelling and Stable.

Thirty-second, (North,) Nos. 120 and 132—2 Handsome Modern Three-story Stone Residences, with side yards.

Fourth, (North.) No. ——— Three-story Brick Tavern and Dwelling.

REAL ESTATE SALE, JULY 22d.
Will include—

Green, No. 728—Business Location—Two-and-a-half-story Brick Dwelling. Orphans' Court Sale—Estate of Wm. J. Benners, dec'd. Proceedings in partition.

Well-secured Irredeemable Ground Rent, $180 a year, Silver Same Estate.

Third, (North,) No. 1025—Three-story Brick Lager Beer Saloon, 88 feet front—Orphans' Court Peremptory Sale—Estate of Samuel Wagenhall, dec'd.

Fourth, (North,) No. 1118—Three-story Brick Dwelling, with Three-story Back Buildings, and 2 Three-story Back Buildings in the rear, No. 1117 Leithgow street. Same Estate.

Fourth, (North,) No. 1116—Three-story Brick Dwelling, with 2 Three-story Brick Dwellings in the rear. Same Estate.

Leithgow, No. 1115-2 Three-story Brick Dwellings. Same Estate.

Eleventh, (South,) No. 1127—Three-story Brick Dwelling.

JAMES A. FREEMAN & CO.,
AUCTIONEERS.
No. 422 WALNUT STREET.

REAL ESTATE SALE AT THE EXCHANGE, JULY 16th.

Orphans' Court Absolute Sale.—15th and Bainbridge streets. Business Stand. Three-story Brick Liquor Store and Dwelling, at the S. W. Corner, and Three-story Brick Dwelling on Wyoming street. Lot 16 feet on 15th street by 83 feet deep on Bainbridge street, and 18 feet on Wyoming street. Estate of George Stewart, dec'd.

Orphans' Court Absolute Sale.—620 16th street. Genteel Three-story Brick Dwelling north of Bainbridge street. Lot 17 x 69 feet. Same Estate.

Orphans' Court Absolute Sale.—702 South 15th street. Three-story Brick Dwelling, South of Bainbridge street. Lot 16 x 85 feet with 2 Three-story Brick Houses on Wyoming street. Same Estate.

Orphans' Court Absolute Sale.—424 South 20th street. Business Location. Three-story Brick Dwelling, and Lot 17 x 43 feet. Estate of Kleve, minors.

Orphans' Court Absolute Sale.—433 Redwood street. Three-story Brick Dwelling, and Lot 16 x 116 feet to Federal street, on which it fronts 16 feet. Estate of Hugh McAnneny, deceased.

Orphans' Court Sale.—North 10th street, Nos. 2304 and 2306. 2 Neat Two-story Brick Cottages, above Dauphin street. Lots 33 x 90. Estate of Michael Burke, dec'd.

Assignees' Absolute Sale.—Berks street. Brick Foundry Building and Valuable Lot below 5th street, 62 x 98 feet to Hackey street, on which it fronts 66 feet. Subject to $382 ground rent. Estate of T. B. Freyer & Co.

Peremptory Sale by Order of the Board of Public Education.—Norris and Franklin streets. Valuable Lot of Ground Suitable for Building Sites, 140 feet front on Norris street and 90 feet on Franklin street. Plan and Survey at the Store.

Sale by Order of Heirs.—2323 Coates street. Business Stand. Three-story Brick Store and Dwelling. Lot 18 x 70 feet. Estate of John Friar, dec'd.

Sale by Order of Heirs.—2321 Coates street. Neat Three-story Brick Dwelling, adjoining the above. Lot 18 x 68 feet. Same Estate.

Sale by Order of Heirs.—2326 Virginia street. Neat Two-story Brick House, 15th Ward. Lot 12 x 44 feet. Same Estate.

Sale by Order of Heirs.—Virginia street, Nos. 2322 and 2324. 2 Neat Two-story Brick Houses, 15th Ward. Lots 12 x 43 feet. Same Estate.

Sale to Close an Estate.—1518 South Front street. Well built Three story Brick Dwelling, 7 rooms, above Tasker street. Lot 16 x 70 feet. Immediate possession.

Market street, No. 2134.—Business Stand. Three-story Brick Store and Dwelling west of 21st street. 16 x 125 feet to Simes street, has 9 rooms. Immediate possession. Terms half cash.

Filbert and 21st streets. Business Stand.—Three-story Brick Liquor Store and Dwelling, at S. E. corner. Lot 18 x 65 feet. Terms half cash.

24th street.—2 Substantially Built Three-story Brick Dwellings, between Walnut and Sansom streets, each Lot 16 x 65 feet deep. Terms half cash.

24th street below Walnut.—Desirable Building Lot and 2 Three-story Brick Houses fronting on Beach avenue. Lot 18 x 96 feet. Terms half cash.

Executor's Absolute Sale.—Estate of Daniel McCarthy, deceased. Schooner "Marian Gage." On Wednesday, July 16th, 1873, at 12 o'clock noon, will be sold at the Philadelphia Exchange, the one-eighth interest in the Schooner "Marian Gage," 302 tons tonnage, draws 12 feet water, built at Wilmington, Delaware, 121 feet long, 29½ feet beam, 10 feet 3 inches hold. Commanded by Capt. Wm. C. Fountain. Sale Positive. $100 to be paid at the time of sale.

AT PRIVATE SALE.

1625 North Fifteenth street above Oxford street.—Handsome Modern Three-story Brick Residence with Back Buildings and every convenience (13 rooms), and in excellent order. Lot 20 x 160 feet to Carlisle street. Immediate possession. $6,000 may remain on mortgage.

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[SUPPLEMENT.]

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PHILADELPHIA, FRIDAY, JULY 4, 1873.

ORPHANS' COURT.

There will be an Orphans' Court held on the 5th, 12th, and 19th days of July, in the new Quarter Sessions Court Room.

QUARTER SESSIONS.

Saturday, July 5, 1873.

1 Commonwealth ex rel James Rust v The Sheriff; Hab Corpus; Gimber.

2 Commonwealth ex rel Patrick McKeirnan v The Sheriff; Hab Corpus; Fox.

3 Commonwealth ex rel Owen McCabe v The Sheriff; Hab Corpus; Shapley.

4 Commonwealth ex rel Henry M Winslow v The Sheriff; Hab Corpus; Cassidy.

5 Commonwealth ex rel Isaiah Pascoe v The Sheriff; Hab Corpus; Tull.

6 Commonwealth ex rel Catharine Epright v James Pierson; Hab Corpus; Carroll.

7 Commonwealth ex rel Emma Jones v Edward Henry Jones; Hab Corpus; Redheffer.

8 Commonwealth v Stewart & McIlvaine; J M West.

9 Commonwealth v Haughey; McCandless.

10 City v Thiele; O'Byrne.

11 id Wunderlich; Ingram.

12 id Derfuer; Ransford.

SHERIFF'S SALE.

Abstract of Properties to be sold by WM. R. LEEDS, ESQ., *Sheriff.*

On Monday, July 7, 1873,

At the New County Court House,

Sixth street below Chestnut street, at 4 o'clock, P. M.

CONDITIONS OF SALE.

Fifty dollars of the price or sum at which the property shall be struck off, must be paid to the Sheriff at the time of sale, unless the purchase-money be less than that sum, in which case only the purchase-money is to be paid. Otherwise the property will again be immediately put up and sold. The balance of the purchase-money must be paid to the Sheriff, at his office, within TEN DAYS from the time of sale, without any demand being made by the Sheriff therefor. Otherwise the property may be sold again at the expense and risk of the person to whom it is struck off, who, in case of any deficiency at such resale, shall make good the same.

EXPLANATION.

For the benefit of our unprofessional readers, who do not understand the meaning of the letters and figures following the defendant's names, we make the following explanation: D. C., District Court; C. P., Court of Common Pleas; S. C., Supreme Court—indicate the Courts out of which the writ of execution issues under which the sale is made; V. E. or Ven. Ex., Venditioni Exponas; Lev. Fac. or L. F., Levari Facias—show the kind of writ—a Levari Facias is the writ of sale upon a *Mortgage* or *Mechanic's Lien*; a *Venditioni*, upon an ordinary *Debt*, or for *Ground rent*; 223, J. 69, means No. 223, June Term, 1869, the number and term of the docket entry; the following figures show the amount of debt, and the *name* following is that of the attorney issuing the writ.

The arrangement of the sale being made according to alphabetical sequence of the counsels' names; commencing at A one month, and at Z the other, and so alternately, this is done in order that each counsel's writs may come together.

Chas. M. Fay.
D. C. Ven. Ex. 934. J. 73.
$1,100. Aldrich.
3 story brick house and lot, W. side 20th st., 365 ft. N. of Columbia av., 16 ft. front, 78 ft. deep.

Isaac Heister.
D. C. Al. Lev. Fa. 1018. J. 73.
$4,243 60. Archer.
Lot, N. W. side Phila., Germantown and Norristown R. R., 22d Ward, beginning at S. W. cor. land of Wm. Overington, adjoining land of Lewis Clapier and Joseph Roberts, thence N. 36° 40′ W. 25 52–100 perches, N. 51° 15′ E. 48 8–100 perches, S. 36° 45′ E. 14 perches, S. 37° 15′ W. 49 16–100 perches, S. 65° 15′ W. 88–100 perches. Containing ⅞ acre.
$500 to be paid at time of sale.

Abraham P. Erb.
D. C. Ven. Ex. 623. J. 73.
$1,732 40. Arnold.
Church building and lot, E. side Darien st., 136 ft. N. of Poplar st., 48 ft. front, 61 ft. 11 in. deep on N. line, 58 ft. 10¼ in. deep on S. line.

Jacob Hyneman, dec'd.
D. C. Lev. Fa. 799. J. 73.
$419 50. Arnold.
House and lot, N. side Clearfield st., 75 ft. 8¾ in. W. of 34th st., 20 ft. front, 113 ft. 11 in. deep on E. line, 112 ft. 1⅛ in. deep on W. line, 20 ft. 1 in. on rear end.

John Schneider.
C. P. Ven. Ex. 239. J. 73.
$75. Ashman.
3 story brick house and lot, E. side St. John st., 104 ft. 1 in. S. of Beaver st., 15 ft. 11 in. front, 73 ft. 2 in. deep.

John Dippel and Charles Falsteth.
D. C. Ven. Ex. 614. J. 73.
$1,600. J. A. Bickel.
2 story rough cast building and lot, E. side 9th st., 76 ft. 6 in. S. of Montgomery av., 15 ft. front, 112 ft. 6 in. deep.

Patrick Corcoran.
D. C. Lev. Fa. 880. J. 73.
$69? Blackburn.
2 story brick house and lot, S. side Alter st., 83 ft. 6 in. W. of 20th st., 14 ft. front, 47 ft. deep. G. R. $36.

Jas. S. Stewart.
D. C. Ven. Ex. 881. J. 73.
$2,000. Blackburn.
Dwelling and lot, S. side Shippen st., 299 28–100 ft. W. of 15th st., 15 ft. front, 80 ft. deep.

Jas. S. Stewart.
D. C. Ven. Ex. 882. J. 73.
$3,000. Blackburn.
Dwelling and lot, S. side Shippen st., 284 28–100 ft. W. of 15th st., 15 ft. front, 80 ft. deep.

C. M. S. Leslie.
D. C. Lev. Fa. 937 & 938. J. 73.
$12,500, each. Booth.
No. 1. Eight yearly ground-rents of $105, each, out of 8 lots, N. side Catharine st., 79 ft. 6 in. W. of 23d st., each lot 16 ft. front, 62 ft. deep.
No. 2. Eight yearly ground-rents of $105, each, out of 8 lots, N. side Catharine st., 207 ft. 6 in. W. of 23d st., each lot 16 ft. front, 62 ft. deep.

John Schaeffer.
D. C. Lev. Fa. 625 to 627. J. 73.
$849 80, each. Bowers.
No. 1. 2 story brick house and lot, S. W. side Hazzard st., 50 ft. 6 in. S. E. of Jasper st., 12 ft. front, 58 ft. 6 in. deep.
No. 2. 2 story brick house and lot, S. W. side Hazzard st., 62 ft. 6 in. S. E. of Jasper st., 12 ft. front, 58 ft. 6 in. deep.
No. 3. 2 story brick house and lot, S. W. side Hazzard st., 74 ft. 6 in. S. E. of Jasper st., 12 ft. front, 58 ft. 6 in. deep.

Emily B. and James H. Colbourn.
D. C. Lev. Fa. 628. J. 73.
$1,834 01. Bowers.
Lot, S. side Park av., 128 ft. W. of 29th st., 32 ft. front, 79 ft. 10⅜ in. deep on E. line, 69 ft. 6⅞ in. deep on W. line.

Saml. J. Arbuckle.
D. C. Ven. Ex. 602. J. 73.
$5,000. Brinckle.
3 story brick and store and dwelling, 2 story brick stable, carriage house and lot, N. E. side Main st., Manayunk, 44 ft. N. W. of Gay st., thence N. W. 120 ft., N. W. 23 ft. 5 in., S. W. 120 ft., S. E. 24 ft. Two mortgages—one of $6,500, and one of $8,500.

Jos. Allman.
D. C. Al. Ven. Ex. 986. J. 73.
$384. Brinckle.
No. 1. Lot, S. E. side Kingsessing av., 85 ft. S. W. of 68th st., 40 ft. front, 225 ft. deep.
No. 2. 2 lots, N. W. side Kingsessing av., 325 ft. N. E. of 68th st., thence N. W. 190 ft. 8½ in., S. 71° 6¾′ E. 227 ft., S. W. 128 ft. 4¾ in.
No. 3. Lot, N. cor. Kingsessing av. and 68th st., 45 ft. front, 205 ft. deep.
No. 4. Lot, S. cor. Chester av. and 68th st., 55 ft. front, 205 ft. deep.
No. 5. Yearly ground rent of $36 out of lot, N. W. side Kingsessing av., 147 ft. 6 in. S. W. of 68th st., 90 ft. front, 205 ft. deep.

Alex. K. McClure and Wife.
D. C. Ven. Ex. 980. J. 73.
$6,079 92. Geo. Bull.
Dwelling and lot, S. W. cor. 40th and Pine sts., 76 ft. front, 190 ft. deep.
Mr. McClure has no interest.

Andrew D. Caldwell.
D. C. Ven. Ex. 642. J. 73.
$240 25. E. S. Campbell.
Lot, S. E. side Cedar st., 100 ft. N. E. of Richmond lane, 100 ft. front, 100 ft. deep. G. R. $42, silver.

Thos. H. Mole.
D. C. Fi. Fa. 670. J. 73.
$424 75. Cantrell.
Lot, E. side 16th st., 75 ft. S. of Donnagana st., thence E. 69 ft. 2 in., S. 8 ft. 5¾ in., S. W. 69 ft. 6 in, N. 16 ft. 3 in. G. R. $58.43.

Jas. H. Campbell.
D. C. Lev. Fa. 954. J. 73.
$2,828 70. Carey & H. C. Thompson.
Dwelling and lot, N. E. cor. 3d and Shippen sts., 20 ft. front, 46 ft. deep.

John G. Pierie.
D. C. Lev. Fa. 955. J. 73.
$884. Carey & H. C. Thompson.
2 story brick house and lot, N. side Herman st., 170 ft. W. of 28th st., 12 ft. front, 60 ft. 9 in. deep.

Sam'l H. Dungan.
D. C. Lev. Fa. 999. J. 73.
$11,072 50. Carey, Thompson.
Lot, N. side Spring Garden st., 161 ft. 10 in. W. of 18th st., 36 ft. front, 170 ft. 11 in. deep.
Mr. Dungan has no interest.

Patrick Reenan.
D. C. 2d Pl. Ven. Ex. 991. J. 73.
$113 94. Carty.
3 story brick house, fronting on Cabot st., and lot, N. side Stiles st., 181 ft. 8 in. E. of Schuylkill 6th st., 16 ft. front, 109 ft. deep. G. R. $72.
$300 to be paid at time of sale.

Frank V. MacNeill, dec'd.
D. C. Lev. Fa. 992. J. 73.
$3,288 50. Carty.
No. 1. 3 story brick house and lot, W. side 5th st., 20 ft. N. of Buckley st., 19 ft. 10 in. front, 77 ft. 2½ in. deep, then narrowing by an offset of 16 ft. 3 in. to the breadth of 3 ft. 7 in., then extending the further depth of 4 ft., making total depth 81 ft. 2½ in. G. R. $106¾.
No. 2. 4 story brick house and lot, E. side 13th st., 65 ft. N. of Catharine st., 16 ft. front, 70 ft. deep.

Patrick Hardy.
D. C. Lev. Fa. 939. J. 73.
$2,063 67, silver. Caven.
No. 1. 3 story brick house and lot, W. side 4th st., 29 ft. 8 in. N. of Monroe st., 13 ft. 5 in. front, 46 ft. 11 in. deep.
No. 2. 3 story brick house and lot W. side 4th st., 16 ft. 7 in. N. of Monroe st., 13 ft. 1 in. front, 46 ft. 11 in. deep.
No. 3. 3 story brick house and lot, W. side 4th st., 43 ft. 1 in. N. of Monroe st., 12 ft. 11 in. front, 46 ft. 11 in. deep.
No. 4. 3 story brick store, dwelling and lot, N. W. cor. 4th and Monroe sts., 16 ft. 7 in. front, 46 ft. 11 in. deep.
N. B.—Nos. 1, 2 and 4 subject to a proportionable part of yearly ground-rent of $38.

John O'Neill.
D. C. Lev. Fa. 940. J. 73.
$2,200. Caven.
3 story brick house and lot, N. side Dickinson st., 184 ft. W. of 6th st., 16 ft. front, 70 ft. deep. Mortgage. $3,000.

Chas. A. Miller.
D. C. Ven. Ex. 677. J. 73.
$448 39. J. A. Clark.
4 story brick house, with back buildings and lot, N. W. cor. Green and 22d sts., 45 ft. front, 164 ft. 7 in. deep. Mortgage, $11,000.

John L. Landis.
D. C. Pl. Ven. Ex. 635. J. 73.
$6,000. H. G. Clay.
Large 2½ story frame house, with 2 story brick back buildings, &c., and lot, 27th Ward, on W. side Darby plank road, thence N. 52° E. 160 ft., N. 40° W. 485 ft., S. 52° W. 177 ft. 6 in., S. 57½° E. 57 ft. 6 in., S. 40° E. 430 ft. 3 in.

Mrs. Kate A. Yerkes.
C. P. Lev. Fa. 281. J. 73.
$24 98. Collis, Terry.
Lot, S. side Master st., 139 ft. 1 in. E. of 21st st., 15 ft. 4¾ in. front, 83 ft. 1¾ in. deep on W. line, 81 ft. ¼ in. on E. line.

Geo. E. Henderson.
D. C. Lev. Fa. 681. J. 73.
$7,206 06. Conarroe.
No. 1. Yearly ground rent of $54 out of 2 story brick house and lot, S. W. cor. of Mifflin st. and Barcroft av., 16 ft. front, 50 ft. deep.
No. 2. Yearly ground rent of $54 out of 2 story brick house and lot, S. side of Mifflin st., 16 ft. W of Barcroft av., 16 ft. front, 50 ft. deep.
No. 3. Yearly ground rent of $54 out of 2 story brick house and lot, S. side of Mifflin st., 32 ft. W. of Barcroft av., 15 ft. front, 50 ft. deep.
No. 4. Yearly ground rent of $48 out of 2 story brick house and lot, W. side of Barcroft av., 53 S. of Mifflin st., 14 ft. front, 44 ft. deep.
No. 5. Yearly ground rent of $48 out of 2 story brick house and lot, W. side of Barcroft av., 67 ft. S. of Mifflin st., 14 ft. front, 44 ft. deep.
No. 6. Yearly ground rent of $48 out of 2 story brick house and lot, W. side of Barcroft av., 81 ft. S. of Mifflin st., 14 ft. front, 44 ft. deep.
No. 7. Yearly ground rent of $48 out of 2 story brick house and lot, W. side of Barcroft av., 95 ft. S. of Mifflin st., 14 ft. front, 44 ft. deep.
No. 8. Yearly ground rent of $48 out of 2 story brick house and lot, W. side of Barcroft av., 109 ft. S. of Mifflin st., 14 ft. front, 47 ft. deep.
No. 9. Yearly ground rent of $48 out of 2 story brick house and lot, W. side of Barcroft av., 123 ft. S. of Mifflin st., 14 ft. front, 47 ft. deep.
No. 10. Yearly ground rent of $48 out of 2 story brick house and lot, W. side of Barcroft av., 137 ft. S. of Mifflin st., 14 ft. front, 44 ft. deep.

Jos. M. Price.
D. C. Lev. Fa. 855. J. 73.
$984 60. Corson.
Lot, W. side Tucker st., 124 ft. S. of Cambridge st., 14 ft. front, 80 ft. deep.

Benj. Dowling.
D. C. Lev. Fa. 958. J. 73.
$1,156 50. Crawford.
Buildings, improvements and lot, E. Mt. Holly st., 140 ft. S. of Wharton st., ft. front, 47 ft. deep. G. R. $44.25.

John B. Rue.
D. C. Ex. 729. J. 73.
$600. H. M. Dechert.
2 story stone dwelling, with Mansard roof, and one-story stone back building and lot, S. W. side Franklin Cemetery av., 60 ft. S. E. of Emerald st., 25 ft. front, 124 ft. 5½ in. deep on N. W. line, 124 ft. 4 in. deep on S. E. line.

Nathan Stretch.
D. C. Lev. Fa. 1019. J. 73.
$1,243 33. H. M. Dechert.
2 story brick house and lot, N. side Rockland st., 138 ft. W. of 37th st., 12 ft. front, 53 ft. 3 in. deep.

Jas. S. McGlumphy, owner, McGlumphy & Charles, contractors.
D. C. Lev. Fa. 956 & 957.
$123 04 & $116 95. R. P. Dechert.
No. 1. 2 story brick house, with Mansard roof and 2 story back buildings, and lot, N. side Aspen st., 30 ft. E. of Preston st., 15 ft. front, 71 ft. deep.
No. 2. 2 story brick house, with Mansard roof and 2 story back buildings, and lot, S. side Sycamore st., 15 ft. E. of Preston st., 15 ft. front, 78 ft. deep.

Henry Hartman.
D. C. Ven. Ex. 1005. J. 73.
$146 71. R. P. Dechert.
2 story brick house and lot, S. side Afton st., 18 ft. W. of 16th st., thence S. 64 ft., W. 12 ft. 6 in., N. 3 ft., W. 3 ft., N. 61 ft., E. 15 ft. 6 in.

Wm. R. Christman.
D. C. Ven. Ex. 1023. J. 73.
$311 37. Dickerson & Vanarsdalen.
3 story brick house and lot, E. side 12th st., 31 ft. N. of Jefferson st., 15 ft. front, 65 ft. deep.

Wm. H. H. Roberts, John Warford, and Thomas Oliver Goldsmith, Jr.
D. C. Lev. Fa. 683. J. 73.
$18,159. S. Dickson.
5 story iron front building, with 4 story brick back buildings and lot, N. side Market st., about 19 ft. ¾ in. E. of Grindstone alley, thence N. 87 ft. 6½ in., W. 2 ft. 10 in., N. 66 ft. 2 in., E. 13 ft. 9½ in., S. 66 ft. 2 in., E. 5 ft. 3 in., S. 87 ft. 6½ in., W. 16 ft. 2½ in. G. R. $1,260.

Louisa Cecelia Poizat.
D. C. Lev. Fa. 684. J. 73.
$5,490. S. Dickson.
No. 1. Dwelling and lot, in 21st Ward, beginning at a corner of the late Sebastian Reaver's land, and the late Thomas Livezey's land, thence N. 36° 30′ W. 45 9–10 perches, S. 62° W. 32 perches, S. 36° 30′ E. 45 9–10 perches, N. 62° E. 32 perches. Containing 9 acres and 28 perches.
No. 2. Lot, in 21st Ward, beginning at a corner in the middle of Livezey's mill road, thence S. 59° 58′ E. 39 54–100 perches, S. 61° 45′ W. 105 7–10 perches, N. 19° 41′ E. 45 59–100 perches, N. 61° 21′ E. 48 26–100 perches. Containing 16 acres and 13 perches.
N. B. The above properties will be sold together as one property; upon the property are two store tenements, together with ordinary outbuildings.

Geo. C. Monteith.
D. C. Lev. Fa. 685. J. 73.
$1,421 75. S. Dickson.
2 story gray stone front dwelling, with Mansard roof, and 2 story brick back buildings and lot, N. side Spruce st., 75 ft. W. of 38th st., 25 ft. front, 99 ft. deep.

Andrew McFarland.
D. C. Lev. Fa. 585 and 586. J. 73.
$896 25, each. Downing.
No. 1. 2 story brick house and lot, W. side Bodine st., 239 ft. N. of Diamond st., 13ft. front, 47 ft. deep.
No. 2. 2 story brick house and lot, W. side Bodine st., 252 ft. N. of Diamond st., 13 ft. front, 47 ft. deep.

Geo. W. Marks.
D. C. Lev. Fa. 587. J. 73.
$1,581 50. Downing.
3 story brick house and lot, E. side 3d st., 88 ft. N. of Susquehanna av., 14 ft. front, 61 ft. 9 in. deep.

David S. Bunnell.
D. C. Lev. Fa. 730. J. 73.
$105 48. Elcock.
3 story brick house and lot, E. side Mervine st., 112 ft. S. of Diamond st., 18 ft. front, 80 ft. deep.

Amos E. Griffiths and Wife.
D. C. Lev. Fa. 927. J. 73.
$3,120. Elsasser.
4 story brick house, with double 3 story back buildings, also 2 story brick stable on rear end, and lot, W. side Broad st., 100 ft. N. of Brown st., 20 ft. front, 160 ft. deep. G. R. $360. Mortgage $4,000 and interest.

Jos. Edwards, trustee, and Ann Edwards.
D. C. Lev. Fa. 928. J. 73.
$2,095. Elsasser.
2 story brick feed store and lot, N. E. cor. Ridge av. and 22d st., thence N. 64 ft. 1⅜ in., E. 37 ft. 6 in., S. 40 ft. 6⅝ in., S. W. 40 ft. 6⅝ in., N. W. 17 ft. 9¾ in.

Anna, Mary A., Helen A. and Sarah E. Mapother.

D. C. Al. Ven. Ex. 929. J. 73.
$3,500. Elsasser.

Double brick house, frame tenant house, frame stable and lot, beginning on the side of road leading to Harrowgate, 23d Ward, thence N. 27¾° W. 12 perches, 10⅛ links, S. 71½° W. 52 perches, 13 links, S. 38½°, 20½ perches, N. 63½° E. 46 perches, 14 links. Containing 5 acres, 12 perches. Mortgage, $5,000 and interest.

$300 to be paid at time of sale.

John D. Taylor & Wm. Gillespie.

D. C. Lev. Fa. 828. J. 73.
$91,575. J. Fallon.

Lot, with the sugar house and other buildings and improvements, in the late District of the Northern Liberties, composed of several contiguous lots described together as one lot, as follows: Beginning at a point in the W. side of Delaware Second st., between Callowhill and Wood sts., and in the line of ground now or late of John Heyl, thence W. by the same ground 200 ft. to the E. side of St. John st. (formerly called Ann st.), thence N. 94 ft. 10 in., thence E. by ground formerly of David Deshler 100 ft. to a point, thence S. on a line parallel with the said St. John st. 33 ft. 4 in. to another point, thence E. 31 ft. 5½ in. to the W. line of premises granted to Solomon Rice, thence S. by the same, and by ground granted to Byersdorffer, and along the E. side of a 2. ft. 10 in. wide alley 40 ft., thence E. by the said Byersdorffer's ground 68 ft. 6¾ in. to the W. side of 2d st., thence S. along the W. side of the said 2d st. 21 ft. 6 in.

N. B.—The following machinery and fixtures, now upon the above described premises, will be sold with them: 1 sugar melter, 6 ft diameter, with stirrer, wrought iron steam box, for steaming packages; 8 blow-ups, for sugars and syrups, with coils, 4 having double bottoms, inside copper; 12 wrought iron bag filters, with extra nozzles, &c.; 35 charcoal filters, 23 wrought iron, 12 cast iron, 4 ft. diameter, 23 ft. long, with all the necessary pipes, cocks, valves, &c.; 1 copper vacuum pan, 8 ft. 6 in. diameter, complete, holds 35,000 pounds boiled sugar, 350 square ft. heating surface; 1 cast iron vacuum pan, 10 ft. diameter, 650 square ft. heating surface (new); 1 20 in. Cameron air-pump (new); 1 engine, 18 in. diameter, 3 ft. stroke, connected with air-pump for copper pan, and with shafting for driving crushing mills and platform elevator; 1 hoisting engine, 18 in. stroke, 12 in. diameter, with complete hoisting apparatus, also connected with char elevator and machine for cleaning bone-black; 1 char elevator; 1 machine for cleaning and and distributing bone-black; 1 wrought iron heater, with stirrer, holding 35,000 pounds boiled sugar; 1 engine for stirring same; 8 Weston's centrifugal machines, with cast iron mixer and engine for driving same; 4 flue boilers, each 6 ft. diameter, 5 flues each, pumps for water, sugar, liquor and syrups; 4 kilns for reburning bone-black, 20 retorts each; 39 wrought iron tanks, different sizes, averaging about 2,200 gallons each; besides the water connections with the city supply, is an artesian well, with a Henderson duplex pump.

Morris Lester.

D. C. Lev. Fa. 899. J. 73.
$1,594 24. D. N. Fell.

House and lot, E. side Amber st., 65 ft. 9 in. S. of Cumberland st., 14 ft. 3 in. front, 64 ft. deep. G. R. $70.

Jacob Frame.

D. C. Lev. Fa. 931 to 933. J. 73.
$2,117 each. D. N. Fell.

No. 1. 2 story brick house and lot, W. side 36th st., 80 ft. N. of Atlanta st., 20 ft. front, 75 ft. deep.

No. 2. 2 story brick house and lot, W. side 36th st., 120 ft. N. of Atlanta st., 20 ft. front, 75 ft. deep.

No. 3. 2 story brick house and lot, S. W. cor. 36th and Aspen sts., 20 ft. front, 75 ft. deep.

John Henry Tingley.

D. C. Lev. Fa. 1000. J. 73.
$9,201 50. W. W. Fell.

Buildings, improvements and lot, beginning in the middle of Armstrong st., thence N. 42° 19′ E. 170 ft. 1½ in., S. 47° 46′ E. 8 ft. 6 in., N. 42° 14′ E. 778 ft. ½ in. S. 47° 46′ E. 223 ft. 10 in., S. 42° 30′ N. 649 ft. 8 in., S. 77° 4′ W. 270 ft. 6 in., S. 86° 41′ W. 107 ft. 7 in.

John S. Mallooh.

D. C. Lev. Fa. 1001. J. 73.
$9,208. W. W. Fell.

No. 1. 2 three-story brick houses and 2 lots, W. side Warnock st., 348 ft. N. of Berks st., 32 ft. (each 16 ft.) front, 56 ft. deep.

No. 2. 2 three-story brick houses and 2 lots, E. side Warnock st., 450 ft. N. of Berks st., 32 ft. (each 16 ft.) front, 56 ft. deep.

No. 3. 3 story brick house and lot, W. side Alder st., 328 ft. N. of Berks st., 12 ft. front, 44 ft. deep. Mortgage, $1,000.

Nos. 1 and 2 each subject to a mortgage of $1,750.

John Eichner.

D. C. Lev. Fa. 609. J. 73.
$1,229 28. Ferguson.

2 three-story brick houses and lot, W. side Howard st., 65 ft. ⅜ in. N. of Columbia av., 20 ft. front, 95 ft. 6 in. deep. G. R. $60.

Wm. Murphy.

D. C. Lev. Fa. 610. J. 73.
$1,431 60. Ferguson.

3 story brick house and lot, S. side Gordon st., 160 ft. 5 in. E. of Cedar st., 11 ft. 2 in. front, 72 ft. deep.

Sam'l C. Lippincott.

D. C. Lev. Fa. 746. J. 73.
$521 50. Ferguson.

Brick house and lot, W. side 18th st., 30 ft. 2 in. N. of Sharswood st., 16 ft. 10 in. front, 74 ft. 10 in. deep. Subject to two mortgages, amounting together to $4,000.

James Kerns.

D. C. Lev. Fa. 894. J. 73.
$1,289 90. Fletcher.

3 story brick house and lot, E. side 9th st., 80 ft. N. of Tasker st., 16 ft. front, 61 ft. 8 in. deep. Mortgage, $1,000. G. R. $68.88.

Franklin Allen.

D. C. Ven. Ex. 990. J. 73.
$277 46. Flood.

3 story brick house and lot, S. side Christian st., 126 ft. E. of 13th st., 16 ft. front, 100 ft. deep. Subject to building restrictions.

Unknown.

C. P. Lev. Fa. 162. J. 73.
$65 62. J. S. Gerhard.

Lot, E. side State st., 10 ft. 3 in. S. of Baring st., 20 ft. front, 133 ft. deep.

Thos. M. Davis.

C. P. Lev. Fa. 163. J. 73.
$49 58. J. S. Gerhard.

Lot N. side Venango st., 62 ft. ⅜ in. E. of Turner st., 20 ft. ⅛ in. front, 100 ft. deep.

Edward B. Jones.

C. P. Lev. Fa. 169. J. 73.
$95 27. J. S. Gerhard.

Lot, N. side Venango st., 41 ft. E. of 7th st., 41 ft. front, 98 ft. deep.

David C. Montgomery.

D. C. Ven. Ex. 576. J. 73.
$257 25. Thos. Gilpin.

Triangular lot, N. side Scott st., 70 ft. E. of 10th st., thence on N. side of Scott st. 86 ft., N. W. 108 ft., S. 71 ft.

Shadrach Lees.

D. C. Pl. Ven. Ex. 701. J. 73.
$387 89. Graham.

Lot, N. W. cor. 2d st. and Allegheny av., 100 ft. front, 239 ft. 1 3-8 in. deep on N. line, 238 ft. 3 in. deep on S. line. G. R. $150. Subject to building restrictions.

Jos. Green and Wife.

D. C. Lev. Fa. 885. J. 73.
$5,004 90. W. B. Hanna.

Brick house and lot, S. W. cor. Dauphin and Fairhill sts., 16 ft. 10 in. front. 64 ft. deep. G. R. $126.

Henry R. Lawrence and Henry J. Hansell.

D. C. Ven. Ex. 697. J. 73.
$2,317 39. Harlan.

No. 1. 3 story brick store and dwelling and lot, N. E. side Ridge av., 234 N. W. of Girard av., 18 ft. front, 66 ft. 2 in. deep on N. W. line, 89 ft. ¾ in. on S. E. line. Two mortgages—one of $4,500, and the other $2,000.

No. 2. 3 story brick store and dwelling, and lot, N. E. side Ridge av., 126 ft. N. W. of Girard av., 18 ft. front, 97 ft. 7⅛ in. deep on N. W. line, 83 ft. 6 in. deep on S. E. line. Two mortgages—one of $4,600, and the other $2,000.

No. 3. 2 story brick house and lot, N. side Mifflin st., 96 ft. W. of 2d st., 15 ft. front, 52 ft. deep. G. R. $63.75, and mortgage of $1,000.

No. 4. 3 story brick house and lot, N. side Reed st., 34 ft. E. of Mole st., 16 ft. front, 58 ft. deep. Two mortgages—one of $1,500, and the other $1,333.

No. 5. 3 story brick house and lot, N. side Reed st., 50 ft. E. of Mole st., 16 ft. front, 58 ft. deep. Two mortgages—one of $1,500, and the other $1,333.

No. 6. 3 story brick house and lot, S. side Ellsworth st., 144 ft. W. of 21st st., 16 ft. front, 65 ft. deep. Mortgage $1,400.

Jacob Yergey.

D. C. Lev. Fa. 643. J. 73.
$1,054. Hartranft.

3 story brick house and lot, S. side Oxford st., 76 ft. E. of 20th st., 15 ft. front, 61 ft. deep. Mortgage $1,800.

Jacob Stoeckle.

D. C. Lev. Fa. 1003. J. 73.
$1,536 88. Hartranft.

4 story brick carriage manufactory and warehouse, and other buildings and lot, N. E cor. Frankford road and Sergeant st., thence E. 129 ft. 8 in., S. 20 ft. ⅜ in., W. 120 ft., N. 20 ft. 11½ in., further N. 40 ft. 4 in. G. R. $240. Mortgage, $4,000.

Henry S. Matlack.

D. C. Pl. Ven. Ex. 879. J. 73.
$1,000. A. A. Hirst.

3 story brick house and lot, E. side 20th st., 322 ft. S. of Poplar st., 20 ft. 4 in. front, 65 ft. deep.

Joseph N. Pope.
D. C. Al. Ven. Ex. 994 to 997. J. 73.
$800, each. Wm. Hopple, Jr.
No. 1. 2 story brick house and lot, S. W. side Williams st., 190 ft. N. W. of Amber st., 12 ft. front, 71 ft. 9 in. deep.
No. 2. 2 story brick house and lot, S. W. side Williams st., 202 ft. N. W. of Amber st., 13 ft. 6 in. front, 71 ft. 9 in. deep.
No. 3. 2 story brick house and lot, S. W. side Williams st., 166 ft. N. W. of Amber st., 12 ft. front, 71 ft. 9 in. deep.
No. 4. 2 story brick house and lot, S. W. side Williams st., 178 ft. N. W. of Amber st., 12 ft. front, 71 ft. 9 in. deep.

Oliver N. King.
D. C. Lev. Fa. 883. J. 73.
$666 50. S. B. Huey.
House and lot, N. side Christian st., 150 ft. W. of 21st st., 16 ft. front, 70 ft. deep.

Israel M. Burrows.
D. C. Lev. Fa. 860. J. 73.
$1,773 95. J. W. Hunsicker.
3 story brick house and lot, S. side York st., 17 ft. W. of Howard st., 15 ft. 7½ in. front, 57 ft. deep.

John Kolb.
D. C. Lev. Fa. 861. J. 73.
$6,959 44. J. W. Hunsicker.
No. 1. 4 three-story brick houses and lots, N. W. cor. 4th and Coates sts., 17 ft. front, 77 ft. deep.
No. 2. 3 story brick house and lot, N. side Coates st., 17 ft. W. of 4th st., 17 ft. front, 77 ft. deep.

Robert Weir.
C. P. Ven. Ex. 167 & 168. J. 73.
$38 68, and $39 19. Janney.
No. 1. Lot, W. side Agate st., 176 ft. N. of Alleghany av., 32 ft. front, 50 ft. 4 in. deep. G. R. $10.
No. 2. Lot, W. side Agate st., 208 ft. N. of Alleghany av., 32 ft. front, 50 ft. 4 in. deep. G. R. $10.

Jos. N. Pope.
D. C. Lev. Fa. 843 & 844. J. 73.
$800, each. Janvier.
No. 1. 2 story brick house and lot, N. E. side Auburn st., 215 ft. 6 in. N. W. of Amber st., 14 ft. front, 71 ft. 9 in. deep.
No. 2. 2 story brick house and lot, N. E. side Auburn st., 229 ft. 6 in. N. W. of Amber st., 14 ft. front, 71 ft. 9 in. deep.
Mr. Pope has no interest.

Alfred Martien and others.
D. C. Lev. Fa. 1022. J. 73.
$25,196 50. J. G. Johnson.
No. 1. 4 story brick house and lot, N. side Carpenter st., 59 ft. 6 in. E. of 7th st., 27 ft. 3 in. front, 39 ft. 11 in. deep.
Also the exclusive right of building over a strip of ground on the W. side, 5 ft. 6 in. wide on Carpenter st., 20 ft. deep.
No. 2. Brick house and lot, E. side 7th st., between High and Chestnut, 20 ft. front, 86 ft. 6 in. deep.

Alexander Patton.
D. C. Ven. Ex. 543. J. 73.
$1,736. Junkin.
No. 1. Buildings, improvements and lot N. side Spring Garden st., 36 ft. E. of 24th st., thence E. 17 ft. 3½ in., S. 83 ft. 11½ in., W. 18 ft.
No. 2. Buildings, improvements and lot S. E. cor. Pennsylvania av. and 24th st., thence S. E. 124 ft. 11 in., S. 61 ft. 2½ in., W. 61 ft. 2½ in., N. 124 ft. 11 in. G. R. $360.
No. 3. Buildings, improvements and lot N. side Spring Garden st., 18 ft. E. of 24th st., 18 ft. front, 83 ft. 11½ in. deep.

Edward Hughes.
D. C. Al. Lev. Fa. 544. J. 73.
$7,000. Junkin.
Lot, E. side 41st st., 321 ft. S. of Baltimore av., 24 ft. front, 136 ft. 4 in. deep on N. line, 136 ft. 5 7-8 in. deep on S. line.

C. M. S. Leslie.
D. C. Al. Lev. Fa. 930. J. 73.
$7,247. Junkin.
No. 1. Brick house and lot, S. side St Alban's place (No. 2330), 239 ft. 6 in. W. of 23d st., 16 ft. front, 62 ft. deep.
No. 2. Brick house and lot, S. side St. Alban's place (No. 2332), 255 ft. W. of 23d st., 16 ft. front, 62 ft. deep.
No. 3. Brick house and lot, S. side St Alban's place (No. 2334), 271 ft. 6 in. W. of 23d st., 16 ft. front, 62 ft. deep.
No. 4. Brick house and lot, S. side St. Alban's place (No. 2336), 287 ft. 6 in W. of 23d st., 16 ft. front, 62 ft. deep.

Jos. H. Thompson, dec'd.
D. C. Lev. Fa. 960. J. 73.
$4,263. Juvenal.
3 story brick house and lot, E. side 7th st., between Noble and Buttonwood sts., 26 ft. 6 in. front, 70 ft. 8¼ in. deep.

John R. McNeille.
D. C. Lev. Fa. 1017. J. 73.
$655 07. Kinsey.
3 story house and lot, N. E. side Fulton st., 139 ft. 2 1-8 in. S. E. of Trenton R. R., 14 ft. 5 in. front, 51 ft. 1 in. deep.

Patrick Cronin.
C. P. Al. Lev. Fa. 261 J. 73.
$29. C. Kneass.
2 story brick house and lot, S. E. side Ashmead st. (No. 151), between Wakefield and Mercer sts, 40 ft. front, 202 ft deep.

Eurista Scott, owner, Freeman Scott, registered owner.
C. P. Pl. Lev. Fa. 262. J. 73.
$34 75. C. Kneass.
House and lot, W. side 2d st., 62 ft. 11½ in. N. of Norris st., thence S. W. 131 ft. 11½ in., N. 62 ft. 11½ in., E. 121 ft. 9 in., S. 12 ft. ½ in.
N. B.—The whole of the purchase money to be paid at time of sale.

Mary W. Neff.
C. P. Pl. Lev. Fa. 263. J. 73.
$50 58. C. Kneass.
2 story frame house (No. 243) and lot, N. E. cor. 10th and Morgan sts, 18 ft. front, 60 ft. deep.
N. B.—The whole of the purchase money to be paid at time of sale.

Freeman Scott, owner, Mary Scott, registered owner.
C. P. Pl. Lev. Fa. 264. J. 73.
$24 87. C. Kneass.
3 story brick house (No. 817) and lot, N. side Depot st., 145 ft. W. of 8th st., 15 ft. front, 54 ft. deep.
N. B.—The whole of the purchase money to be paid at time of sale.

Freeman Scott, owner, Mary Scott, registered owner.
C. P. Pl. Lev. Fa. 265. J. 73.
$24 87. C. Kneass.
3 story brick house (No. 815) and lot, N. side Depot st., 130 ft. W. of 8th st., 15 ft. front, 54 ft. deep.

Freeman Scott, owner, Mary Scott, registered owner.
C. P. Pl. Lev. Fa. 266. J. 73.
$24 87. C. Kneass.
3 story brick house (No. 813) and lot, N. side Depot st., 115 W. of 8th st., 15 ft. front, 54 ft. deep.
N. B.—The whole of the purchase money to be paid at time of sale.

Freeman Scott.
C. P. Lev. Fa. 273. J. 73.
$24 39. C. Kneass.
2 story brick house and lot, W. side Elder st. (No. 204), 36 ft. N. of Sergeant st., 16 ft. front, 35 ft. deep.
The entire purchase money to be paid at time of sale.

Charles W. Graham and Charles Mulliken, owners. Charles Mulliken, registered owner.
D. C. Al. Lev. Fa. 801. J. 73.
$215. C. Kneass.
3 story brick house and lot, S. side Mt. Vernon st., 185 ft. 4 in. W. of 18th st., 23 ft. 4 in. front, 100 ft. 9 in. deep.

Louisa C. Poizat.
D. C. Al. Lev. Fa. 898. J. 73.
$143. Kneass.
3 story brick house and lot, S. side Spruce st. (No. 638), 20 ft. E. of 7th st., 20 ft. front, 100 ft. deep.

Samuel H. Elliott.
D. C. Lev. Fa. 688. J. 73.
$534 16. P. H. Law.
3 story brick house, with 2 story back building, and lot, E. side Howard st., 195 ft. N. of Dauphin st., 15 ft. front, 56 ft. 6 in. deep.

Sam'l H. Elliott.
D. C. Lev. Fa. 1011. J. 73.
$518 35. P. H. Law.
3 story brick house, with two-story back buildings and lot, E. side Howard st., 350 ft. N. of Dauphin st., 15 ft. front, 56 ft. 6 in. deep.

John Gormley.
D. C. Lev. Fa. 703. J. 73.
$1,072 50 J. G. Leach.
2 three-story brick houses and lot, W. side 54th st., 59 ft. 7½ in. S. of Wyalusing st., 29 ft. front, 85. ft. 9⅞ in. deep.

Andrew Boyd.
D. C. Ven. Ex. 702. J. 73.
$442 59. Lister.
Lot, S. side Taylor st., 262 ft. W. of 10th st., 32 ft. front, 96 ft. deep. G. R. $96.

Emily Thackara.
C. P. Lev. Fa. 283. J. 73.
$95. H. McIntyre.
Building and lot, W. side Gratz st. (No. 1002), 84 ft. 10½ in. N. of Oxford st., 18 ft. front, 77 ft. 5⅛ in. deep.

John Grisoom.
C. P. Ven. Ex. 172. J. 73.
$61 89. McKinley.
Right, title and interest in house and lot, S. E. side Belgrade st., 104 ft. 4 in. N. E. of Montgomery av., 24 ft. 4 in. front, 64 ft. deep.

James Sweeney.
C. P. Ven. Ex. 233. J. 73.
$94 70. McKinley.
House and lot S. side Marriott st., 155 E. of 9th st., 15 ft. front, 55 ft. deep.

Thos. E. Combs.
D. C. Lev. Fa. 983. J. 73.
$430 47. R. C. McMurtrie.
House and lot, N. side Siegel st., 155 ft. 9 in. W. of 6th st., 14 ft. front, 49 ft. deep. Mortgage $850.

James Smith.
D. C. Lev. Fa. 1014. J. 73.
$906 46. Maloney.
2 story brick house and lot, W. side Moyamensing av., 236 ft. 4 in. S. of Moore st., 16 ft. 8 in. front, 86 ft. ⅝ in. deep. G. R. $50.

Theodore C. Rose.
D. C. Lev. Fa. 1015. J. 73.
$687 15. Maloney.
Brick house and lot, S. E. side Memphis st., 110 ft. 8¾ in. N. E. of Montgomery av., 13 ft. 10 in. front, 50 ft. 6¼ in. deep. Mortgage, $1,500, with interest.

Jos. G. Wills.
D. C. Lev. Fa. 831. J. 73.
$1,359 51. C. Matlack.
3 story brick house, with frame bath room and lot, S. side York st., 45 ft. E. of 5th st., 14 ft. 6 in. front, 57 ft. deep.

George T. Thackara and Wife.
D. C. Lev. Fa. 603. J. 73.
$176 40. C. H. Melcher.
2 story brick building and lot, W. side Gratz st., 84 ft. 6⅞ in. N. of Oxford st., 18 ft. front, 77 ft. 5⅞ in. deep.

Wm. L. and Sarah Jane Mason, dec'd.
S. C. Lev. Fa. 11. J. 73.
$5,707 41. E. S. Miller.
2 brick houses and lot, S. side Locust st., between 9th st. and Raspberry alley, 20 ft. front, 100 ft. deep.

John G. Fleck.
D. C. Lev. Fa. 572. J. 73.
$4,721 25. E. Spencer Miller.
Buildings, improvements and lot, S. E. cor. South and Water sts., thence S. 35 ft. 3 in., E. 132 ft. 7½ in., N. 4 ft. 4⅛ in., W. 128 ft. 7 in.

Anthony C. Walters.
D. C. Lev. Fa. 895 & 896. J. 73.
$7,302 16, each. E. C. Mitchell.
No. 1. Lot, S. side Chestnut st., 60 ft. E. of 34th st., 20 ft. front, 126 ft. deep.
No. 2. Lot, S. side Chestnut st., 40 ft. E. of 34th st., 20 ft. front, 126 ft. deep.

John Taylor and Wife.
D. C. Lev. Fa. 978 & 979. J. 73.
$1,251 06, each. A. Moore.
No. 1. House and lot, S. E. side Thompson st., 82 ft. 6⅛ in. N. E. of Norris st., 16 ft. front, 54 ft. 10⅜ in. deep on N. E. line, 47 ft. ¾ in. deep on S. W. line, 17 ft. 9¾ in. wide on rear end.
No. 2. House and lot, S. E. side Thompson st., 98 ft. 6⅛ in. N. E. of Norris st., 16 ft. front, S. 50° 8½′ E. 63 ft. 7 in. on N. E. line, 54 ft. 10⅜ in. on S. W. line, 19 ft. 9¾ in. wide on rear end.

Chas. V. Cornell.
D. C. Lev. Fa. 1102. J. 73.
$296 51. A. Moore.
Brick house and lot, N. W. side Allen st., 129 ft. 11⅛ in. N. E. of Frankford road, thence N. 47 ft. 11⅛ in., N. E. 2 ft. 6 in., S. E. 42 ft., S. W. 24 ft. 2 in.

Elisabeth Shaw, owner, Robert A. Shaw, contractor.
C. P. Lev. Fa. 289. J. 73.
$95 58. T. C. Moore.
3 story brick house and lot, E. side Moyamensing av., 73 ft. 9 in. S. of McClellan st., 17 ft. 9 in. front, 70 ft. deep.

Patrick Kelly.
C. P. Ven. Ex. 165. J. 73.
$19 40. Norris.
Lot, E. side 5th st., 320 ft. N. of Otis st., 15 ft. front, 89 ft. 7½ in. deep. G. R. $33.75.

Jeremiah Rhoads.
D. C. Pl. Ven. Ex. 598. J. 73.
$455 29. J. P. Norris.
3 story brick house and lot, N. E. cor. 6th and Huntingdon sts., 20 ft. front, 136 ft. 10½ in. deep. Mortgage $1,700.

Thomas Connor.
D. C. Ven. Ex. 599. J. 73.
$144 15. J. P. Norris.
Lot, W. side 5th st., 342 ft. N. of Dauphin st., 16 ft. front, 139 ft. deep. G. R. $68.

James McMahon.
D. C. Lev. Fa. 889. J. 73.
$800. J. Duross O'Bryan.
2 story brick house and lot, S. side Dudley st., 60 ft. E. of 9th st., 14 ft. front, 49 ft. deep. G. R. $42.

Jas. MacMahon.
D. C. Lev. Fa. 890. J. 73.
$1,200. J. D. O'Bryan.
No. 1. House and lot, W. side Starr st., 128 ft. N. of Snyder av., 14 ft. front, 55 ft. deep.
No. 2. House and lot, W. side Starr st., 156 ft. N. of Snyder av., 14 ft. front, 55 ft. deep. G. R. $42.

Jas. McDonnell.
D. C. Lev. Fa. 891. J. 73.
$1,600. J. D. O'Bryan.
2 story brick house and lot, W. side Beulah st., 111 ft. 1½ in. S. of Tasker st., 13 ft. 9 in. front, 48 ft. 3 in. deep.

Alfred H. Palmer.
D. C. Ven. Ex. 675. J. 73.
$300. P. P.
No. 1. 3 story brick house and lot, N. E. side Albert st., 229 ft. N. W. of Emerald st., 14 ft. front, 66 ft. deep. Mortgage, $1,000.
No. 2. 3 story brick house and lot, N. E. side Albert st., 201 ft. N. W. of Emerald st., 14 ft. front, 66 ft. deep. Mortgage, $1,000.
No. 3. 3 story brick house and lot, N. E. side Albert st., 187 ft. N. W. of Emerald st., 14 ft. front, 66 ft. deep. Mortgage, $1,000.
No. 4. 3 story brick house and lot, N. E. side Albert st., 75 ft. N. W. of Emerald st., 14 ft. front, 66 ft. deep. Mortgage, $1,000.
No. 5. 3 story brick house and lot, N. E. side Albert st., 60 ft. 6 in. N. W. of Emerald st., 14 ft. 6 in. front, 66 ft. deep. Mortgage, $1,000.
No. 6. 3 story brick house and lot, N. E. side Albert st., 173 ft. N. W. of Emerald st., 14 ft. front, 66 ft. deep. Mortgage, $1,000.
No. 7. 3 story brick house and lot, N. E. side Albert st., 159 ft. N. W. of Emerald st., 14 ft. front, 66 ft. deep. Mortgage, $1,000.
No. 8. 3 story brick house and lot, N. E. side Albert st., 145 ft. N. W. of Emerald st., 14 ft. front, 66 ft. deep. Mortgage, $1,000.
No. 9. 3 story brick house and lot, N. E. side Albert st., 131 ft. N. W. of Emerald st., 14 ft. front, 66 st. deep. Mortgage, $1,000.
No. 10. 3 story brick house and lot, N. E. side Albert st., 117 ft. N. W. of Emerald st., 14 ft. front, 66 ft. deep. Mortgage, $1,000.
No. 11. 3 story brick house and lot, N. E. side Albert st., 103 ft. N. W. of Emerald st., 14 ft. front, 66 ft. deep. Mortgage, $1,000.
No. 12. 3 story brick house and lot, N. E. side Albert st., 89 ft. N. W. of Emerald st., 14 ft. front, 66 ft. deep. Mortgage, $1,000.

Alfred H. Palmer.
D. C. Ven. Ex. 676. J. 73.
$300. P. P.
No. 1. 3 story brick house and lot, N. E. side Albert st., 215 ft. N. W. of Emerald st., 14 ft. front, 66 ft. deep. Mortgage, $1,000.
No. 2. 3 story brick house and lot, N. E. side Albert st., 243 ft. N. W. of Emerald st., 14 ft. front, 66 ft. deep. Mortgage, $1,000.
No. 3. 3 story brick house and lot, N. E. side Albert st., 257 ft. N. W. of Emerald st., 14 ft. front, 66 ft. deep. Mortgage, $1,000.
No. 4. 3 story brick house and lot, N. E. side Albert st., 271 ft. N. W. of Emerald st., 14 ft. front, 66 ft. deep. Mortgage, $1,000.
No. 5. 3 story brick house and lot, N. E. side Albert st., 299 ft. N. W. of Emerald st., 14 ft. 6 in. front, 66 ft. deep. Mortgage, $1,000.

Geo. O. Evans and Wife.
D. C. Pl. Lev. Fa. 887. J. 73.
$13,814. Paschall.
No. 1. 3 story brick house and lot, W. side 15th st., 67 ft. 6 in. S. of Columbia av., 23 ft. 6 in. front, 100 ft. deep.
No. 2. Lot, E. side Sydenham st., 67 ft. S. of Columbia av., 23 ft. 6 in. front, 72 ft. 10 in. deep.

Joseph Culbertson, Jr.
D. C. Lev. Fa. 941. J. 73.
$1,860. Paschall.
3 story brick house and lot, E. side Bodine st., 98 ft. S. of Cherry st., 12 ft. front, 49 ft. deep.

George Thackara and Wife.
C. P. Ven. Ex. 161. J. 73.
$86 85. Philpot.
Lot W. side Gratz st., 84 ft. 6⅞ in. N. of Oxford st., 18 ft. front, 77 ft. 5⅞ in. deep.

John Dougherty.
D. C. Fi. Fa. 577. J. 73.
$708. T. P. Potts.
3 story brick house and lot, N. side Grayson st., 112 ft. 6 in. W. of 17th st., 16 ft. front, 80 ft. deep. G. R. $36.

Patrick Moore.
D. C. Lev. Fa. 961. J. 73.
$2,869 60. Quin.
No. 1. 3 story brick house and lot, S. E. cor. Moore and Cuba sts., 13 ft. front, 45 ft. deep. G. R. $30.
No. 2 Brick house and lot, E. side Cuba st., 45 ft. S. of Moore st., 14 ft. front, 49 ft. deep on . line, 48 ft. deep on S. line.
No. 3. 2 story brick house and lot, S. side Williamson st., 354 ft. 4½ in. E. of Moyamensing av., thence S. 47 ft., E. 9 ft. 3 in., N. 47 ft. 4 in., W. 15 ft. G. R. $30.

John Doyle.
D. C. Lev. Fa. 962. J. 73.
$3,366. Quin.
3 story brick house and lot, S. side Vine st. (No. 226), between 2d and 3d sts., 16 ft. front, 75 ft. deep. Mortgage, $3,250.

Franklin Allen.
D. C. Lev. Fa. 963. J. 73.
$2,122. Quin.
3 story brick house and lot, S. side Christian st., 126 ft. E. of 13th st., 16 ft. front, 100 ft. deep. Subject to building restrictions.

Dan'l Love, defendant, John Grisdale, tenant.
D. C. Lev. Fa. 964. J. 73.
$2,238 62. Quin.
House and lot, E. side 19th st., 60 ft. 1⅞ in. S. of Catharine st., 14 ft. 10⅞ in. front, 60 ft. deep.

John Farrar.
D. C. Lev. Fa. 965. J. 73.
$1,800. Quin.
Brick house and lot, N. side Carpenter st., 128 ft. 4 in. W. of 12th st., 17 ft. front, 74 ft. 4 in. deep on E. line, 76 ft. 10 in. deep on W. line.

Robert Galbraith.
D. C. Lev. Fa. 966. J. 73.
$1,972. Quin.
House and lot N. side Burton st., 118 ft. E. of 18th st., 16 ft. front, 40 ft. deep. G. R. $52.

Wm. Lafferty.
D. C. Lev. Fa. 967. J. 73.
$1,112 20. Quin.
Buildings, improvements and lot, S. side Afton st., 48 ft. E. of 18th st., 15 ft. front, 50 ft. deep. G. R. $30.

John Norris and John L. Galloway.
D. C. Lev. Fa. 968. J. 73.
$1,517 75. Quin.
Buildings, improvements and lot, S. side Federal st., 48 ft. W. of 18th st., 16 ft. front, 72 ft. 3⅔ in. deep on E line, 73 ft. 1 in. deep on W. line. G. R. $78.

Jos. Henderson.
D. C. Lev. Fa. 969. J 73.
$2,177 67. Quin.
Buildings, improvements and lot, S. W. cor. 19th and Harlan sts., 15 ft. 8 in. front, 54 ft. deep.

Wm. Poot.
D. C. Lev. Fa. 970. J. 73.
$1,107 80. Quin.
3 story brick house and lot, S. side Carpenter st., 250 ft. W. of 11th st., 16 ft. front, 70 ft. deep. G. R. $124.66⅔.

Wm. Poot and Wife.
D. C. Lev. Fa. 971. J. 73.
$2,191. Quin.
No. 1. House and lot, N. side Moore st., 252 ft. E. of 12th st., 14 ft. front, 62 ft. 6 in. deep. G. R. $80.
No. 2. House and lot, S. side Watkins st., 86 ft. 4 in. W. of 11th st., 15 ft. 10 in. front, 49 ft. 6 in. deep. G. R. $30.

Patrick Sweeney.
D. C. Al. Lev. Fa. 972 & 973. J. 73.
$385, each. Quin.
2 three-story brick houses and lot, E. side 9th st., 135 ft. N. of Carpenter st., together 25 ft. front, 80 ft. deep. The first lot subject to ground rent of $14⅔.

Francis Reilley.
D. C. Lev. Fa. 892. J. 63.
$456 61. Ransford.
Frame house and lot, beginning at a stake S. side Ford road, at corner of Phœbe Jones' land, thence by said land 18¼° W. 521 18-100 ft., S. 72¼° E. 173 1-10 ft., N. 18¼° E. 259 5-10 ft., N. 71¾° W. 158 ft., N. 18¼° E. 258 21-100 ft., to Ford road, thence by said road 68° W. 20 ft.

Wm. Flanigan.
D. C. Lev. Fa. 893. J. 73.
$570 81. Ransford.
Frame house and lot, beginning at a stake S. side Ford road, corner of Phœbe Jones' land, thence S. 18¼° W. 521 18-100 ft., S. 72¼° E. 173 1-10 ft., to a corner of Wm. Davy's land, thence by said land 18¼° E. 259 5-10 ft., N. 71¾° W. 173 ft., N. 18¼° E. 221-100 ft., N. 68° W. 22 ft. Mortgage, $400.

Xavier Beekler.
D. C. Ven. Ex. 563. J. 73.
$7,269. Read & Pettit.
No 1. Buildings, improvements and lot, N. E. side Ann st., and S. E. side Edgemont st., thence N. E. 195 ft., S. E. 78 ft 10 in., S. W. 92 ft. 10⅔ in., S. E. 99 ft., S. W. 107 ft., along N. E. side of Ann st. 171 ft. ⅓ in. Northwest part subject to G. R. of $180.
No. 2. Lot, 25th Ward, beginning at a point in a line at right angles with Salmon st., 95 ft. N. W. of Salmon st. (said line being 161 ft. 11 in. N. E. of Ann st.), thence S. W. 48 ft. 6 in., N. W. 61 ft. 3½ in., N. E. 44 ft. 6¼ in., S. E. 61 ft. 2 in. G. R. $34.50.

Morris Lester.
D. C. Ven. Ex. 564. J. 73.
$1,400. Read & Pettit.
No. 1. 3 story brick house and lot, W. side 5th st., 293 ft. 1¼ in. N. of Susquehanna av., 16 ft. front, 85 ft. deep. G. R. $74.

No. 2. 3 story brick house and lot, E. side Amber st., 65 ft. 9 in. S. of Cumberland st., 14 ft. 3 in. front, 64 ft. deep. G. R. $78.

George A. Nagle.
C. P. Ven. Ex. 238. J. 73.
$30 81. Rich.
Right, title and interest in brick house and lot, E. side Hutchinson st., 60 ft. N. of Poplar st., 15 ft front, 40 ft. ¼ in. deep on N. line, 37 ft. 10¼ in. deep on S. line. Mortgage $800.

Peter Conklin.
D. C. Lev. Fa. 959. J. 73.
$1,489. Rich.
Brick house and lot, S. side Redner st. 72 ft. W. of 22d st., 30 ft. front, 47 ft. deep.

Edward Hughes.
D. C. Lev. Fa. 629. J. 73.
$8,114. Ridgway.
3 story stone house and lot, S. W. cor. 40th st. and Baltimore av., 30 ft. front, 131 ft. deep.

Thos. M. Allen and Wife.
D. C. Lev. Fa. 838. J. 73.
$4,194. Ridgway.
4 story brick house and lot, E. side 20th st., 228 ft. N. of Race st., 18 ft. front, 92 ft. deep.

Peter Moore.
D. C. Lev. Fa. 845. J. 73.
$2,333 34. J. S. Riley.
Lot, N. side Market st., 85 ft. W. of 40th st., 20 ft. front, 124 ft. deep.

Oliver Benner, deceased.
D. C. Lev. Fa. 1024. J. 73.
$3,281. Rodney.
No. 1. Unfinished 3 story brick house and lot, S. E. cor. Sepviva and Tucker sts., 13 ft. 5 7–8 in. front, 55 ft. deep.
No. 2. Unfinished 3 story brick house and lot, S. E. side of Sepviva st., 13 ft. 3 7–8 in. N. E. of Tucker st., 12 ft. front, 55 ft. deep.
No. 3. Unfinished 3 story brick house and lot, S. E. side of Sepviva st., 25 ft. N. E. of Tucker st., 12 ft. front, 55 ft. deep.
No. 4. Unfinished 3 story brick house and lot, S. E. side of Sepviva st., 37 ft. 3 7–8 in. N. E. of Tucker st., 12 ft. front, 55 ft. deep.
No. 5. Unfinished 3 story brick house and lot, S. E. side of Sepviva st., 49 ft. N. E. of Tucker st., 13 ft. 3 in. front, 55 ft. deep.
No. 6. Unfinished 3 story brick house and lot, S. E. side of Sepviva st., 62 ft. 6 in. N. E. of Tucker st., 13 ft. 3 in. front, 55 ft. deep.
No. 7. Unfinished 3 story brick house and lot, S. E. side of Sepviva st., 75 ft. 9 7–8 inches N. E. of Tucker st., 12 ft. front, 55 ft. deep.
No. 8. Unfinished 3 story brick house and lot, S. E. side of Sepviva st., 87 ft. 9 7–8 in. N. E. of Tucker st., 12 ft. front, 55 ft. deep.
No. 9. Unfinished 3 story brick house and lot, S. E. side of Sepviva st., 99 ft. 9 7–8 in. N. E. of Tucker st., 12 ft. front, 55 ft. deep.
No. 10. Unfinished 2 story brick house and lot, N. W. cor. of Serrill and Tucker sts., 13 ft. 3 7–8 in. front, 42 ft. deep.
No. 11. Unfinished 2 story brick house and lot, N. W. side Serrill st., 13 ft. 3 7–8 in. N. E. of Tucker st., 12 ft. front, 42 ft. deep.
No. 12. Unfinished 2 story brick house and lot, N. W. side of Serrill st., 25 ft. N. E. of Tucker st., 12 ft. front, 42 ft. deep.
No. 13. Unfinished 2 story brick house and lot, N. W. side of Serrill st., 37 ft. 3 7–8 in. N. E. of Tucker st., 12 ft. front, 42 ft. deep.
No. 14. Unfinished 2 story brick house and lot, N. W. side of Serrill st., 49 ft. 3 7–8 in. N. E. of Tucker st., 13 ft. 3 in. front, 42 ft. deep.
No. 15. Unfinished 2 story brick house and lot, N. W. side of Serrill st., 62 ft. 6 in. N. E. of Tucker st., 13 ft. 3 in. front, 42 ft. deep.
No. 16. Unfinished 2 story brick house and lot, N. W. side of Serrill st., 75 ft. 9 7–8 in. N. E. of Tucker st., 12 ft. front, 42 ft. deep.
No. 17. Unfinished 2 story brick house and lot, N. W. side of Serrill st., 87 ft. 9 7–8 in. N. E. of Tucker st., 12 ft. front, 42 ft. deep.
No. 18. Unfinished 2 story brick house and lot, N. W. side of Serrill st., 99 ft. 9 7–8 in. N. E. of Tucker st., 12 ft. front, 42 ft. deep.

Joshua Cowpland.
D. C. Lev. Fa. 846. J. 73.
$836 78. Russell & Hanson.
2 lots, described as one, S. side York st., 156 ft. 6 in. W. of 9th st., 16 ft. 7 in. front, 150 ft. deep.

Jas. J. Tevin.
D. C. Lev. Fa. 946. J. 73.
$1,048. Seymour.
2½ story frame, rough cast, house and lot, S. E. side Lehman st., 127 ft. S. W. of Godfrey st., 15 ft. 11–16 in. front, 115 ft. 4 3–4 in. deep.

Lorenzo D. Knowles.
D. C. Lev. Fa. 867. J. 73.
$824 94. Shallcross.
House and tract of ground, beginning at a corner of land of Thomas Ashton, 23d Ward, thence N. 40¼° E. 33⅔ perches, S. 50¼° E. 25 perches, S. 39¼° W. 32⅔ perches N. 5° 10′ W. 26 perches. Containing 50° 35 5-100 perches.

Edward G. Millett.
D. C. Lev. Fa. 868 & 869. J. 73.
$2,000 & $2,600. Shallcross.
No. 1. Brick house and lot, E. side Warnock st., 175 ft. S. of Montgomery st., 16 ft. front, 56 ft. deep. G. R. $72.

No. 2. Brick house and lot, S. side Master st., 16 ft. W. of 21st st., 16 ft. front, 73 ft. deep.

Howard Banes.
D. C. Lev. Fa. 870. J. 73.
$1,615 46. Shallcross.
Tract of land in 23d Ward, beginning at a corner of Norris S. Saurman's land, in the middle of Red Lion road, thence N. 43° 5′ E. 122 2–10 perches, S. 47° 32′ E. 65 47–100 perches, S. 43° 35′ W. 122 2-10 perches, N. 47¼° W. 65 47–100 perches. Containing 50 acres.

Joseph M. Price.
D. C. Ven. Ex. 679. J. 73.
$1,080. Shapley.
2 story brick house and lot, S. side Cambridge st., 568 ft. E. of Margaret st., 16 ft. front, 90 ft. deep.

Jos. G. Wills.
D. C. Lev. Fa. 851 to 853. J. 73.
$900, each. Shapley.
No. 1. 2 story brick house and lot, W. side Orkney st., 88 ft. S. of York st., 14 ft. front, 39 ft. deep.
No. 2. 2 story brick house and lot, W. side Orkney st., 102 ft. S. of York st., 14 ft. front, 39 ft. deep.
No. 3. 2 story brick house and lot, W. side Orkney st., 116 ft. S. of York st., 14 ft. front, 39 ft. deep.

Nicholas Quering, with notice to Joseph Humhpreys.
D. C. Lev. Fa. 600. J. 73.
$1,053 83. Shoemaker.
3 story brick house and lot, N. side Firth st., 158 ft. W. of Amber st., 12 ft. front, 60 ft. deep.

Chas. W. Hepburn.
D. C. Ven. Ex. 692. J. 73.
$500. Simpson.
No. 1. 2 houses and lot, S. side Market st. (No. 4800), 88 ft. front, 214 ft. deep.
No. 2. 3 story brick house and lot, W. side Butler's av. (No. 8), rear of 815 Juniper st., 17 ft. 6 in. front, 40 ft. deep.

Jos. Keen.
D. C. Al. Ven. Ex. 993. J. 73.
$1,100. Smithers.
House and lot, N. E. side Allegheny av., 78 ft. 6 in. S. E. of Edgemont st., 26 ft. 6 in. front, 65 ft. deep.

Aaron B. Fithian.
D. C. Ven. Ex. 656. J. 73.
$191 99, silver. C. Stevenson.
3 houses and lots, W. side 2d st., 40 ft. N. of Buttonwood st., 20 ft. front, 112 ft. deep.

Benj. Jamieson.
C. P. Ven. Ex. 155. J. 73.
$30 42. Stone.
No. 1. Lot N. W. side Jefferson st. 60 13-100 perches N. E. of Smick st., 1, 52-100 perches front, in depth N. 24° 572 W. 25 56-100 perches.
No. 2. Four lots, S. E. side Mt. Vernon st. and N. W. side Jefferson st., 144 ft. 6 in. N. of Division st., 33 ft. front, 214 ft. 4 in. deep.
No. 3. Four lots, N. W. side Mt. Vernon st., 108 ft. 6 in. N. E. of Division st., 69 ft. front, 162 ft. 8 in. deep.

Stephen Bancroft.
C. P. Ven. Ex. 174 to 231. J. 73.
$74 76, and $49 12 each. Stover.
No. 1. Lot, S. W. cor. Twelfth and Mifflin sts., 16 ft. front, 60 ft. deep. G. R. $72.
No. 2. Lot, W. side Twelfth st., 16 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G. R. $72.
No. 3. Lot, W. side Twelfth st., 32 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G. R. $72.
No. 4. Lot, W. side Twelfth st., 48 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep G. R. $72.
No 5. Lot, W. side Twelfth st., 64 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep G. R. $72.
No. 6. Lot, W. side Twelfth st., 80 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G. R. $72.
No. 7. Lot, W. side Twelfth st., 96 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G. R. $72.
No. 8. Lot, W. side Twelfth st., 112 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G. R. $72.
No. 9. Lot, W. side Twelfth st., 128 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G. R. $72.
No. 10. Lot, W. side Twelfth st., 144 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G. R. $72.
No. 11. Lot, W. side Twelfth st., 160 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G. R. $72.
No. 12. Lot, W. side Twelfth st., 176 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G. R. $72.
No. 13. Lot, W. side Twelfth st., 192 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G. R. $72.
No. 14. Lot, W. side Twelfth st., 208 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G. R. $72.
No. 15. Lot, W. side Twelfth st., 224 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G. R. $72.
No. 16. Lot, W. side Twelfth st., 240 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep G. R. $72.
No. 17. Lot, W. side Twelfth st., 256 ft S. of Mifflin st., 16 ft. front, 60 ft. deep G. R. $72.
No. 18. Lot, W. side Twelfth st., 272 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep G. R. $72.
No. 19. Lot, W. side Twelfth st., 288 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G. R. $72.
No. 20. Lot, W. side Twelfth st., 304 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G. R. $72.
No. 21. Lot, W. side Twelfth st., 320 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep G. R. $72.
No. 22. Lot, W. side Twelfth st., 336 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G. R. $72.
No. 23. Lot, W. side Twelfth st., 352 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G
No. 24. Lot, W. side Twelfth st., 368 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G. R. $72.
No. 25. Lot, W. side Twelfth st., 384 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep. G. R. $72.
No. 26. Lot, W. side Dean st., 59 ft. S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R. $47.31.
No. 27. Lot, W. side Dean st., 73 ft., S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R. $47.31.
No. 28. Lot, W. side Dean st., 87 ft. S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R. $47.31.
No. 29. Lot, W. side Dean st., 101 ft. S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R. $47.31.
No. 30. Lot, W. side Dean st., 115 ft. S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R. $47.31.
No. 31. Lot, W. side Dean st., 129 ft. S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R. $47.31.
No. 32. Lot, W. side Dean st., 143 ft. S. of Mifflin st, 14 ft. front, 49 ft. deep. G. R. $47.31.
No. 33. Lot, W. side Dean st., 157 ft. S. of Mifflin st., 15 ft. 3 in. front, 49 ft. deep. G. R. $47.31.
No. 34. Lot, W. side Dean st., 172 ft. 3 in. S. of Mifflin st., 15 ft. 3 in. front, 49 ft. deep. G. R. $47.31.
No. 35. Lot, W. side Dean st., 187 ft. 6 in. S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R. $47.31.
No. 36 Lot, W. side Dean st., 201 ft. 6 in. S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R. $47.31.
No. 37. Lot, W. side Dean st., 215 ft. 6 in. S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R. $47.31.
No. 38. Lot, W. side Dean st., 229 ft. 6 in. S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R. $47.31.
No. 39. Lot, W. side Dean st., 243 ft. 6 in. S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R. $47.31.
No. 40 Lot, W. side Dean st., 257 ft. 6 in. S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R. $47.31.
No. 41. Lot, W. side Dean st., 271 ft. 6 in. S. of Mifflin st., 15 ft. 3 in. front, 49 ft. deep. G. R. $47.31.
No. 42. House and lot, W. side Dean st., 286 ft. 9 in. S. of Mifflin st., 15 ft. 3 in. front, 49 ft. deep. G. R. $47.31.
No. 43. Lot, W. side Dean st., 302 ft. S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R. $47.31.
No. 44. Lot, W. side Dean st., 316 ft. S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R. $47.31.
No. 45. Lot, W. side Dean st., 330 ft. S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R. $46.31.
No. 46. Lot, W. side Dean st., 344 ft. S. of Mifflin st., 14 ft. front, 49 ft. deep.
No. 47. Lot, W. side Dean st., 358 ft. S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R. $47.31.
No. 48. Lot, W. side Dean st., 372 ft. S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R $47.31.
No. 49. Lot, W. side Dean st., 386 ft. S. of Mifflin st., 14 ft. front, 49 ft. deep. G. R. $47.31.
No. 50. 2 story brick house and lot, S. side Mifflin st., 95 ft. W. of Twelfth st., 18 ft. front, 56 ft. deep. G. R. $72.
No. 51. 2 story brick house and lot, S. side Mifflin st., 148 ft. W. of Twelfth st., 18 ft. front, 56 ft. deep. G. R. $72.
No. 52. 2 story brick house and lot, S. side of Mifflin st., 182 ft. W. of Twelfth st., 16 ft. front, 56 ft. deep. G. R. $72.
No. 53. 2 story brick house and lot, S. side Mifflin st., 198 ft. W. of Twelfth st., 16 ft. front, 56 ft. deep. G. R. $72.
No. 54. 2 story brick house and lot, S. side Mifflin st., 214 ft. W. of Twelfth st., 16 ft. 6 in. front, 56 ft. deep. G. R. $72.
No. 55. 2 story brick house and lot, S. side Mifflin st., 230 ft. 6 in. W. of Twelfth st., 18 ft. front, 56 ft. deep. G. R. $72.
No. 56. 2 story brick house and lot, S. side Mifflin st., 248 ft. 6 in. W. of Twelfth st., 17 ft. front, 56 ft. deep. G. R. $72.
No. 57. 2 story brick house and lot, S. side Mifflin st., 300 ft. 6 in. W. of Twelfth st., 16 ft. front, 56 ft. deep. G. R. $72.
No. 58. 2 story brick house and lot, S. side Mifflin st., W. of Twelfth st., ft. front, 56 ft. deep. G. R. $72.

Wm. Caveron.
D. C. Ven. Ex. 658. J. 73.
$3,407 68. Stover.
Lot, E. side Almond st., 336 ft. N. of Cumberland st., thence N. 58 ft. 2¾ in., S. E. 80 ft. 8⅜ in., W. 46 ft.

Stephen P. Bancroft.
D. C. Al. Ven. Ex. 900 to 926. J. 73.
Stover.
No. 1. Unfinished 2 story brick store, and dwelling and lot, E. side 13th st., 16 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.
No. 2. Unfinished 2 story brick store, and dwelling and lot, E. side 13th st., 32 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.
No. 3. Unfinished 2 story brick house and lot, E. side 13th st., 48 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.
No. 4. Unfinished 2 story brick house and lot, E. side 13th st., 64 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 5. Unfinished 2 story brick house and lot, E. side 13th st., 80 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 6. Unfinished 2 story brick house and lot, E. side 13th st., 96 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 7. Unfinished 2 story brick house and lot, E. side 13th st., 112 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 8. Unfinished 2 story brick house and lot, E. side 13th st., 128 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 9. Unfinished 2 story brick house and lot, E. side 13th st., 144 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 10. Unfinished 2 story brick house and lot, E. side 13th st., 160 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 11. Unfinished 2 story brick house and lot, E. side 13th st., 176 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 12. Unfinished 2 story brick house and lot, E. side 13th st., 192 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 13. Unfinished 2 story brick house and lot, E. side 13th st., 208 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 14. Unfinished 2 story brick house and lot, E. side 13th st., 224 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 15. Unfinished 2 story brick house and lot, E. side 13th st., 240 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 16. Unfinished 2 story brick house and lot, E. side 13th st., 256 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 17. Unfinished 2 story brick house and lot, E. side 13th st., 272 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 18. Unfinished 2 story brick house and lot, E. side 13th st., 288 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 19. Unfinished 2 story brick house and lot, E. side 13th st., 304 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 20. Unfinished 2 story brick house and lot, E. side 13th st., 320 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 21. Unfinished 2 story brick house and lot, E. side 13th st., 336 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 22. Unfinished 2 story brick store, dwelling and lot, E. side 13th st., 352 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 23. Unfinished 2 story brick store, dwelling and lot, E. side 13th st., 368 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 24. Unfinished 2 story brick store, dwelling and lot, E. side 13th st., 384 ft. S. of Mifflin st., 16 ft. front, 60 ft. deep.

No. 25. Lot of ground, N. side McKean st., 63 ft. W. of 12th st., 50 ft. front, 341 ft. deep.

No. 26. 24 unfinished 2 story brick houses and lot, N. side McKean st., 148 ft. W. of 12th st., 50 ft. 3 in. front, 341 ft. deep.

No. 27. 24 unfinished 2 story brick houses and lot, N. side McKean st., 198 ft. 3 in. W. of 12th st., 50 ft. 3 in. front, 341 ft. deep.

Anthony C. Walters.

D. C. Lev. Fa. 584. .3.
$3,000. E. Taylor.

2 story brown stone house, with Mansard roof, back ldings, and lot, S. side Sansom st., 88' W. of 32d st., 16 ft. fro , 75 ft. deep

Dorothea Koch.

C. P.. V . Ex. 236. J. 73.
$89 25. Tener.

No. 1. 3 story brick house (No. 1037) and lot, E. side Lawrence st., 20 ft. front, 67 ft. deep.

No. 2. 2 story frame house (No. 1042) and lot, W. side of Leithgow st., 22 ft. front, 43 ft. deep.

Geo. C. Monteith.

D. C. Ven. Ex. 571. J. 73.
$240. A. Thompson.

2 story brick and stone house, with French roof, and lot, N. W. cor. 38th and Spruce sts., 25 ft. front, 103 ft. deep.

Edward Hughes.

D. C. Al. Ven. Ex. 698 to 700. J. 73.
$237 each. J. B. Townsend.

No. 1. 2 story brick house, with Mansard roof, and lot, S. side St. Alban's place, 351 ft. 6 in. W. of 23d st., 16 ft. front, 62 ft. deep.

No. 2. 2 story brick house, with Mansard roof, and lot, N. side St. Alban's place, 5 ft. 6 in. W. of 23d st., 16 ft. front, 62 ft. deep.

No. 3. 2 story brick house, with Mansard roof, and lot, N. side St. Alban's place, 239 ft. 6 in. W. of 23d st., 16 ft. front, 62 ft. deep.

Joshua Cowpland.

D. C. Lev. Fa. 800. J. 73.
$5,918. J. B. Townsend.

No. 1. Improvements and lot, N. side Johnson's lane, at the corner of a 20 ft. wide road, thence N. 62° 10′ E. 183 ft., N. 27° 30′ W. 200 ft., S. 62° 15′ W. 183 ft., E. 201 ft. 6 in.

No. 2. 2½ story frame dwelling, and 2 story frame shop, and lot, N. side Johnson's lane, 313 ft. E. of said 20 ft. wide road, thence N. 62° 10′ E. 100 ft., N. 27° 30′ W. 195 ft., S. 62° 15′ W. 100 ft., S. 27° 30′ E. 200 ft.

Washington G. Hagaman.

D. C. Al. Lev. Fa. 871. J. 73.
$1,049 16. Wakeling.

2 story brick house, used as a factory, and lot, S. side Whitehall st., 62 ft. W. of 12th st., 32 ft. front, 85 ft. deep.

John J. Haley.

D. C. Al. Lev. Fa. 872. J. 73.
$4,845 33. Wakeling.

3 and 4 story brick factory building, with steam engine, &c., for making felt hat bodies, and 3 lots, N. W. cor. 12th and Buttonwood sts., 55 ft. front, 94 ft. deep. The southernmost 20 ft. front subject to ground rent of $19. The northernmost 17 ft. 6 in. front subject to ground rent of $14.87½, and the remainder subject to ground rent of $14.87½, and also mortgage of $4,000.

Geo. W. Dewees.

D. C. Ven. Ex. 1013. J. 73.
$400. Waxler.

3 story brick house and lot, W. cor. Tackawanna and Orthodox sts., 20 ft. front, 154 ft. 3-4 in. deep.

Frank W. Newbold.

D. C. Lev. Fa. 1009. J. 73.
$1,035. J. M. West.

2 story brick house and lot, S. side Morris st., 101 ft. E. of 11th st., 15 ft. front, 53 ft. 6 in. deep. G. R. $48.

Franklin W. Newbold.

D. C. Lev. Fa. 1010. J. 73.
$1,736. J. M. West.

2 story brick house and lot, W. side 11th st. (No. 1630), 141 ft. N. of Morris st., 15 ft. 6 in. front, 60 ft. deep. G. R. $80.37.

Henry M. Boyd.

D. C. Lev. Fa. 862 to 864. J. 73.
Wm. N. West.

No. 1. 3 story brick house, with marble front and Mansard roof, and lot, S. side Chestnut st., 426 ft. E. of 33d st., 18 ft. front, 120 ft. 3 in. deep.

No. 2. 3 story brick house, with marble front and Mansard roof, and lot, S. side Chestnut st., 234 ft. E. of 33d st., 18 ft. front, 120 ft. 2 in. deep.

No. 3. 3 story brick house with stone front, Mansard roof, and lot, S side Chestnut st., 270 ft. E. of 33d st., 20 ft. front, 120 ft, 2 in. deep.

Mr. Boyd has no interest.

Geo. F. Spicer and Wife.

D. C. Lev. Fa. 865. J. 73.
$2,195 20. Wm. N. West.

No. 1. Dwelling, outbuildings and lot, at corner of line of land of late Peter Shower, thence S. 82° 21′ E. 356 ft. 3 in., N. 6° 10′ E. 993 ft. 6 in., S. 87° 16′ W. 23 ft. 5 in., S. 80° 20′ W. 284 ft. 5 in., S. 89° 40′ W. 54 ft. 9 in., S. 6° 31′ W. 895 ft. 11¼ in. Containing 7, acres, 2 roods and 28 perches.

No. 2. 2 three-story brick houses and lots, E. side 39th st., 112 and 128 ft. N. of Haverford st., 16 ft. front, each, 71 ft. deep, Each subject to 2 mortgages of $2,500 and $1,000, respectively.

No. 3. Lot, N. W. cor. Susquehanna av. and Pacific st., 18 ft. front, 87 ft. deep.

Henry R. Coggshall and Alfred S. Gillett.

D. C. Al. Lev. Fa. 1004. J. 73.
$3,207 12. R. N. Willson.

3 story plastered house, with 2 story back buildings, other buildings 4 lots, S. E. side Rittenhouse st. and N. W. side Lehman st., 295 ft. S. W. of Marion av., 60 ft. front (each lot 80 ft.) on Rittenhouse st., 270 ft. deep, with 60 ft. front on Lehman st.

John H. Mallooh.

D. C. Ven. Ex. 1016. J. 73.
$33,735 11. R. N. Willson.

No. 1. 3 story brick house, with Mansard roof, and 4 story back buildings and lot, E. side 34th st., 168 ft. S. of Chestnut st., 18 ft. front, 100 ft. deep.

No. 2. 3 story brick house, with 2 story back buildings and lot, W. side 3d st., 280 ft. N. of Norris st., 15 ft. front, 60 ft. deep.

No. 3. 3 story brick house, with Mansard roof, and 4 story back buildings and lot, S. side Chestnut st., 60 ft. E. of 34th st., 20 ft. front, 126 ft. deep.

No. 4. 2 story brick house, with Mansard roof, and 2 story back buildings and lot, E. side Franklin st., 371 ft. 3 in. N. of Diamond st., 14 ft. 2 in. front, 65 ft. deep.

Josiah Ashenfelder and others.

D. C. Ven. Ex. 653. J. 73.
$247 70. Wollaston.

Double 3 story frame building and lot, E. side Marlborough st., 215 ft. 2 in. N. of Girard av., 18 ft. 7 in. front, 84 ft. deep. Mortgage, $1,500.

Patrick O'Brien.

D. C. Pl. Lev. Fa. 1025. J. 73.
$1,508. Wrigley.

No. 1. 2 three-story brick houses and lot, N. side Carpenter st., 238 ft. 6 in. E. of 11th st., 15 ft. 6 in. front, 62 ft. deep. G. R. $49.50.

No. 2. Brick house and lot, N. side Carpenter st., 259 ft. 6 in E. of 11th st., 15 ft. 6 in. front, 62 ft. deep. G. R. $49.50.

Patrick O'Bryan.

D. C. Pl. Lev. Fa. 1026. J. 73.
$2,007 20. Wrigley.

No. 1. 2 three-story brick houses and lot, N. side Carpenter st., 275 ft E. of 11th st., 15 ft. 6 in. front, 62 ft. deep. G. R. $49.50.

No. 2. Brick house and lot, N. side Carpenter st., 259 ft. 6 in. E. of 11th st., 15 ft. 6 in. front, 62 ft. deep. G. R. $49.50.

Philip Schuldheiser.

D. C. Lev. Fa. 660. J. 73.
$495 45. A. Zane, Jr.

Lot, N. side Victoria st. (No. 50 in section G of plans of lots of Stephen W. Tichenor), 17 ft. 3 in. front, 71 ft. 4 in. deep.

Legal Gazette.

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[Reported specially for the Legal Gazette.]

United States Supreme Court.

INSURANCE COMPANY v. LYMAN.

A knowing that his vessel had been lost on the 8th of January, 1870, but concealing his knowledge of the fact, applied for, on the 15th following, and got a written policy of insurance dated on that day, on her, "lost or not lost," from the 1st of January, to the 1st of April, 1870, following. The insurance company, discovering afterwards that when he applied for this policy he knew of the loss, refused to pay. He brought suit, setting out his written policy, but declaring on it in such a way as was meant to show that the execution of it was but "a compliance with, and a formal statement" of an agreement to make the insurance, which he alleged had been entered into between himself and the insurers on the 31st of December, 1869, and before the loss: *Held*,

1. That parol proof was not admissible to show that the contract of insurance was actually made before the loss occurred, though executed and delivered, and paid for afterward, for that to allow such proof would be to contradict and vary the terms of the policy in a matter material to the contract.
2. That the terms of the contract having been reduced to writing, signed by one party and accepted by the other at the time the premium of insurance was paid, neither party could abandon that instrument, as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution, for that purpose.
3. That the fact the plaintiff went to the insurance office about half-past three o'clock in the afternoon, saw a clerk or person (whom he was not able afterwards to identify) standing at the desk, to whom he applied to have the vessel insured, who told him that "the secretary had gone home, and that there was no one in the office who could do it, but said he would speak to the secretary when he came in the morning, and have it attended to the first thing," is not sufficient evidence of a completed contract—an agreement assented to by both parties at any one time—to be submitted to a jury in a suit as on a verbal contract for insurance, and assuming that the case was one where no written contract had ever been executed.

Error to the Circuit Court for the District of Louisiana.

Lyman & Co. brought their action in the court below against the Merchants' Mutual Insurance Company of New Orleans, for the sum of $12,000, the value of the brig "Sailor Boy," lost at sea on the 8th of January, 1870, and which was insured, as they allege, by the said company. Their petition set forth that on the 30th of October, 1869, the company had issued a policy to them on the brig for the sum named, which insured her until January 1st, 1870.

That on the 15th December, 1869, they applied to the company to insure them in the same sum, upon the same vessel for three months, from the said 1st January, 1870.

That after taking time to consider, the company, on December 24th, 1869, proposed to renew the insurance for the premium of $600, and that on December 31st, the plaintiffs accepted this proposition for renewal, and that the company on that day agreed with them that it would issue the policy, and make it out and send it to them, and receive the premium.

That on the 15th January, 1870, the plaintiffs sent for the policy and paid the premium, and the company issued to plaintiffs the policy annexed to the petition; that the said policy was but a compliance with and a formal statement of the agreement to renew the insurance, made December 31st, 1869.

That on the 8th of January, 1870, the brig was lost, &c.

Along with their petition the plaintiffs filed two policies of insurance, on their face such as above stated; that is to say, one dated October 30th, 1869, for two months, expiring January 1st, 1870, and one dated January 15th, 1870, and which, by its terms, purported to make an insurance "from the 1st January, 1870, to the 1st of April, 1870."

On the trial it appeared that the plaintiffs, when they renewed the policy of the 15th January, and paid the premium for insurance, knew that the vessel was lost, and that the defendants had no such knowledge or information.

As on this state of facts it would be obvious that no action could be sustained on the *policy*—and, indeed, that, in point of fact, the taking of such a policy and causing the defendant to sign it would have been a fraud—the plaintiffs framed their petition on the assumption, and directed their evidence to the showing that the execution of the policy was but carrying into effect an agreement made before the loss of the vessel.

In order to sustain this their case, they offered in evidence the deposition of their agent, which gave an account of conversations had by him in reference to a renewal of the insurance, with some one in the defendants' office. The defendants objected to this testimony, on the ground that there was a written application for and contract of insurance between the parties for the same amount of insurance and same amount of premium on the same object insured, the vessel called "Sailor Boy," by the same plaintiffs as insured and the same defendants as insurers, for the same space of time, to wit, from the 1st day of January, 1871, to the 31st March, 1871; that the plaintiffs had no right to contradict the written application aforesaid by proof of a previous verbal contract; that the plaintiffs' right of action, if any, was on the written application and contract aforesaid, and that they could not ignore the said written contract to fall back on an alleged previous verbal contract of the same tenor and purport; that the evidence showing that when the said written contract was executed the plaintiffs and their agents were aware of the fact of the previous loss and abandonment of the "Sailor Boy," the said written application and policy were not binding in law, but were, nevertheless, the contract of the parties, subject to be gainsaid by proper allegations and proof of fraud; that the plaintiffs could not ignore the written contract.

But the court ruled as follows:

"The plaintiffs put their entire case upon a verbal contract to renew the insurance made, as they allege, on the 31st day of December, eight days before the loss. They admit that when they sent for the written policy, on the 15th of January, they knew of the loss, and that they could not recover on the written policy standing by itself, but they say that the real contract was made on the 31st of December, and that they had a right to go to the jury on that issue."

The court accordingly overruled the objection and admitted the testimony.

The testimony admitted was that of a single witness. It went to show that on the 15th December, 1869, he was directed by the agent of the plaintiffs "to go to the company's office and see if they would renew the policy, and to get the rate; that he saw the secretary, who said that the company would renew, but that he could not then give the rate, but would let the agent know; that the witness had himself done nothing further in the matter till December 31st, though he heard that the company had informed the agent of the rate, five per cent, and that it was satisfactory; that on the 31st he was again told by the agent to go and renew the policy; that about half-past three in the afternoon of that day he went to the company's office, and asked to have the policy renewed; that a clerk, or person standing at the desk, to whom he applied, told him that the secretary had gone home, and that there was no one in the office who could do it, but that he would speak to the secretary, when he came in, in the morning, and have it attended to the first thing; that the witness did nothing further until the 15th January, when the agent of the plaintiffs sent him to the company for policy."

The witness stated the transaction of that day as follows:

"I went to the office of the defendants, and asked the man at the corner of the desk for the policy on the 'Sailor Boy.' He turned over his book, but could not find it; said he would go and see the secretary. He went into the back office and returned with the secretary. The secretary said that he did not know that a policy had been ordered. I told him that I had ordered it the 31st of December. He said there had been no application made out. I told him I did not know anything about that; that no one said anything about an application to me. He said there should be one, and told the clerk to make one out for me to sign. The clerk made it out, and I signed it, and paid the premium, $510. The secretary asked me if anything had been heard from the vessel; I said, not that I knew of."

Upon cross-examination, the witness testified that he was requested by the president of the company, after payment of the insurance money had been demanded, to come to the office and identify the person to whom he had made application on 31st December, but that he was not able to recognize or identify any one as the person.

A verdict was given, and judgment entered for the plaintiffs, for the sum insured, and interest.

The case being now here on error.

Mr. *W. M. Evarts* for the insurance company, plaintiff in error, argued that there was error:

1st. In admitting evidence of a parol contract of insurance of the same subject, and for the same risk between the same parties, as the written policy given in evidence by the plaintiffs. For that the plaintiff had a complete written contract made on the 15th of January, upon a written application made on that day; and by a policy on that day dated. And that the fact that it was void from a fraud of his part, did not make it less the written contract of the parties, or a contract of that date, nor affect its efficacy under the rule of evidence, to exclude parol evidence of a written contract.

2d. In submitting to the jury the evidence offered as showing or tending to show a contract of insurance by the defendant, made on the 31st of December, when the said evidence showed no such contract, but on the contrary, showed a failure to make any contract, or to treat concerning such a contract. For that the proof showed that all that happened on that day, was that the messenger of the plaintiffs went to the insurance office, after business hours, and failed to find any one with whom to treat concerning the insurance.

Mr. *T. J. Durant*, contra:

1st. The evidence was not offered to contradict the written contract, but to show the circumstances under which it was made, and to show to what state of facts it really referred, by explaining that the instrument, made on the 15th January, only put in writing what had been agreed to between the parties on the 31st December previous, to which date and fact the policy related back. In other words, it was offered to show that the policy was but the expression, in a written form, of the verbal contract previously made.

2d. But we had a right to abandon our written contract altogether, and recover on our parol contract, not relying on the written policy, except as evidence, if we chose so to use it, and as giving part of the history of the transaction.

Thus viewing the case, the fact that the vessel was lost on the 8th of January, and that the loss was known to the assured is unimportant.

Corporations may contract by parol, and a verbal contract to issue a policy may be as binding as any contract in writing.

The evidence did tend in some degree certainly, to show the exact thing which it was offered to show, and was proper to go to the jury for what it was worth.

Mr. Justice MILLER delivered the judgment of the court.

Undoubtedly a valid verbal contract for insurance may be made, and when it is relied on, and is unembarrassed by any written contract for the same insurance, it can be proved and become the foundation of a recovery, as in all other cases where contracts may be made either by parol or in writing. But it is also true that when there is a written contract of insurance, it must have the same effect as the adopted mode of expressing what the contract is, that it has in other classes of contract, and must have the same effect in excluding parol testimony in its application to it, that other written instruments have.

Counsel for the defendants in error here, relies on two propositions; namely, that the policy, though executed January 15th, is really but the expression of a verbal contract made the 31st day of December previous, and that the loss of the vessel between those two dates does not invalidate the contract, though known to the insured and kept secret from the insurers; and secondly, that they can abandon the written contract altogether and recover on the parol contract.

We do not think that either of these propositions is sound.

Whatever may have been the precise facts concerning the negotiations for a renewal of the insurance, previous to the execution of the policy, they evidently had reference to a written contract, to be made by the company.

When the company came to make this instrument, they were entitled to the information which the plaintiffs had of the loss of the vessel. If then they had made the policy, it would have bound them, and no question would have been raised of the validity of the instrument, or of fraud practiced by the insured.

On the other hand, if they had refused to make a policy, no injury would have been done to the plaintiffs, and they would then have stood on their parol contract, if they had one, and did not need a policy procured by fraudulent concealment of a material fact at the time it was executed and the premium paid.

To permit the plaintiffs, therefore, to prove by parol, that the contract of insurance was actually made before the loss occurred, though executed and delivered, and paid for afterward, is to contradict and vary the terms of the policy in a matter material to the contract, which we understand to be opposed to the rule on that subject in the law of Louisiana, as well as at the common law.

We think it equally clear, that the terms of the contract having been reduced to writing, signed by one party and accepted by the other at the time the premium of insurance was paid, neither party can abandon that instrument, as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution, for that purpose. The doctrine is too well settled, that all previous negotiations and verbal statements are merged and excluded when the parties assent to a written instrument as expressing the agreement. And it is hardly necessary to say, that the party who has destroyed the validity of that contract by his own fraud, cannot for *that reason* treat it as if it had never been made, and recover on the verbal statements made before its execution.

We may add that, as the only testimony offered to prove this parol contract, was the deposition of a single witness, made part of the bill of exceptions, we do not see in that deposition sufficient evidence of a completed contract, of an agreement assented to by both parties at any one time, to be submitted to a jury, even if the written contract had never been executed,

Judgment reversed, with directions to grant a new trial.

No. 12.—DECEMBER TERM, 1872.

MYRA BRADWELL, Plaintiff in Error,
v. THE STATE OF ILLINOIS.

1. The Supreme Court of Illinois having refused to grant to plaintiff a license to practice law in the courts of that State, on the ground that females are not eligible under the laws of that State, such a decision violates no provision of the Federal Constitution.
2. The second section of the fourth article is inapplicable, because plaintiff is a citizen of the State of whose action she complains, and that section only guarantees privileges and immunities to citizens of other States, in that State.
3. Nor is the right to practice law in the State courts a privilege or immunity of a citizen of the United States, within the meaning of the first section of the fourteenth article of amendment of the Constitution of the United States.
4. The power of a State to prescribe the qualifications for admission to the bar of its own courts is unaffected by the fourteenth amendment, and this court cannot inquire into the reasonableness or propriety of the rules it may prescribe.—*Legal News.*

In error to the Supreme Court of the State of Illinois.

Mr. Justice MILLER delivered the opinion of the court.

The plaintiff in error, residing in the State of Illinois, made application to the judges of the Supreme Court of that State for a license to practice law. She accompanied her petition with the usual certificate from an inferior court of her good character, and that on due examination she had been found to possess the requisite qualifications. Pending this application she also filed an affidavit, to the effect "that she was born in the State of Vermont; that she was (had been) a citizen of that State; that she is now a citizen of the United States, and has been for many years past a resident of the city of Chicago, in the State of Illinois." And with this affidavit she also filed a paper claiming that, under the foregoing facts, she was entitled to the license prayed for by virtue of the second section of the fourth article of the Constitution of the United States, and of the fourteenth article of amendment of that instrument.

The statute of Illinois on this subject enacts that no person shall be permitted to practice as an attorney or counsellor-at-law, or to commence, conduct, or defend any action, suit, or plaint, in which he is not a party concerned, in any court of record within this State, either by using or subscribing his own name or the name of any other person, without having previously obtained a license for that purpose from some two of the justices of the Supreme Court, which license shall constitute the person receiving the same an attorney and counsellor-at-law, and shall authorize him to appear in all the courts of record within this State, and there to practice as an attorney and counsellor-at-law, according to the laws and customs thereof.

The Supreme Court denied the application, apparently upon the ground that it was a woman who made it.

The record is not very perfect, but it may be fairly taken that the plaintiff asserted her right to a license on the grounds, among others, that she was a citizen of the United States, and that having been a citizen of Vermont at one time, she was, in the State of Illinois, entitled to any right granted to citizens of the latter State.

The court having overruled these claims of right, founded on the clauses of the Federal Constitution before referred, those propositions may be considered as properly before this court.

As regards the provision of the Constitution that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, the plaintiff in her affidavit has stated very clearly a case to which it is inapplicable.

The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the State whose laws are complained of. If the plaintiff was a citizen of the State of Illinois, that provision of the Constitution gave her no protection against its courts or its legislation.

The plaintiff seems to have seen this difficulty, and attempts to avoid it by stating that she was born in Vermont.

While she remained in Vermont that circumstance made her a citizen of that State. But she states, at the same time, that she is a citizen of the United States, and that she is now, and has been for many years past, a resident of Chicago, in the State of Illinois.

The fourteenth amendment declares that citizens of the United States are citizens of the State within which they reside; therefore plaintiff was, at the time of making her application, a citizen of the United States and a citizen of the State of Illinois.

We do not here mean to say that there may not be a temporary residence in one State, with intent to return to another, which will not create citizenship in the former. But plaintiff states nothing to take her case out of the definition of citizenship of a State, as defined by the first section of the fourteenth amendment.

In regard to that amendment counsel for plaintiff in this court truly say, that there are certain privileges and immunities which belong to a citizen of the United States as such; otherwise it would be nonsense for the fourteenth amendment to prohibit a State from abridging them, and he proceeds to argue that admission to the bar of a State of a person who possesses the requisite learning and character, is one of those which a State may not deny.

In this latter proposition we are not able to concur with counsel. We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these, and these alone, which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them. This right in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any State, or in any case, to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the State and Federal courts, who were not citizens of the United States, or of any State. But, on whatever basis this right may be placed, so far as it can have any relation to citizenship at all, it would seem that, as to the courts of a State, it would relate to citizenship of the State, and as to Federal courts, it would relate to citizenship of the United States.

The opinion just delivered in the slaughter-house cases from Louisiana, renders elaborate argument in the present case unnecessary; for, unless we are wholly and radically mistaken in the principles on which those cases are decided, the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.

It is unnecessary to repeat the argument on which the judgment in those cases is founded. It is sufficient to say they are conclusive of the present case.

The judgment of the State court is, therefore, affirmed.

Mr. Chief Justice Chase dissenting.

D. W. MIDDLETON,
C. S. C. U. S.

Mr. Justice BRADLEY.

I concur in the judgment of the court in this case by which the judgment of the Supreme Court of Illinois is affirmed, but not for the reasons specified in the opinion just read.

The claim of the plaintiff, who is a married woman, to be admitted to practice as an attorney and counsellor at law, is based upon the supposed right of every person, man or woman, to engage in any lawful employment for a livelihood. The Supreme Court of Illinois denied the application, on the ground that, by the common law, which is the basis of the laws of Illinois, only men were admitted to the bar, and the Legislature had not made any change in this respect, but had simply provided that no person should be admitted to practice as attorney or counsellor without having previously obtained a license for that purpose from two justices of the Supreme Court, and that no person should receive a license without first obtaining a certificate from the court of some county of his good moral character. In other respects it was left to the discretion of the court to establish the rules by which admission to the profession should be determined. The court, however, regarded itself as bound by at least two limitations. One was that it should establish such terms of admission as would

promote the proper administration of justice, and the other that it should not admit any persons, or class of persons, not intended by the Legislature to be admitted, even though not expressly excluded by statute. In view of this latter limitation the court felt compelled to deny the application of females to be admitted as members of the bar. Being contrary to the rules of common law and the usages of Westminster Hall from time immemorial, it could not be supposed that the Legislature had intended to adopt any different rule.

The claim that, under the fourteenth amendment of the Constitution, which declares that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, the statute law of Illinois, or the common law prevailing in that State, can no longer be set up as a barrier against the right of females to pursue any lawful employment for a livelihood (the practice of law included), assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life.

It certainly cannot be affirmed, as a historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say, identity, of interests and views which belong, or should belong, to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law, that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the Legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.

For these reasons I think that the laws of Illinois now complained of are not obnoxious to the charge of abridging any of the privileges and immunities of citizens of the United States.

I concur in the opinion of Mr. Justice Bradley.—FIELD, J.

D. W. MIDDLETON,
C. S. C. U. S.

Hon. *Matt. H. Carpenter*, for plaintiff in error.

Court of Common Pleas.

IN EQUITY.

SIMSON v. BATES.

1. Equity will interfere by injunction to prevent the sale of a wife's property under an execution against her husband, only when her title is undisputed, and it appears that the creditor is using the process of the law to her injury.
2. It will not aid the wife when she has been guilty of fraud or collusion with her husband, whereby his creditors have been held at bay.

Opinion of the court by PAXSON, J. Delivered July 5th, 1873.

The plaintiff, who is a married woman, obtained a special (*ex parte*) injunction against the defendant, who is an execution creditor of her husband, to restrain him from selling her separate real estate. The defendant having filed an answer, now moves to dissolve said injunction.

The bill sets out the plaintiff's title to the real estate in question, and alleges that it was bought by her—the deed taken in her own name, and the property paid for out of moneys received by her from the estate of her mother, who was a resident of the kingdom of Bavaria, in which country she died in the year 1870.

The answer of defendant, Bates, sets forth that he has no knowledge as to the facts above stated, but that, "from the best of his information," he believes them to be untrue, so far as they relate to the purchase money of said premises.

It also avers that the judgment under which the property of the plaintiff had been levied upon was recovered in the District Court of this city against Zachariah Simson, the husband of plaintiff, and one William N. Dewees, trading as Simson & Dewees, in an action brought to recover the value of certain goods sold to said firm, and delivered to them at their store, No. 429 Race street; that the said Zachariah Simson filed in said suit an affidavit of defence, in which he alleged *inter alia*. "that he is not a partner in the firm of Simson & Dewees, but that the said firm is composed of Nannie Simson (plaintiff) and William N. Dewees." Said answer further alleges that the defendant issued an execution upon said judgment, under which the goods in said store were levied upon; whereupon the said Nannie Simpson claimed to be the owner of said goods, and gave the sheriff notice to that effect. Further, that upon a pluries writ of fieri facias issued upon said judgment, he caused a levy to be made upon the goods in said store, as well as upon the household furniture at the residence of the said Zachariah Simson, No. 1828 North Seventh street, and that the said Nannie Simson claimed that she was the owner of said household goods, and also joint owner with one Charles Badenfield, of the goods and chattels in said store, of which the sheriff was duly notified.

Hunter's Appeal, 4 Wr. 194, decided that "under the act of 11th of April, 1848, and 12th of April, 1850, the levy and sale of a wife's real estate by a creditor of her husband's, on execution against him, is contrary to law, and may be restrained by injunction," with the qualification that "In order to authorize the interference of a court of equity, a clear case of title in the wife under the acts of 1848 and 1850 must be made out; otherwise the court will not interfere, but leave the parties to their remedy at law." In the case above cited the title of the wife was not disputed by plea, answer or demurrer. In a later case, Winch's Appeal, 11 P. F. S. 424, the Supreme Court held that "when the title of a wife is disputed, and when a creditor has a right to proceed against the property to test the title, it is error to assume jurisdiction in equity and enjoin against the creditor's execution, and thus withdraw the facts from a jury;" and that "equity will restrain a creditor only when he is clearly and indisputably proceeding against right and justice to use the process of the law to the injury of another."

A creditor of the husband has a right to levy upon and sell whatever interest he may believe the latter has in the real estate of his wife. It is only when the process of the court is used against admitted right, to the injury of the wife, that equity will interfere. Nor will it aid the wife when she has been guilty of fraud or collusion with her husband, whereby his creditors are kept at bay. We are not prepared to say in this case that the plaintiff has been guilty of such fraud or collusion; but the allegations in the answer certainly show that she has been active in defeating the creditors of the firm of which her husband was a member. She may have been right in all this. We cannot say she is not, without prejudging her case; but it is sufficient to indicate that the defendant is not using his execution for the purpose of oppression, or of inflicting wrong or injury upon the plaintiff. He is merely pursuing his legal remedies under considerable difficulties. I do not think the case one in which equity ought to interfere. If the property should be sold, the title can be tested in an action of ejectment and the facts passed upon by a jury. The plaintiff should be left to her remedy at law.

Injunction dissolved.

ASH v. BOWEN.

Where a bill was filed by a *cestui que trust* and her husband, alleging that the trust was invalid, to which the defendant, the trustee, refused to plead, answer or demur, and his counsel withdrew his appearance, whereby a judgment *pro confesso* by default was entered, on motion of the plaintiff for a decree in his favor, the motion was refused, the court holding, that the record clearly showed collusion; that the judgment *pro confesso* should be opened, the defendant's answer and proofs taken, if necessary.

Opinion of the court by PAXSON, J. Delivered July 5th, 1873.

We are asked in this case to decree that the trust created by one of the plaintiffs, Ellen Margaretta Ash, *nee* Harland, by her indenture of 11th of April, 1856, is invalid, for the reason, as alleged in the bill, that at the time of the execution of said deed, and the creation of said trust, she was neither married, nor in immediate contemplation of marriage. The bill avers that at that time she did not know Thomas Reeves Ash, with whom she has since intermarried, and who is joined with her as plaintiff.

To the said bill, the defendants, who are the trustees named in the deed, have not filed either a plea, answer, or demurrer. The learned counsel who at one time represented them, for reasons which were no doubt satisfactory, by leave of court withdrew his appearance for said defendants; after which a judgment *pro confesso* was entered against them. Upon this state of the record the plaintiff moves the court for a decree in her favor.

We cannot close our eyes to the fact that there is collusion in this case. We are asked to strike down this trust, and order a reconveyance of the trust estate to the *cestui que trust* upon her mere statement, and to take what we cannot but regard as a collusive judgment by default as establishing the averments of the bill. This, notwithstanding the fact, which appears of record, that the plaintiff, Ellen Margaretta Harland, was married to her husband, Thomas Reeves Ash, in less than one year from the execution of her deed of trust. It may be, as she alleges in the bill, that she did not know him at the time she executed said deed; yet a due regard for the proper administration of equity prevents our entering any decree in the present state of this record.

Under all the peculiar circumstances of the case, let the judgment *pro confesso* be opened, an answer put in by the defendants, and proofs taken, if necessary. The cause will then be ripe for a hearing upon the merits.

LEGAL GAZETTE.

Friday, July 11, 1873.

JOHN H. CAMPBELL,
EDITOR.

THEODORE F. JENKINS,
ASSOCIATE EDITOR.

THE JUDICIARY ARTICLE.

The following are all the remaining sections of the judiciary article, as passed by the Constitutional Convention, on second reading except two or three which we will print next week.

SECT. 20. Whenever, within six months after the official publication of any act of Assembly in the pamphlet laws, and not thereafter, it shall be alleged before the attorney general by affidavit, showing probable cause to believe that the passage or approval of such law was procured by bribery, fraud or other corrupt means, it shall be the duty of the attorney general forthwith to apply to the Supreme Court, or one of the judges thereof for process in an appropriate proceeding which shall be ordered, if there appears to the said court, or to the said judge to be such probable cause, and in which the commonwealth upon relation of the attorney general, shall be plaintiff, and such party as the Supreme Court, or the judge who shall grant such issue, shall direct, shall be defendant, to try the validity of such act of Assembly, whereupon the court shall direct publications of the same, and any party in interest may appear, and upon petition be made a party plaintiff or defendant thereto.

The said issue shall be framed and tried before a jury by one of the judges of the Supreme Court, in whatever form and in such county as the Supreme Court may direct; and if it shall appear to the court and jury upon such trial that the passage or approval of the same was procured by bribery, fraud or other corrupt means, such act of Assembly shall be adjudged null and void, and such judgment shall be conclusive. And the governor shall thereupon issue his proclamation declaring such judgment. Either party shall be entitled within three months and not thereafter to a writ of error as in other cases.

No officer of the commonwealth, nor any officer or member of the Legislature shall be exempt from testifying when required in such case, but the testimony of any such witness shall not be used against him in any criminal prosecution, except for perjury therein.

SECT. 21. No duties shall be imposed by law upon the Supreme Court or any of the judges thereof, except such as are judicial, nor shall any of the judges thereof exercise any power of appointment, except as herein provided. The Court of Nisi Prius is hereby abolished, and no court of original jurisdiction to be presided over by any one or more of the judges of the Supreme Court, shall be established.

SECT. 22. A register's office for the robate of wills and granting letters of administration, and an office for recording of deeds, shall be kept in each county. The Register's Court is hereby abolished, and the jurisdiction and powers thereof are vested in the Orphans' Court. In every city and county wherein the population shall exceed one hundred and fifty thousand, the Legislature shall, and in any other city or county may establish a separate Orphans' Court, to consist of one or more judges, who shall be learned in the law, and which court shall exercise all the jurisdiction and powers now vested in, or which may hereafter be conferred upon the Orphans' Court, and thereupon the jurisdiction of the judges of the Court of Common Pleas within such city or county in Orphans' Court proceedings, shall cease and determine. The register of wills shall be compensated by a fixed salary, to be paid as may be provided by law. He shall be clerk of the Orphans' Court, and subject to the direction of said court in all matters pertaining to his office. Assistant clerks may be appointed by the register, but only with the consent and approval of the court. All accounts filed in the register's office and in the Orphans' Court shall be audited by the court without expense to parties, except where all parties in interest in a pending proceeding shall nominate an auditor whom the court may in its discretion appoint.

SECT. 23. The style of all process shall be "The Commonwealth of Pennsylvania." All prosecutions shall be carried on in the name and by the authority of the commonwealth of Pennsylvania, and conclude against the peace and dignity of the same.

SECT. 24. In all cases of unlawful homicide, and in such other criminal cases as may be authorized by law, the accused, after conviction and sentence, may remove the indictment record, and all proceedings to the Supreme Court, for review, in the same manner as in civil cases.

SECT. 25. Any vacancy happening by death, resignation, or otherwise, in any court of record, shall be filled by appointment by the governor, to continue till the first Monday of January next succeeding the first general election, which shall occur two months after the happening of such vacancy.

District Court of Philad'a.

KRAUSE et al. v. STILES.

1. A landlord, as against an execution creditor, is entitled to accruing rent apportioned to the time of the levy.
2. Rent may issue out of lands and tenements corporeal, or out of them and their furniture.
3. The sheriff's return to a *fi. fa.* is conclusive against the plaintiff, in the distribution of the fund arising therefrom.
4. An attachment under the act of 1869 has precedence to a levy made subject thereto under a *fi. fa.* subsequently issued.
5. The prothonotary of the District Court is entitled to a fee for recording auditors' reports.
6. The practice, where an auditor desires an increase of the statutory fee, laid down.

[As the auditor's report on the material points in this case was confirmed for the reasons stated by him, we publish his opinion in full.]

Exceptions to auditor's report.

Opinion by the auditor, P. F. ROTHERMEL, JR., Esq.

From all the evidence produced before the auditor in this matter, he reports to the court the following as the facts pertinent to the present inquiry:

1. That by lease, dated August 7th, 1868, J. Francis Fisher, owner, let to Edward Stiles, defendant in the execution, from proceeds of which the fund in court arises, the premises situated at the northeast corner of Eleventh and Spring Garden streets, "for the term of one year (and so on, from year to year) from the 8th day of August, Anno Domini one thousand eight hundred and sixty-eight, at a rent of one thousand dollars per annum, to be paid in quarterly payments of two hundred and fifty dollars each." That the defendant was in possession under the above lease, when, by virtue of the said execution, his personal property there found was levied upon and sold. That rent was in arrear since May 8th, 1872. That the use of shelving, counters, bins, and those things which thus belonged to the premises leased (a grocery store), passed to the lessee with the same. That by lease, executed the 8th day of August, 1872, the same premises were let by the said J. Francis Fisher, to a certain Robert Stiles, "from the 8th day of August, Anno Domini one thousand eight hundred and seventy-two;" and that on the same date, Edward Stiles, the defendant and previous lessee, became surety for the lessee in the last lease.

2. That on June 28th, 1872, an attachment, under the provisions of the act of March 17th, 1869, issued out of the Court of Common Pleas of the city and county of Philadelphia (No. 272, June T., 1872), in which James A. Aull and John Mellsop, trading as James A. Aull & Co., were plaintiffs, and the said Edward Stiles, defendant. To which the sheriff made the following return:

"Attached as within commanded, June 28th, 1872, certain stock and fixtures of the grocery store, northeast corner of Spring Garden and Eleventh streets, and summoned the defendant, by giving to him a true and attested copy of the within writ, and making known to him the contents thereof, June 28th, 1872, at 1 o'clock 15 minutes P. M."

That on September 21st, 1872, plaintiffs in the above attachment obtained judgment, and on the twenty-fourth of the same month, damages were assessed at $228.08. Upon which a *fi. fa.* issued September 27th, to September Term, 1872, No. 105, to which the sheriff made the following return:

"No goods not exempt, except those attached under the attachment upon which the within writ issued, which goods were levied upon July 2d, 1872, under a certain other writ of *fieri facias*, issued out of the District Court for the city and county of Philadelphia, to June Term, 1872, No. 863, subject to said attachment, and another attachment issued out of your honorable court as of June Term, 1872, No. 352, and said goods were sold July 8th, 1872, for the sum of five hundred and twenty-one dollars; and $504.67 thereof was paid into the District Court for distribution."

3. That upon judgment obtained in your honorable court, by Jno. H. Krause, Henry M. Ingram and John T. Totten, trading as John H. Krause & Co., against the said Edward Stiles (Sept. T., 1871, No. 1144), for $430, a writ of *fieri facias* was issued July 2d, 1872, to June Term, 1872, No. 863, to which the sheriff made the following return:

"Levied upon the personal property of the defendant, July 2d, 1872, subject to a certain attachment issued out of the Court of Common Pleas, to June Term, 1872, No. 272; and after setting aside property, viz., household furniture, to the value of $300, I sold the residue of said property July 8th, 1872, for the sum of five hundred and twenty-one dollars."

That the following notice was sent to the sheriff on behalf of J. Francis Fisher, landlord.

PHILADA., July 8, 1872.

You are notified, that there is due me this day, by Mr. Edward Stiles, for rent of premises at the northeast corner of Eleventh and Spring Garden streets, for two months (at the rate of $83.33⅓ per month), one hundred and sixty-six dollars and sixty-six and two-thirds cents, which amount you will please recover for me from the proceeds of the sale of the goods, &c., taken in execution upon said premises by you.

The preference given to the landlord's claim in the distribution of the fund in court is due to the provisions of the 83d section of the act of June 16th, 1836, which are as follows: "The goods and chattels being in or upon any messuage, lands or tenements, which are or shall be demised for life, or years, or otherwise, taken by virtue of an execution, and liable to the distress of the landlord, shall be liable for the payment of any sum of money due for rent at the time of taking such goods in execution: *Provided*, That such rent shall not exceed one year's rent."

To this position, the plaintiff in the execution raised the following points of objection:

1st. It was contended, that as the above section was intended to make amends to the landlord for taking away his power of *distress* by a judicial sale of the tenant's goods, it did not apply in the present case, the levy upon and sale of the goods having been made a month prior to "quarter day," when the rent became due, and the right of distress accrued. That the rent could not, under the statute, be apportioned to the time of the levy.

There can be no doubt that the objection is founded upon principle. That the Legislature meant by this section to give the right in question only when the goods were liable to distress, not only appears from the use of those words in the act, and the further requirement that the rent claimed shall be "due," but is a recognized groundwork of many decisions upon the subject; and as the nature of rent, it being payable out of the profits of the land, and the consideration for its payment being the enjoyment of the thing demised, requires that it should be complete before any obligation to pay can arise; it would seem that apportioning the rent to the time of the levy, would be in direct violation of the terms of the act, there being no power of distress until rent is due, and in law, rent never being considered to be due or existing as a tangible interest until it has become actually payable; thus in Dun's Case, 10

LEGAL GAZETTE.

[SUPPLEMENT.]

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PHILADELPHIA, FRIDAY, JULY 11, 1873.

DISTRICT COURT.

CURRENT MOTION LIST.

Saturday, July 12, 1873.

1 Langstrom v Hewes; Pancoast;
2 Corcoran v Corcoran; Husband.
3 Pugh v Thackara; Ashmead.
4 Buck v Perkins; Graham.
5 Dyer v Lock; Johnson.
6 Penna v Scott; Meyers.
7 Hart v Dougherty; Rothermel;
8 Hays v Wilson;
9 Thompson v Haley; White.
10 Slagle v Day; Hirst.
11 McDonald v Monteith; Dechert.
12 Shamberger v Smith; Folz;

DEFERRED MOTION LIST.

1 Clark v Lister; Shapley.
2 Graham v Burns; id
3 Wentz v Harlan; Harlan.
4 Simpson v Hepburn; Hepburn.
5 Beckner v Gentner; Flint.
6 Deveroux v Hays; Bonham.
7 Pratt v Schreiner; Shields;
8 Lamond v Robins;
9 Vanderslice v Derringer; Walker.
10 Nelms v Reiner; Patton;
11 McCarthy v Murphy; McDonough.
12 Beck v Holeman; Wollaston.
13 Gover v Croasdale; Jennison;
14 Bulkley v Clay; Perkins
15 City v Swope; Waxler.
16 Smaltz v Price; Hunsicker.
17 Jaquette v Woods; Moyer;
18 Hughes v Quinlan; Pratt;

COMMON PLEAS.

CURRENT MOTION LIST.

Saturday, July 12, 1873.

1 Clark v Clark; Ransford;
2 Dalrymple v Dalrymple; Hirst
3 Sprogell v Sprogell; Ker;
4 Edwards v Edwards; Seltzer;
5 Wenzell v Wenzell; Seltzer;
6 Schreevoigt v Schreevoigt; Chubb;
7 Knox v Knox; Browne;
8 Aarons v Aarons; Davis;
9 Schlichter v Schlichter; Campbell;

ORPHANS' COURT.

MOTION LIST.

Saturday, July 12, 1873.

1 Hand's Estate; Return to citation; Palethorp.
2 Brick's Estate; For guardian; E S Campbell.
3 Rice's Estate; Return to citation; Palethorp.
4 Dundas' Estate; For extension of time to answer; Biddle.
5 Shaw's Estate; Return to order of sale; Hartman.
6 Holtka's Estate; For guardian; Parsons.
7 Carnell's Estate; Return to order; Adams.
8 Dowlan's Estate; To confirm sale; Vail.
9 Ellis' Estate; Rule on auditor to file testimony; Hanson.
0 Jones' Estate; To discharge administrator; Ridgway.
11 Craig's Estate; To amend petition; Roberts.
12 Charlton's Estate; To join in deed; Crawford.
13 Miller's Estate; Widows' claim; Bennett.
14 Reiffs' Estate; Widow's claim; Chase.
15 Fraley's Estate; Widow's claim; Erichson.
16 Phillip's Estate; To sell real estate; T A Porter.
17 Davis' Estate; Return to citation; Powell.
18 Davis' Estate; Return to citation; Powell.
19 Luder's Estate; For guardian; Dittmann.
20 Robb's Estate; For guardian; Levi.
21 Tomlinson's Estate; Return to citation; Spering, Pratt.
22 Bodder's Estate; For guardian; Alexander.
23 Huster's Estate; For citation; Hannis.
24 Streeper's Estate; To satisfy mortgage; Thorn.
25 Shreve's Estate; For guardian; Poulson.
26 Brown's Estate; Return to citation; Atkinson.
27 Hutchison's Estate; Rule for attachment; Atkinson.
28 Martin's Estate; Rule for attachment; Sellers.
29 Wagner's Estate; Return to attachment; Perkins.
30 Shiber's Estate; For guardian; Hillman.

QUARTER SESSIONS

Saturday, July 12, 1873.

1 Commonwealth ex rel John Shane v Keeper of County Prison; Hab Corpus; Pratt.
2 Commonwealth ex rel Wm Culsh v Keeper of County Prison; Hab Corpus; Pratt.
3 Commonwealth ex rel Abraham Hannala et. al v Keeper of County Prison; Hab Corpus; Jermon.
4 Commonwealth ex rel Samuel Smith v Keeper of County Prison; Hab Corpus; Jermon.
5 Commonwealth ex rel Edward B Bursa v The Sheriff; Hab Corpus; J Ross Dubs.
6 Commonwealth ex rel John Prentzell v The Sheriff; Hab Corpus; Kneass.
7 Commonwealth ex rel James McDade v The Sheriff; Hab Corpus; Shields.
8 Commonwealth ex rel John N Hagey et al v The Sheriff; Hab Corpus; Fletcher.
9 Commonwealth ex rel Patrick McKeirnan v The Sheriff; Hab Corpus; Fox.
10 Commonwealth ex rel Bernard Finnegan v The Sheriff; Hab Corpus; O'Reilly.
11 Commonwealth ex rel John W Christman v The Sheriff; Hab Corpus; E C Shapley.
12 Commonwealth ex rel Emma Jones v Edward Henry Jones; Hab Corpus; Redheffer.
13 Commonwealth v Thomas Henderson; Breach of Peace; Hartman.
14 Commonwealth v P F McDonnell; Breach of Peace;
15 Commonwealth v Keims; H F Hepburn.
16 City v Derfuer; Ransford.
17 id Wunderlich; Ingram.
18 id Thiele; O'Byrne.
19 Commonwealth v Haughey; McCandless.
20 Commonwealth v Stewart & McIlvaine; J M West.

Co. 128, where it is laid down, that "rent reserved is to be paid out of the profits of the land, and is not due until the profits be taken by the lessee." It was (for this reason) held, that "if the tenant of the land is evicted, or if the lease be determined before the legal time of payment, no rent shall be paid, for there never shall be an apportionment with respect to part of the time as there shall be on an eviction of part of the lands;" and Collings v. Harding, Cro. Eliz. 606; Trevail v. Ingraham, 2 Mod. 282, and Henn v. Hanson, 1 Lev. 99, are all authorities which show that so little does accruing rent partake of the character of a present debt or duty, that a release of all demands from the lessor to the lessee will not discharge it; for, as Littleton says, "it was neither *debitum* or *solvendum* at the time of the release made."

The provision of the statute, that the rent claimed shall be *due*, has, however, been altogether disregarded by the courts in construing the same, while, on the other hand, a most liberal interpretation has been given to the words "liable to the distress." Thus in Wickey v. Eyster, 8 P. F. Smith, 501, it was held, "the words 'liable to the distress of the landlord,' do not mean that the rent must be ripe for distress, but they refer to the *liability of the goods themselves as subjects of distress.*"

And upon this principle, "the settled interpretation of the 83d section of the act of 1836 has been that the rent for the current quarter or year, at the time of the levy on the tenant's goods on the demised premises, although not then due, will be apportioned to the time of the levy." Moody v. Morgan, 6 W. & S. 333; Case v. Davis, 3 Harris, 80; Anderson's Appeal, 3 Barr, 218, and Collins' Appeal, 11 Casey, 83, following West v. Sink, 2 Yeate's Reports, 274, and Binns v. Hudson, 5 Binn. 505, decisions under the act of 1772, of which that of 1836 is a transcript, are authorities to the same effect. And while the falsity of the reasoning of the earlier cases is admitted, the doctrine of *stare decisis* is applied and their ruling adhered to. The objection cannot, therefore, be sustained.

2. Again it was contended, that as the second lease of the premises upon which the goods were taken in execution was made before the term under the first lease had expired, and with the consent of the lessee under the first lease (evidenced by his becoming surety for the lessee in the second), the same amounted to a surrender of the premises before the rent fell due, and, therefore, there never was any right to distrain for the rent claimed, and hence, upon the ground stated in the first objection, no equivalent for it under the statute. In support of the position, Greider's Appeal, 5 Barr, 425, was relied upon.

This objection is clearly based upon a misapprehension of the facts. The second lease was not made until after the tenancy under the first was at an end, and the right of distress for rent due, complete. The lease to the defendant in the execution was, "for the term of one year from the 8th day of August, Anno Domini one thousand eight hundred and sixty-eight." The subsequent one, "from the 8th day of August, Anno Domini one thousand eight hundred and seventy-two." Now, though there is not entire uniformity in the rule laid down by courts with reference to the computation of time, when the expression is "from" any given date, the day of the date being sometimes included, and at others excluded, it is clear, that in a lease for one year from a given date, if one terminus is included, the other must be excluded, or the lease would, contrary to its terms, be for a year and a day; thus, Duffy v. Ogden, 14 P. F. Smith, 240, and Myers v. Anderson, 12 Harris, 252, hold that, "leases beginning on the 1st of April, expire on the 31st of March of the following year." Hence, as the form of the expression is identical in both the instruments in question, it is apparent, whether they be regarded as terminating on the 7th or 8th of August, as the same rule of computation must apply in each case, the second lease could not take effect until the first had expired, and the rent under it become due and payable. In Greider's Appeal (cited supra) the lease was surrendered by the tenant between the time of levy and sale of his goods, and when no rent was due and payable to the landlord. The effort was to apportion the rent, and thus claim it against the execution creditor; but the court held, that those adjudged cases which permitted landlord's to apportion rent and claim up to the time of the sheriff's levy, though adhered to upon the rule of *stare decisis*, were founded upon illogical reasoning, and were not, therefore, to be extended to cases differently characterized, and did not apply to cases where there had been an express and voluntary surrender of the term. It was argued on authority, that the surrender drowned and extinguished the lesser estate of the tenant, and that rent reserved and issuing out of that estate, *but not due at the time of surrender*, was also extinguished.

As, however, in the present case, the second lease, as shown above, was not made until the tenancy under the first was at an end, and the rent reserved due and payable, the principle of the exception established in Greider's Appeal, to the general rule allowing rent to be apportioned to the time of the levy can have no application.

3d. Again it was claimed that as shelving, bins, counters, &c., passed with the premises leased to the defendant in the execution, the rent reserved was in consideration of the use of both personal and real estate, which destroyed the right of distress, and, therefore, upon the principle forming the basis of the previous objections, the right under the statute.

Commonwealth v. Coutner, 6 Harris, 439, was cited as an authority in point. This contains the following *dictum*, the court having sustained the right of distress, so far as the entire essential merits of the case were concerned: "Rent must issue out of lands, and if the real and personal property leased are so mixed together in the lease, that it cannot be determined how much of the consideration is to be paid for the use of the chattels, and how much for the use of the real estate, there can be no distress for the non-payment of it." It is apparent the confusion contemplated in the above does not exist in the present case, *the rent reserved in the lease under consideration is exclusively for the use of the premises, no mention being made of chattels*, but presuming that the lease had in terms included shelving, bins, &c., as the doctrine advanced in Commonwealth v. Coutner, was expressly repudiated in the subsequent case of Mickle's Administrator v. Mills, 1 Grant's Cases, 320, the objection is without support. It was there held: "A rent may issue out of lands and tenements corporeal, or out of them and their furniture," and the court in reviewing the *dictum* in Commonwealth v. Coutner, which was the result of a too strict adherence to the definition of rent, as "a certain profit issuing yearly out of lands and tenements corporeal," said, "not having noticed the inadequacy of the induction upon which the definition rests, we did not suspect any danger in drawing the very obvious deduction we did in Commonwealth v. Coutner, * * * We are glad the learned judge who tried this case was not misled by our mistake. He tried the question rightly. A rent may issue out of lands and tenements corporeal, or out of them and their furniture."

That this case is law, is clear beyond doubt, such and similar leases have prevailed time out of mind, and yet the right of distress never been questioned, except perhaps by inference from the *dictum* found in Commonwealth v. Coutner. Opposed to this incidental *dictum*, we find in addition to the case cited, the same point adjudicated in England, in Newman v. Anderton, 5 Bos. & Pul. 224. In replevin, defendant avowed the taking by distress for rent of a house "with certain furniture and effects" therein, under a lease or demise. A verdict was rendered for the defendant, and application was made by plaintiff to set it aside on the ground that there was no right of distress under such a lease. The same course of argument was adopted there as here; and the court after holding the question under advisement said, the right of distress in such cases had never before been questioned, although of frequent occurrence; and the chief justice cites cases where the principal inducement to the lease is the personal property or utensils accompanying the premises, and yet, he says, he never heard it doubted that the landlord might distrain for the rent. The rent is construed to issue out of the realty, and not the goods, although the value of the former is greatly enhanced by the latter. These authorities clearly determine the point.

The right of the attachment creditor to priority in the distribution over the execution creditors was also disputed by the latter.

The sheriff's return to the *fi. fa.*, under which the execution creditors claim, is, however, decisive of the point against them. It was as follows:

"Levied upon personal property of defendant, July 2d, 1872, *subject* to a certain attachment issued out of the Court of Common Pleas, of June Term, 1872, No. 272, &c. A return which places the case directly within the principle of the ruling in Prather v. Chase, 3 Brewster, 206, and Paxson's Appeal, 13 Wright, 195, in the former of which it was held, that "a sheriff's return to a *fi. fa.* is conclusive as to whether a prior writ of foreign attachment was lawfully executed upon the goods and chattels levied upon under the *fi. fa*, so as to establish a priority of seizure over subsequent executions." And in the latter, where the plaintiff in certain executions claimed priority in the distribution of the proceeds, on the ground that the levies on two executions previously issued, *subject* to which levies his own were returned by the sheriff, were mere paper levies, it was held, that "the plaintiff, in the subsequent executions, could not contradict the returns to them, his remedy was by action, if false returns had been made." The principle upon which the decision was founded is thus stated by the learned judge, who delivered the opinion of the court. "The appellant's difficulty lies in the necessity, in order to arrive at what he claims, to contradict the returns on his own writs. He insists upon striking out in effect, by testimony *aliunde*, what is not extrinsic matter in his returns, namely, that the levies are subject to prior levies. If it were foreign or intrinsic matter, it would legally be no part of a proper return, and would prove nothing; but it is not so; it is the regular mode of stating the facts of the levy. Upon the principle of the authorities conceded by the appellant's counsel, and which could not have been denied, viz.: that the return on an execution is conclusive in the case, I see not what possible escape there is for the appellant from its force. May he contradict them? If he may, the principle does not exist; but we know that it does, and as it does, he cannot evade it by any theory made apparent in these cases;" language which might with equal propriety have been applied to the case before us.

The auditor, after deducting the costs of the audit, awarded and directed payment of the balance as follows:

To the landlord, rent from May 8th, 1872, to July 2d, 1872.

To the plaintiffs in the attachment, the amount of their judgment and costs.

And the balance to the plaintiffs in the execution, on account of their judgment.

The plaintiffs in the execution excepted to the order of distribution, to the auditor's fee and to the costs allowed the prothonotary.

Opinion by MITCHELL, J. Delivered June 27th, 1873.

The first three exceptions are not sustained, and are sufficiently answered by the authorities cited by the auditor. There remain, however, exceptions to the auditor's fee, and to the prothonotary's claim for costs, which are proper to be noticed.

1. By the act of April 14th, 1870, a regular schedule of fees is established for auditors in this county, but the court is authorized "in important cases on cause shown," to allow "such additional compensation as they may deem proper."

In the opinion of this court, the proper practice to be pursued under this act by an auditor who desires the allowance of such additional compensation, is to complete his report as far as the table of distribution, and then to submit the report with a statement of his fee, calculated on the regular charges of the act, and a suggestion of what further allowance is deemed reasonable by himself or by the counsel before him. Having thus before it the facts by which to judge of the extent and difficulty of the auditor's labors, the court will be enabled to comply with

the spirit as well as the letter of the act of Assembly.

The regular fee in this case would be $17.50. But one meeting was held, as the facts were nearly all proved by record, or other written evidence. But on the facts, four or five questions of law, some of them of considerable nicety, arose, and had to be decided by the auditor. To these questions the auditor gave not only time and labor, but professional skill, which, as the result of past labor, is also a subject of compensation. We think, therefore, that this is a proper case for the exercise of the discretion given to the court by the act of 1870, and though it would have been preferable to have submitted the question of the fee to the court in the first instance, yet as the amount charged, $50, is not unreasonable for the services performed, we will not now change it.

2. The remaining exception is to the sum of $9:12, awarded by the auditor to the prothonotary for his commissions and costs.

A careful examination has failed to show any ground for this exception. The only item of any importance about which a doubt could exist, is the charge of $2.10 for recording the auditor's report.

By the act of April 25th, 1850, the prothonotaries of the various Courts of Common Pleas and District Courts are required to record in books provided for that purpose, "all accounts of assignees, trustees, sequestrators and committees, and all reports of auditors thereon. * * * And all reports of distributions or appropriations made by the various sheriffs of the commonwealth, and filed in their offices respectively." It will be seen that this act does not in terms include reports of auditors upon the distribution of moneys paid into court as the proceeds of execution; but a fair and liberal construction of the act would seem to make it necessary that such reports should be included. The scope of the act would seem to be that all accounts of the administration and distribution of money, and also all auditors' reports, should be recorded. Sect. 18 provides for the recording of all auditors' reports in the Orphans' Courts; and sect. 19 follows in the language I have already quoted. If the words "reports of distributions or appropriations made by the sheriff," meant to require a record of every distribution made by the sheriff of the proceeds of a writ, it is impossible to suppose the Legisture meant to leave unrecorded the most important cases of all—those, namely, in which there was a contest for the fund. The fair construction of these words, therefore, is, that they were meant to describe just such cases as this, and to require the recording of this auditor's report. Such has been the uniform practice in this court since the passage of the act.

Assuming then, that the charge for recording is legally made, is the amount charged correct? By the act of 1850, the prothonotary is to charge one-half the fees allowed to the recorder of deeds. Since the argument of this case, the words of the auditor's report have been counted three separate times—once by the prothonotary's counsel, once by myself, and once by another person by my direction, and the maximum discrepancy in the prothonotary's fee by the three counts is 13 cents—a discrepancy easily accounted for by the variation in counting dates and amounts as words, when expressed in Arabic numerals. As the prothonotary's count was the intermediate one of the three, it was probably the most correct.

By the act of April 2d, 1868, section 3 (P. L. 5), "the fees to be received by the several prothonotaries of the Courts of Common Pleas and of the District Courts of this commonwealth," were materially raised, for some of the services performed by the prothonotary in this case. When that act was passed there were no District Courts in existence in the commonwealth, except those of Philadelphia and Allegheny counties, yet at the end of the act is a proviso, that it shall not apply to certain counties named, including Allegheny and Philadelphia. There is thus a latent repugnancy or incompatibility in the parts of the act, and probably the true intent would be best reached by limiting the operation of the proviso to the sheriff, recorder and other officers named in the act, and holding that the express mention of the District Courts must override the proviso as to the prothonotary. But it is not necessary to do this, as the prothonotary of this court has never claimed to charge by the rates fixed in this act, and I have referred to it only to show the carefulness and accuracy of that officer, who, in a case of doubt, has charged the smaller fee, and to observe in this connection that it is very much to be regretted, for the interests of the prothonotary, and of those who have business with him, that the Legislature does not make a simple, intelligent, and intelligible fee bill.

Exceptions dismissed.

J. W Hunsicker, Esq., for the exceptants.

D. Weatherly, Jr., Esq., for the landlord.

J. H. Gendell, Esq., for plaintiffs in the attachment.

Court of Common Pleas.

In re Complaint against the President, Managers and Company of the FRANKFORD AND BRISTOL TURNPIKE ROAD.

1. A return by a constable to a precept under the act of 24th March, 1803, that he had summoned "three disinterested persons," will not support an inquisition; and all proceedings founded thereon should be set aside.
2. The constable should summon "three disinterested freeholders," and should so return.
3. Though a juror occasionally uses a turnpike road, and pays toll, he is not thereby disqualified.
4. The jurors should not be sworn to inquire as to anything save the condition of the road.

Opinion by PAXSON, J. Delivered July 5th, 1873.

This was a certiorari directed to Alderman Thaddeus Stearne, and inquest, to send up the record in the above case.

The proceeding was instituted under the act of 24th of March, 1803, P. L. 418, incorporating said company, and the object of it was to compel the company to open its toll gates, upon the allegation that the road was not in such "good and perfect order" as required by the act of Assembly as aforesaid.

By section 16 of said act it is provided "that if the said company shall neglect to keep the said road in good and perfect order for the space of five days, and information thereof shall be given to any justice of the peace of the neighborhood, such justice shall issue a precept to be directed to any constable, commanding him to summon three disinterested freeholders to meet at a certain time in the said precept to be mentioned at the place in the said road which shall be complained of, of which meeting notice shall be given to the keeper of the gate or turnpike nearest thereto, and the said justice shall, at such time and place, by the oaths or affirmations of the said freeholders, inquire whether the said road or any part thereof is in such good and perfect order and repair as aforesaid, and shall cause an inquisition to be made under the hands of himself and a majority of said freeholders; and if the said road shall be found by said inquisition to be out of order and repair, contrary to the true intent and meaning of this act, the said justice shall certify and send one copy of the said inquisition to each of the keepers of the turnpikes or gates between which such defective places shall be, and from thenceforth the toll hereby granted to be collected at such turnpikes or gates, for passing the interval of road between them, shall cease to be demanded, paid or collected, until the said defective part or parts of the said road shall be put in good and perfect order and repair as aforesaid," &c.

The inquisition sets forth a complaint made before Alderman Stearne, on the 15th day of May last, by Wm. J. Fries, Lewis P. Allen, and John F. Kinsey, in which, it is alleged, that certain portions of said turnpike road, specified in said complaint, were in very bad condition and out of repair, &c., and had been so for more than five days prior to the making of said complaint.

Then follows the precept of said alderman directed to the constable of the twenty-third ward, commanding him to summon "three disinterested persons" to view said road, &c. To the said precept the constable made the following return: "In obedience to the within precept, I have summoned three disinterested citizens, good and lawful men of my bailiwick, to be and appear at the time and place within mentioned, May 16th, 1873, as by this precept I am commanded."

The inquest met on the ground on the 22d day of May, the time designated in the precept, and proceeded to view the road, and hear testimony, and upon the same day condemned the road as being out of order and repair, contrary to the act of Assembly aforesaid.

A number of exceptions were filed on behalf of the turnpike company to these proceedings. The first exception is, that the alderman had no jurisdiction; the act of 1803, before cited, conferring the jurisdiction upon justices of the peace. That the act in question does not confer this jurisdiction upon aldermen is clear. At the time of its passage there were no aldermen within the territorial limits of this road, and the power conferred by the act could only have been exercised at that time by justices of the peace. But it is provided by the 23d section of the act of 20th March, 1810 (Purdon, 847, pl. 26), that "the like jurisdiction and authorities vested by this act in the justices of the peace within this commonwealth, shall be and they are hereby vested in each and every of the aldermen appointed within the city of Philadelphia, who shall, *in all cases*, exercise all such powers within the said city, which any justice of the peace may exercise within any courts in this State, and shall be entitled to like fees; and in all cases shall be under and subject to such limitations, restrictions and provisions, as justices of the peace are, in like circumstances, subjected to by this act." It was contended by the learned counsel for the company, that this section only conferred upon aldermen the powers which had been by said act therein conferred upon justices of the peace, and was not a grant of general powers, or of any power not specified in said act. But we think the section referred to is entitled to a broader interpretation, and that in addition to conferring upon the aldermen all the jurisdiction given to justices of the peace by the act of 20th March, 1810, it confers upon the former in all cases, all such powers within the said city which any justice of the peace may exercise within any county in this State. That this interpretation of the section referred to is the correct one, is apparent from the language of the act itself, and as it has been acted upon, and acquiesced in by the bar and the public for over sixty years, it is too late now to disturb it.

The 2d, 3d, 4th, 5th and 6th exceptions may be considered together. They are all directed to the fact, that it does not properly appear upon the face of the proceedings that the three persons summoned by the constable were freeholders. It is hardly necessary to say, that as this qualification is imposed by the act of Assembly, it cannot be dispensed with; on the contrary, the record must show affirmatively that it has been complied with. The statute under which this complaint was instituted, is highly penal in its nature; the proceedings themselves are of a summary character, and in derogation of common law rights.

The precept of the alderman and the return of the constable are both defective in this respect. The precept requires the constable to summon "three disinterested persons." The constable makes return that he has summoned "three disinterested citizens," without naming them. Not a word here about "freeholders." Nothing even to designate the citizens whom he summoned, or to show that the three citizens who acted upon the inquest were the persons referred to by the constable in his return. Standing alone, these defects would be fatal, but it was strenuously argued by the learned counsel for the complainants, that said defects have been cured by the inquisition; that it appears therein that the three persons referred to were freeholders respectively, and were summoned by the constable. It is true that said inquisition does set forth that by virtue of the said precept the constable made return to said alderman and jury that he had "summoned Christian H. Geisse, John Holden, and Jeremiah Quickshall, three disinterested persons," &c. What the constable did return, is in writing, is attached to the inquisition, and contradicts the finding thereof. It also appears that objection was made to one or more of the inquest by the com-

pany, whereupon they were respectively examined on their *voir dire*, and each juror stated that he was a freeholder. I quote from the proceedings: "Defendants ask for an adjournment; objected to by complainants; objection sustained; jurors sworn and examined on their *voir dire*, and answer severally that they are freeholders in this county." There is nothing here but the statement of each juror that he was a freeholder. There is no finding of that *fact* by a tribunal competent to pass upon it. At most it is only evidence tending to establish a fact. The inquest, even if competent to pass upon the qualification of its own members, in no place finds the fact that the members thereof were freeholders. The inquisition nowhere refers to them as such. It speaks of them as "said alderman and jurors."

In this case we have no record made up by the alderman. We have only the inquisition made by that officer and the three persons summoned by the constable. The finding of facts by the inquisition is conclusive as to all matters properly submitted to it, and as to which the inquest was charged to inquire. In landlord and tenant cases such finding has been held to cure certain defects or omissions in the proceedings. It may be stated generally that the finding of a fact by the inquisition in such cases, as to which it was the province of the inquest to inquire, cures the omission to set out such fact in the preliminary proceedings. But the rule to be applied to this case is more strict than in cases of landlord and tenant, for the reason that in the latter, the proceedings, though summary, are not penal; they rest entirely upon contract,

I do not think the inquisition cures the defect referred to. The objection was made at the earliest moment, and the defendants are entitled to avail themselves of it here.

The precept should have commanded the constable to summon "freeholders;" the return of the constable should have set forth the fact that the persons summoned, naming them, were freeholders. The omission to do so leaves the proceedings without any proper evidence of this necessary qualification, and would have been a sufficient ground to quash the array, if there had been any mode by which such a proceeding could have been instituted, or any tribunal before which it could have been properly heard. While we would not exact unnecessary strictness in matters of form in such cases, we cannot dispense with matters of substance. Here form and substance are alike omitted. The constable in the first instance determines the qualifications of the inquest. He is to summon "three disinterested freeholders." This return, if properly made, is *prima facie* evidence that they are such, and conclusive unless challenged for cause, and the contrary shown. In the latter case it would rest with the alderman to decide the challenge and pass upon the question of their qualifications. If they were not such persons as the precept commanded the constable to summon, it might, perhaps, be his duty to issue another precept, and have other persons who did possess the qualifications summoned. In no event could the inquest sit in judgment upon the qualifications of its own members; and as neither the constable nor the alderman have officially certified to the fact that either of the three persons referred to was a freeholder, we think the proceedings are radically defective.

I might pause here, but as our decision may result in the commencement of the suit *de novo*, I will briefly refer to some of the remaining exceptions as bearing upon the law of the case.

The 7th and 8th exceptions allege that two of the inquest were not "disinterested;" and the ground of this allegation is, that they sometimes travelled the road and paid toll. This, if so, would not amount to a legal disqualification. The objection might be urged against any citizen of the commonwealth who may have occasion to use their road. I do not think the fact that a man has used the road and paid toll in the past, or may do so in the future, renders him legally incompetent to serve on the inquest. I am, however, free to say, that the constable ought, in such case, to obey the command of the alderman's precept in its spirit as well as its letter, and if not possible to summon freeholders who did not use the road at all, to at least summon such as by their location and business have occasion to do so but seldom. If it should appear to the court in any future proceeding, that the members of the inquest were large toll-payers of the road, it might materially lessen the weight we would otherwise feel disposed to give to their verdict upon the facts.

It was also alleged by the ninth exception that the parties who made the judgment were improperly sworn. The inquisition shows that they were sworn not only to inquire into the condition of the road, as required by the law, but also "of such other matters and things as shall be lawfully required of them in the premises." The latter part of the oath should have been omitted. The inquest had nothing to do with any "other matters."

The remaining exceptions are not important, and any discussion of them is unnecessary.

The 2d, 3d, 4th, 5th and 6th exceptions are sustained, the inquisition set aside, and all proceedings subsequent to the complaint are quashed.

John G. Johnson, Esq., for company.

Wm. Grew and *Geo. Peirce, Esqs.*, contra.

SHERIFF'S SALES.

The following are the prices obtained for the properties sold at Sheriff's sale on Monday last.

Chas. M. Fay. $50
Isaac Heister. 4,600
Jacob Hyneman, de'd. 50
Chas. M. S. Leslie. No. 1, $500. No. 2, 500
John Schaeffer. No. 1, $50. No. 2, 50. No. 3, 50
Emily B. and James H. Colbourn. 50
Samuel J. Arbuckle. 50
Joseph Allman. Nos. 1, 2, 3, 4 & 5, each, 25
Andrew D. Caldwell. 300
Thomas H. Mole. 55
James H. Campbell. 3,500
John G. Pierle. 100
Samuel H. Dungan. 3,500
Patrick Reenan. 750
Frank V. MacNeill, dec'd. No. 1, $4,500. No. 2, 2,000
John O'Neill. 100
Chas. A. Miller. 2,500
John L. Landis. 6,000
Geo. E. Henderson. Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9 & 10, each, 20
Joseph M. Price. 1,050
Benjamin Dowling. 200
Nathan Stretch. 1,200
Wm. H. H. Roberts. John Warford and Thomas Oliver Goldsmith, Jr., 10,000
Louisa Cecelia Poizat. Nos. 1 & 2, 3,000
Geo. C. Monteith. 3,000
Andrew McFarland. No. 1, $1,100. No. 2. 1,100
Geo. W. Marks. 1,800
Joseph Edwards. 2,425
Anna Mary A., Helena A., and Sarah E. Mapother. 4,000
John D. Taylor. 56,500
Morris Lester. 950
Jacob Frame. Nos. 1, 2 & 3 each, 2,200
John Henry Tingley. 9,800
John Eichner. 550
Wm. Murphy. 400
James Kerns. 200
Franklin Allen. 3,600
Unknown owner, &c. 125
Thomas M. Davis, owner, &c. 50
Edward B. Jones. 50
Shadrach Lees. 50
Joseph Green and Rachael, his wife. 1,500
Henry R. Lawrence and Henry J. Hansell, trading, &c. No. 1, $50. No. 2, 50. No. 3, 200. No. 4, 15. No. 5, 10. No. 6, 10
Jacob Yergy. 1,600
Jacob Stoockle. 2,500
Henry S. Matlack. 100
Joseph N. Pope. No. 1, $1,050. No. 2, 1,000. No. 3, 1,050. No. 4. 1,050
Oliver K. King. 1850
Israel M. Burrows. 2,600
Robert Weir. No. 1, $25. No. 2. 25
Joseph N. Pope and terre tenants. No. 1, $1,100. No. 2, 1,100
Alexander Patton. Nos. 1, 2 & 3. 3,525
Chas. M. S. Leslie. No. 1, $3,150. No. 2, 3,625. No. 3, 3,750. No. 4. 3,825
Joseph H. Thompson, dec'd. 4,300
John R. McNeille. 100
Patrick Cronin, owner, &c. 225
Samuel H. Elliott. $450
Samuel H. Elliott. 900
John Gormley. 1,600
Andrew Boyd. 50
Emily Thackara. 1,000
John Griscom. 30
James Sweeney. 1,500
Thomas E. Combs, with notice to Chas. H. Woodruff, assignee's terre tenant. 50
James Smith. 300
Theo. C. Rose. 100
Joseph G. Wills. 1,900
Wm. L. Mason and Sarah J. Mason, dec'd. 9,650
John G. Fleck. 5,400
John Taylor, Ann Maria, his wife. No. 1, $500. No. 2, 500
Chas. V. Cornell, owner, &c. 200
Patrick Kelly. 50
Jeremiah Rhoads. 60
Thomas Connor. 50
James McMahon. 50
James McMahon. No. 1, $200. No. 2, 150
Geo. O. Evans, and Martha Jane his wife. No. 1, $7,000. No. 2, 1,300
John Dougherty. 500
Patrick Moore. No. 1, $1,750. No. 2, 700
John Doyle. 950
Daniel Love, defendant, and John Grisdale, tenant in possession. 2,000
John Farrar. 100
Robert Galbraith. 100
Wm. Lafferty. 100
Joseph Henderson. 100
Wm. Foot. 100
Wm. Foot and Caroline A., his wife. No. 1, $525. No. 2, 625
Patrick Sweeney. 1,675
Francis Reilley. 1,650
Xavier Beckler. Nos. 1 & 2, 18,700
Morris Lester. No. 1, 250
Peter Conklin. 500
Edward Hughes. 9,600
Thos. M. Allen and Elizabeth, his wife. 5,300
Joshua Cowpland. 50
James T. Tevin. 50
Lorenzo D. Knowles, with notice, &c. 925
Howard Banes. 4,900
Joseph M. Price. 100
Nicholas Quering, with notice to Jos. Humphreys, terre tenant. 10,000
Joseph Keen. 150
Benjamin Jamison. 30
Wm. Caveron. 40
Anthony C. Walters. 3,600
George C. Monteith. 50
Edward Hughes. No. 1, $2,000. No. 2, 550. No. 3. 550
Joshua Cowpland. No. 1, $50. No. 2, 50
John J. Haley. 11,000
Washington G. Hagaman. 2,350
Geo. W. Dewees. 200
Frank W. Newbold. 950
Franklin W. Newbold. 1,200
John S. Malloch. No. 1, $1,000. No. 2, 500. No. 3, 1,000. No. 4, 1,000
Josiah Ashenfelder, Samuel Ware, and Jacob Heller, Sr. 116
Patrick O'Bryan. No. 1, $1,100. No. 2, 1,105
Patrick O'Bryan. 1,250
Philip Schuldheiser. 50

REGISTER'S NOTICE.—To all Legatees: Creditors, and other persons interested, Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in July, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

May 30, Robert Adams, Guardian of SARAH H. ADAMS, dec'd.
" 30, Mary Schofield, Administratrix of HENRY SCHOFIELD, dec'd.
" 31, Philip Brokate, Administrator of MATILDA ELIZA BROKATE, dec'd.
June 2, Elijah Dallett et al., Administrators of JOHN DALLETT, dec'd.
" 2, August Tecklenburg, Guardian of FISCHER'S Minors, as filed by Louisa Tecklenburg, Administratrix of August Tecklenburg, dec'd.
" 2, Wm. C. Houston et al., Administrators d. b. n. c. t. a. of C. HOUSTON, deceased, acting Trustees for Churchill H. Van Cleve and children, under the will of C. Houston, dec'd.
" 5, William Purves, surviving Executor of JACOB DUNTON, dec'd.
" 5, William Webb, acting Executor of SAMUEL WEBB, dec'd.
" 6, Bernard Owens, Trustee under the will of CATHARINE MONNIER, (formerly Mivelaz), dec'd.
" 6, Elizabeth H. Rowland, Administratrix of WILLIAM ROLAND, deceased.
" 6, Charles S. Mingin, Administrator of JOB MINGIN, dec'd.
" 6, Martha W. Conway, Administratrix of Dr. THOMAS CONWAY, deceased.
" 7, John B. Sidel, Executor of ABRAHAM R. HARPER, dec'd.
" 7, Andrew Wylie, Administrator d. b. n. c. t. a. of EDWIN M. STANTON, dec'd.
" 10, Robert J. Arundel, Executor and Trustee under the will of JAMES A. MAHANY, dec'd as filed by Eliza Arundel, sole Executrix of his will.
" 11, Sarah A. Oram et al., Executrix of HENRY C. ORAM, as filed by Sarah A. Oram, surviving Executrix.
" 12, Anna C. Peace, Guardian of J. COLEMAN DRAYTON, a minor.
" 13, Peter Keegan Guardian of WILLIAM McKIEVE, late minor
" 13, Joseph Singerly, Executor of LEWIS SCOUT, dec'd.
" 14, Jonathan Brock, Administrator of WILLIAM W. WATT, dec'd.
" 14, William G. Porter, Executor of JANE BENEZET, dec'd.
" 14, Joseph T. Pratt, Executor of AMOS CLIFT, dec'd.
" 14, R. O. Lowry et al., Executors of L. D. LOWRY, dec'd.
" 14, Sarah Graham et al., surviving Trustees under the will of THOMAS GRAHAM, dec'd, as filed by Albert S. Ashmead, acting Trustee.
" 16, James Smith et al., Administrators of JAMES B. ROGERS, dec'd.
" 16, Jacob Lewis, surviving Executor of WILLIAM M. BOWEN, dec'd.
" 18, Henry E. Long, Executor of HENRY LONG, dec'd.
" 18, Henry E. Long, Administrator of ANN LONG, dec'd.
" 19, Hope A. Richards, Administratrix of WILLIAM H. RICHARDS, dec'd.
" 19, Eli Keen, Administrator of ANNIE ADOLPH, dec'd.
" 19, Margaret Jackson, Administratrix of MARY ANN McDOWELL (formerly Toy), dec'd.
" 20, Jesse T. Vodges, Administrator of ANN VODGES, dec'd.
" 20, Rebecca M. Kratz (late Robertson), Administratrix of ARCHIBALD McINTYRE ROBERTSON, dec'd.
" 20, William F. Dean, acting Executor of WILLIAM ESHER, dec'd.
" 21, Joseph Cairns, Administrator of ANN McGINNISS, dec'd.
" 21, William S. Magee, Administrator d. b. n. c. t. a. of CHARLES PLEASANTS, dec'd.
June 24, Stephen A. Cochran, Executor of GILBERT COMBS, dec'd.
" 24, Samuel C. Cadwallader, Administrator of PHEBE C. TAYLOR, deceased.
" 24, Eliza Arundel, Executrix of R. J. ARUNDEL, dec'd.
" 24, Jacob Rush, Administrator of HENRY C. KIRBY, dec'd.
" 24, Catharine Kratz, Administratrix of ISAAC A. KRATZ, dec'd.
" 24, Henry C. Townsend, Executor of JAMES PROSSER, dec'd.
" 25, Dr. Jennett Johnson et al., Executors of SAMUEL JOHNSON, dec'd, as rendered by Israel H. Johnson, accounting Executor.
" 25, Dr. Israel H. Johnson, surviving Executor of GEORGE KNORR, dec'd.
" 25, Lewis H. Phillips et al., Administrators of LEWIS P. JACOBY, dec'd.
" 25, George Alexander, Executor of MARY JOHNSON, dec'd.
" 25, Edward Twaddell, surviving Executor and Trustee of JAMES TWADDELL, dec'd.
" 26, Rt. Rev. James F. Wood, Administrator d. b. n. c. t. a. of Dr. JOHN GEGAN, dec'd.
" 26, The Girard Life Ins. Co., &c., Trustee of SARAH E. RICHARDS, under the will of Sarah E. Richards, dec'd.
" 26, John Craig, Administrator of GEORGE GRAIG, Jr., dec'd.
" 26, Philadelphia Trust Safe Deposit Company, &c., Executors of WILLIAM W. GERHARD, M. D., deceased.
" 26, Curwen Stoddart et al., Executors of ELIZA BABCOCK, dec'd.
" 26 John Thornley et al., Executors of PHILIP S. WHITE, dec'd.
" 26, Benjamin F. Day et al., Executors of JOSEPH DAY, dec'd.
" 27, Clement C. Biddle et al., Trustees under the will of JOSEPH DUGAN, dec'd.
" 27, Augustus J. Pleasanton et al., Trustees under the will of JOSEPH DUGAN, dec'd.
" 27, Augustus J. Pleasanton et al., Trustees under the will of JOSEPH DUGAN, dec'd.

WILLIAM M. BUNN,
jul 11-4t Register.

M. THOMAS & SONS, AUCTIONEERS.

Nos. 139 and 141, late 67 and 69 S. Fourth St.

REAL ESTATE SALE, JULY 15th.

Will include—

Jackson, Cape May, N. J., adjoining the Merchants' Hotel—Lease, Good-will and Fixtures of a Bottling Establishment. Assignee's Peremptory Sale—Estate of Edward Maginnis, in Bankruptcy.

REAL ESTATE SALE, JULY 22d.

Will include—

Green, No. 728—Business Location—Two-and-a-half-story Brick Dwelling. Orphans' Court Sale—Estate of Wm. J. Benners, dec'd. Proceedings in partition.

Well-secured Irredeemable Ground Rent, $180 a year, Silver. Same Estate.

Third, (North,) No. 1025—Three-story Brick Lager Beer Saloon, 88 feet front—Orphans' Court Peremptory Sale—Estate of Samuel Wagenhall, dec'd.

Fourth, (North,) No. 1118—Three-story Brick Dwelling, with Three-story Back Buildings, and 2 Three-story Brick Dwellings in the rear, No. 1117 Leithgow street. Same Estate.

Fourth, (North,) No. 1116—Three-story Brick Dwelling, with 2 Three-story Brick Dwellings in the rear. Same Estate.

Leithgow, No. 1115—2 Three-story Brick Dwellings. Same Estate

Eleventh, (South,) No. 1127—Three-story Brick Dwelling.

Bethlehem Turnpike, Montgomery County, Pa., 1 mile from Colmar Station on the Doylestown branch of the North Pennsylvania Railroad—Desirable Country Seat, 15 Acres. Executors' Sale—Estate of Enos Mathias, dec'd.

Front, (North,) No. 2005—Three-story Brick Dwelling, with a Three-story Brick Building in the rear on Amber street, No. 1904.

Sixth, (South,) No. 1506—Modern Three-story Brick Dwelling.

Fourth, (North,) No. 2030—Three-story Brick Tavern and Dwelling.

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No. 422 WALNUT STREET.

REAL ESTATE SALE AT THE EXCHANGE JULY 16th.

Orphans' Court Absolute Sale.—15th and Bainbridge streets. Business Stand. Three-story Brick Liquor Store and Dwelling, at the S. W. Corner, and Three-story Brick Dwelling on Wyoming street. Lot 16 feet on 15th street by 83 feet deep on Bainbridge street, and 13 feet on Wyoming street. Estate of George Stewart, dec'd.

Orphans' Court Absolute Sale.—620 16th street. Genteel Three-story Brick Dwelling north of Bainbridge street. Lot 17 x 69 feet. Same Estate.

Orphans' Court Absolute Sale.—702 South 15th street. Three-story Brick Dwelling, South of Bainbridge street. Lot 16 x 85 feet with 2 Three-story Brick Houses on Wyoming street. Same Estate.

Orphans' Court Absolute Sale.—424 South 20th street. Business Location. Three-story Brick Dwelling, and Lot 17 x 43 feet. Estate of Kieve, minors.

Orphans' Court Absolute Sale.—433 Redwood street. Three-story Brick Dwelling, and Lot 16 x 116 feet to Federal street, on which it fronts 16 feet. Estate of Hugh McAneny, deceased.

Orphans' Court Sale.—North 10th street, Nos. 2304 and 2306. 2 Neat Two-story Brick Cottages, above Dauphin street. Lots 33 x 90. Estate of Michael Burke, dec'd.

Assignees' Absolute Sale.—Berks street. Brick Foundry Building and Valuable Lot below 5th street, 62 x 98 feet to Hackey street, on which it fronts 66 feet. Subject to $382 ground rent. Estate of T. B. Freyer & Co.

Peremptory Sale by Order of the Board of Public Education.—Norris and Franklin streets. Valuable Lot of Ground Suitable for Building Sites, 140 feet front on Norris street and 90 feet on Franklin street. Plan and Survey at the Store.

Sale by Order of Heirs.—2323 Coates street. Business Stand. Three-story Brick Store and Dwelling. Lot 18 x 70 feet. Estate of John Friar, dec'd.

Sale by Order of Heirs.—2321 Coates street. Neat Three-story Brick Dwelling, adjoining the above. Lot 18 x 68 feet. Same Estate.

Sale by Order of Heirs.—2326 Virginia street Neat Two-story Brick House, 15th Ward. Lot 12 x 44 feet. Same Estate.

Sale by Order of Heirs.—Virginia street, Nos. 2322 and 2324. 2 Neat Two-story Brick Houses, 15th Ward. Lots 12 x 43 feet. Same Estate.

Sale to Close an Estate.—1513 South Front street. Well built Three story Brick Dwelling, 7 rooms, above Tasker street. Lot 16 x 70 feet. Immediate possession.

Market street, No. 2134.—Business Stand. Three-story Brick Store and Dwelling west of 21st street. 16 x 125 feet to Simes street, has 9 rooms. Immediate possession. Terms half cash.

Filbert and 21st streets. Business Stand. Three-story Brick Liquor Store and Dwelling, at S. E. corner. Lot 18 x 65 feet. Terms half cash.

24th street.—2 Substantially Built Three-story Brick Dwellings, between Walnut and Sansom streets, each Lot 16 x 65 feet deep. Terms half cash.

24th street below Walnut.—Desirable Building Lot and 2 Three story Brick Houses fronting on Beach avenue. Lot 18 x 96 feet. Terms half cash.

Executor's Absolute Sale.—Estate of Daniel McCarthy, deceased. Schooner "Marian Gage." On Wednesday, July 16th, 1873, at 12 o'clock noon, will be sold at the Philadelphia Exchange, the one-eighth interest in the Schooner "Marian Gage," 302 tons tonnage, draws 12 feet water, built at Wilmington, Delaware, 121 feet long, 29½ feet beam, 10 feet 3 inches hold. Commanded by Capt. Wm. C. Fountain. Sale Positive. $100 to be paid at the time of sale.

AT PRIVATE SALE.

1625 North Fifteenth street above Oxford street.—Handsome Modern Three-story Brick Residence with Back Buildings and every convenience (13 rooms), and in excellent order. Lot 20 x 160 feet to Carlisle street. Immediate possession. $6,000 may remain on mortgage.

FOR SALE.—10 Acres, containing 700 feet, River front, on Front street, South Ward, Chester, Pa., adjoining Delaware River Iron, Ship and Engine Works, an excellent location for a Ship Yard. Also several Desirable Building Lots, 300 feet square, in South Ward, and the Borough of South Chester.

Apply to
A. J. REES,
P. O. Box 221, Chester, Pa.
jun 10 tf

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE AMERICAN EXCHANGE BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to three million dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled the INDEPENDENCE HALL BANK, to be located in Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE DRY GOODS BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE ARTISANS' BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE MARKET BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE DELAWARE RIVER BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE GROCERS' BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five million dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the conferring of the powers of a Bank of Deposit, Discount and Issue upon the Philadelphia Banking Company, incorporated in accordance with the Act of Assembly approved March 11th, 1870, and an increase of capital to five million dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation, in accordance with the laws of the Commonwealth, of THE SECURITY BANK, to be located in Philadelphia, with a capital of fifty thousand dollars, with the right to increase the same to five hundred thousand dollars jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE THIRD STREET BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with a right to increase the same to twenty-five hundred thousand dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE CHESTNUT HILL BANK, to be located at Philadelphia, with a capital of fifty thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE STATE OF PENNSYLVANIA BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to ten million dollars. jul 4-6m

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JUST PUBLISHED. CASE OF CHRIST Church, Germantown, Philadelphia. Being a Report of the proceedings before the Board of Presbyters in reference to the application of a majority of the Vestry of said Church for a dissolution of the pastoral connection.

Paper cover, price, $1. Cloth, $1.50.
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Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, JULY 18, 1873. No. 29.

PRINTED EVERY FRIDAY

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ONE COPY FOR ONE YEAR, THREE DOLLARS.

United States Supreme Court.

MARSHALL v. KNOX et al., Assignees.

A lessor obtained a writ of provisional seizure of goods on the premises leased, to enforce his claim for rent. The sheriff took possession. The lessee then filed a voluntary petition in bankruptcy. The bankrupt court upon rule to show cause, directed the sheriff to deliver the goods to the assignee in bankruptcy. The lessor was not allowed to appeal from the decree. The lessor then filed a bill in equity in the Circuit Court, praying that the assignee might be restrained from proceeding under said order, and from taking said goods, and for general relief. The Circuit Court refused to entertain the bill. The assignee took the goods and sold them. *Held*, on appeal to the Supreme Court:

1. The bill was an original proceeding, and the Circuit Court should have entertained it.
2. An appeal would lie from the action of the Circuit Court dismissing the bill.
3. The sheriff's right to the possession of the goods being founded on the lessor's lien thereon for his rent, was superior to the right of the assignee.
4. The lessor was entitled to the full value of the goods, to the amount of his rent clear of expenses, whether the assignee received such value or not.
5. An attachment by mesne process, referred to in the bankrupt act, is an original process of attachment, which becomes a perfected lien by the judgments which may ensue.
6. The District Court had no jurisdiction, upon rule to show cause, to direct the sheriff to deliver the goods to the assignee.

DECEMBER TERM, 1872.

Appeal from the Circuit Court of the United States for the district of Louisiana.

Mr. Justice BRADLEY delivered the opinion of the court.

Thomas D. Marshall, the appellant, was the owner of a plantation in the parish of Avoyelles, in Louisiana, known as the Walnut Grove Plantation, and on the 7th day of February, 1867, leased it to Nathan G. Smith and Henry Fuller for three years, from January 1st, 1867, at three thousand dollars a year, payable in two equal payments. At the end of the first year the tenants were in arrears $1,600, and on the fourth day of January, 1868, Marshall commenced an action therefor, in the District Court of the parish, and applied for and obtained a writ of provisional seizure (as it is called), being the usual process by which a lessor takes possession of his lessee's property found on the premises, for the purpose of enforcing his lien thereon. The writ was served by the sheriff on the sixth day of January, 1868, by serving a copy on the lessees, and by a seizure of their property in land, consisting of mules, wagons, farming implements and stock, grain, furniture, etc., appraised at $1,744.

On the 15th of January, 1868, Smith, one of the lessees, filed in the District Court of the United States for Louisiana, a petition to be declared a bankrupt, and was declared such accordingly; and on the 12th of February, 1868, the defendants were appointed the assignees to take the property aforesaid out of the hands of the sheriff, and to dispose of it under the orders of the bankrupt court. They first obtained from the court a rule upon the lessor (the complainant), and the sheriff to show cause why they should not deliver up the property to the assignees, alleging that various creditors of the bankrupt claimed to have a privilege on the property, and that it was necessary for a proper adjustment of all claims, privileges and liens, that the possession should be surrendered to the assignees, to be subject to the bankrupt court. The lessor contested the rule, stated his own rights and proceedings, and claimed possession of the property through the sheriff, for the purpose of selling the same to raise the amount by his rent. The rule, however, was made absolute, without, so far as appears, any other proof on the subject. The lessor appealed, but the district judge would not allow the appeal, and there was no justice of this court at that time (April, 1868) assigned to that circuit, to whom applications could be made. The lessor thereupon filed the present bill for an injunction to prohibit the assignees from proceeding under the said order of the bankrupt court, and from taking possession of said property, and for a decree that they be directed to pursue any residuary interest of the bankrupt in the lessor's suit, in the detaining and subjecting the property to the payment of his rent, and for further relief. Failing to obtain a preliminary injunction, and the property being taken and sold by the assignees, the lessor filed a supplemental bill, complaining of the illegality of the proceedings, asking for a review of the same, and for an account and damages. The bill and supplemental bill set out the lease, the provisional seizure, the proceedings in the bankrupt court and the acts of the assignees; and complained that the lessor was injured by a sacrifice of the property; and stated that before filing the original bill he had offered the assignees a bond, with sufficient sureties, to protect any persons claiming any superior liens to his on the property, if any such there were, which, however, he denied.

The defendants in their answer alleged that the lessees had a counter claim for repairs and permanent improvements, and that a number of hands employed on the plantation had a privilege for their wages superior to that of the lessor; but no proof of these facts was offered in the case.

The principal allegations of the complainant were proved and the defendants, on their part, adduced proof to show that they had acted in good faith under the orders of the bankrupt court, and that they had sold the property fairly, and held the proceeds for distribution, according to the rights of the parties in due course of the bankruptcy proceedings.

On hearing, the bill was dismissed for want of jurisdiction.

The first question is, whether this decree was rightly made, and is to be solved by reference to the second section of the bankrupt act. By this section it is declared that the Circuit Courts "shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case as in a court of equity." By a subsequent clause of the same section it is declared that said courts "shall have concurrent jurisdiction with the district courts, * * * * of all suits at law or in equity, * * * * by the assignee against any person claiming an adverse interest, or by such person against such assignee, touching any property, or rights of property, of said bankrupt, transferable to, or vested in such assignee."

The first clause confers upon the Circuit Courts that supervisory jurisdiction which may be exercised in a summary manner, in term or vacation, in court or at chambers, and upon the exercise of which this court has decided that it has no appellate jurisdiction. Morgan v. Thornhill, 11 Wall. 65.

The second clause confers jurisdiction by regular suit, either at law or in equity, in the cases specified; that is, in controversies between the assignee and persons claiming an adverse interest touching any property of the bankrupt.

The present case is in form a regular bill in equity, but it also asks a revision of the action of the District Court in the premises. As an original bill in equity it cannot stand if the District Court had no jurisdiction to proceed as it did, for the matter was already decided in that court. As a bill to review the proceedings and decision of the District Court, it was a very proper proceeding, and ought to have been entertained by the Circuit Court. The revisory jurisdiction of the Circuit Court may be exercised by bill as well as by petition, and as this bill complains of the action of the District Court and asks for a review and reversal thereof, the Circuit Court erred in dismissing it for want of jurisdiction. But regarded as a bill of review, we could not, according to our decision in Morgan v. Thornhill, entertain an appeal from the decision of the Circuit Court in the case.

The appeal, therefore, must be dismissed, unless it can be shown that the District Court proceeded without jurisdiction. If this were the case, then the bill may be regarded as an original bill, of which the Circuit Court clearly had jurisdiction, and the appeal to this court was properly taken.

The case here, then, depends on the question whether the District Court had jurisdiction to proceed by rule as it did. The goods, it has been seen, were in the custody of the sheriff, under a writ of provisional seizure, and held as a pledge for the suit of the lessor. The seizure had been made before the bankruptcy. The landlord claimed the right thus to hold possession of them until his claim for rent was satisfied. This claim was adverse to that of the assignee's. The case presented was one of conflicting claims to the possession of the goods; and the sheriff had present possession for the benefit of the lessor. Neither the sheriff nor the lessor was a party to the proceedings in bankruptcy. No process had been served upon them to make them such. They were not before the court; and the court had no control or jurisdiction over them.

Under these circumstances the assignees applied for, and obtained from the District Court, a rule on the lessor and sheriff to deliver the goods to them. Had the court authority to make such a rule? Could such a rule be characterized as due process of law?

The bankrupt law does not distinguish in what cases the District Court may proceed summarily, and in what cases by plenary suit; and we are left to decide the question on the general principles that affect the case. The second section, however, in conferring jurisdiction on the Circuit Courts, uses this language: "Said Circuit Courts shall also have concurrent jurisdiction with the District Courts of the same district of all suits at law or in equity, which may or shall be brought by the assignee in bankruptcy, against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt." This language seems to indicate that where there is a claim to an adverse interest in the property, a suit at law or in equity will be the mode of redress properly resorted to. The eighth section, in granting appeals and writs of error from the District to the Circuit Court, only does so in cases in equity and at law, and in cases where the claim of a creditor is allowed or rejected. If, therefore, adverse claims to property could be decided by the summary action of the District Court, not only would the party claiming adversely to the assignees be

deprived by trial by due process of law, but he would be without appeal. An appeal was, in fact, denied in this case.

We think that it could not have been the intention of Congress thus to deprive parties claiming property, of which they were in possession, of the usual processes of the law in defence of their rights.

The subject, in one of its aspects, came before this court in the case of Smith v. Mason, reported in 14 Wall. 419. In that case the adverse claim was to the absolute property of the fund in dispute; not, as in this, to a mere lien, and to possession by way of pledge under the lien; and we held that the bankrupt court could not, by a mere rule, make the adverse claimant a party to the bankruptcy proceedings and adjudge his right in a runaway boy, but that the assignees must litigate the claim in a plenary suit, either at law or in equity. But it may, with some plausibility, be said that as the property in this case is conceded to be in the bankrupt, and the question has respect only to the right of possession under the lien, the District Court, which has express jurisdiction of the "ascertainment and liquidation of the liens, and other specific claims," on the bankrupt's property, might assume control of the property itself. The claim, however, is to the right of possession, and that right may be just as absolute and just as essential to the interest of the claimant as the right of property in the thing itself, and is, in fact, a species of property in the thing, just as much the subject of litigation as the thing itself. It is the opinion of the court, therefore, that the case is not substantially different from that of Smith v. Mason. Besides, it has another point, in common with that case, upon which a direct adjudication was made thereon. The lessor in this case was not a party to the bankrupt proceeding; and in Smith v. Mason we held expressly that "strangers to the proceedings in bankruptcy, not served with process, and who have not voluntarily appeared and become parties to such litigation, cannot be compelled to come into court under a petition for a rule to show cause."

The court is of opinion, therefore, that the District Court proceeded without jurisdiction in compelling the lessor and the sheriff, under a rule, to show cause to deliver up possession of the goods in question to the assignees. It results that the bill in this case was properly filed as an original bill, and on that account should not have been dismissed as for want of jurisdiction. The case should have been heard and decided upon the merits.

We are, then, brought to the question of merits. If the complainant had no right to hold the goods, notwithstanding his claims to hold them, in an action at law against the assignees, he could have recovered only nominal damage; and, coming into a court of equity for redress and praying for an account of the value of the goods, and for damages, if it turn out that he had no right to withhold the goods from the possession of the assignee, the court would be very reluctant to compel the latter to place the value of goods in his hands to be relitigated in another suit. A court of equity having got possession of the case by the lessor's own act, must proceed to decide the whole merits of the controversy.

But we think it very clear that the complainant had a right to the possession which he claimed. The fourteenth section of the bankrupt act, it is true, vests in the assignees all the property and estate of the bankrupt, "although the same is then attached in mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of such proceedings." But this clause evidently refers to those cases of original process of attachment which may become perfected liens by the judgment which may ensue. The lessor's lien for rent on the goods of his tenant situated on the premises, is one of the strongest and most favored in the law of Louisiana. The articles of the civil code use the following language:

"The lessor has for the payment of his rent and other obligations of his lease, a right of pledge on the movable effects of the lessor, which are found on the property leased." Art. 2675.

"In the exercise of this right the lessor may seize the objects which are the subject of it, before the lessee takes them away, or within fifteen days after they are taken away, if they continue to be the property of the lessee, and can be identified." Art. 2679.

"The right which the lessor has over the products of the estate, and on the movables which are found on the place leased, for his rent, is of a higher nature than mere privilege. The latter is only enforced on the price arising from the sale of the movables to which it applies. It does not enable the creditor to take or keep the effects themselves specially. The lessor, on the contrary, may take the effects themselves and retain them until he is paid." Art. 3185.

When the rent accrues, or even before it is due, if the lessor apprehends that the goods may be removed, he may have a writ of provisional seizure to the sheriff, who by virtue thereof, takes possession of the goods and sells them in due course as soon as the court has recognized the amount of rent for which they are liable. Such a case is similar to that of an execution, in reference to which it has been properly held that where the levy is made before the commencement of the proceedings in bankruptcy, the possession of the officer cannot be disturbed by the assignees. The latter, in such case, is only entitled to such residue as may remain in the sheriff's hands after the debt for which the execution issued has been satisfied. Such, we think, were the relative rights of the parties in this case. If the assignee apprehended that the sheriff would, by delay or negligence, waste goods in his hands, he could either apply to the District Court of the parish for redress or aid in the premises, or perhaps file a bill in equity in the Circuit or District Court of the United States.

The next question is, what relief ought to be given to the complainant? The goods have been sold by the assignees. They cannot be returned in specie. The supplemental bill prays that the assignees be decreed to account to the complainant for the full value of the property, and also such sum of money as he might be entitled to receive by reason of the wrongful acts of the assignees in the premises, and for further relief. The bill, it must be remembered, was originally filed for an injunction to prevent the assignees from disturbing the complainant in his possession of the goods. He was not in laches in defending his rights. He is clearly entitled, under the circumstances of the case, to the full value of these goods, clear of all expenses, whether the assignees realized that full value or not (limited, of course, by the amount of rent which he is entitled to be paid), and also to all the taxable costs to which he has been put by this litigation. As to any damages beyond that, if he has suffered any, we think that he ought not to recover them in this suit, as he, or the sheriff for his benefit, had an option to bring an action of trespass for damages, instead of resorting to a court of equity for relief. Damages are allowed, it is true, in certain cases, as incidental to other relief; but even if they could in strictness be awarded in this suit, we do not think that the case is such as to call for the interpretation of the court in directing an inquiry as to damages.

The decree must be reversed, with directions to the court below to proceed in the cause in conformity with this opinion.

McNITT and TAINTOR v. TURNER.

1. The statute of Illinois, providing that as against a subsequent *bona fide* purchaser, a deed, &c., will take effect only from the time of its being recorded, includes a purchaser at a judicial sale.
2. The decree of a court having jurisdiction of the cause, cannot be impeached collaterally except for fraud.
3. A. conveyed certain real estate to B. After A.'s decease, his administrator, by order of court, sold the same property to C. as the estate of the decedent. B.'s deed was not at the time recorded: *Held*, C. took a good title.

DECEMBER TERM, 1872.

In error to the Circuit Court of the United States for the Southern District of Illinois.

Mr. Justice SWAYNE delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Southern District of Illinois.

The defendant in error brought two separate actions of ejectment in the court below, one against each of the plaintiffs in error. They were landlord and tenant, and by consent of the parties the actions were consolidated. The plaintiff recovered the premises in controversy. The defendants thereupon brought this writ of error.

The chain of title relied upon by the respective parties was as follows:

Turner gave in evidence a patent from the United States to Louis F. Lefay, dated October 23d, 1818; a deed from Lefay to Samuel Spotts, dated December 19th, 1818, and recorded in the proper county, March 22d, 1820; the proceedings of the Circuit Court of Adams county, in Illinois, touching a decree of sale made by that court upon the application of Archibald Williams as the administrator of Spotts, and a sale made accordingly; a deed by the administrator to Duncan N. Hennen, the purchaser, dated June 17th, 1839, recorded April 3d, 1841; and a chain of mesne conveyances extending from the heirs-at-law of Hennen down to Turner, the plaintiff in the court below.

The defendant gave in evidence a deed from Spotts to John Lucas, dated September 12th, 1820, recorded January 2d, 1864, and a sequence of deeds from Lucas down to McNitt, one of the plaintiffs in error. McNitt was in possession of the premises.

The court instructed the jury that Turner had shown title, and was entitled to recover. To this the defendants excepted.

The defendants then asked the court to instruct the jury.

That the deed from Spotts to Lucas and the subsequent deeds in that chain of title, conveyed the fee of the premises to McNitt:

That the deed from Spotts to Lucas having conveyed the premises to Lucas, Spotts did not die seized of them; that they were, therefore, not liable to be sold by his administrator for the payment of his debts, and that the decree of sale was void:

That Spotts having conveyed to Lucas before the proceeding in the Circuit Court of Adams county was instituted by Williams, no title passed by the deed of Williams to Hennen, and hence none by the subsequent mesne conveyances to Turner.

These instructions the court refused to give, and the defendants excepted.

A few remarks will be sufficient to dispose of this exception. All the instructions relate to the deed of Spotts to Lucas.

The decree of sale was made by the court at the September term, 1838. The sale to Hennen was made on the 17th of June, 1839. The deed of Williams to him was made on the 17th of June, 1839, and recorded April 3d, 1841. The deed from Spotts to Lucas, though made on the 12th of September, 1820, was not recorded until January 2d, 1864. The 22d section of statute of Illinois, in force at both these periods, and still in force, provides that "deeds and other instruments relating to or affecting title to real estate, shall be recorded in the county where such real estate is situated." The next section is as follows: "Sec. 23. All deeds, mortgages, or other instruments of writing, which are required to be recorded, shall take effect and be in force after the time of filing the same for record, *and not before* as to all creditors and *subsequent* purchasers, without notice, and all such deeds and title papers shall be adjudged *void* as to all such creditors *and subsequent purchasers without notice*, until the same shall be filed for record."

The term "purchasers" as used in this statute, includes purchasers at judicial sales. A deed not filed for record is as to them wholly without effect. It is in all respects, so far as they are concerned, as if it did not exist. The maxim applies, *De non apparentibus et de non existentibus eadem est ratio*. Martin v. Dryden, 1 Gil. 187; Center v. Root, 28 Ill. 367; Cooke v. Hall, 1 Gil. 575; see also Choteau v. Jones, 11 Ill. 300; Kennedy v. Northrup, 15 Ill. 148; Brookfield v. Goodrich, 32 Ill. 363.

Seisin was originally the completion of the feudal investiture. In American jurisprudence it means generally, owner-

ship. The covenant of seisin and the covenant of right to convey are synonymous. Rawle on Covenants for Title, 34; Browning v. Wright, 2 Bos. & P. 14; 1 Wash. on Real Prop., 35.

The deed from Spotts to Lucas cannot affect any question arising in the case, and must be excluded from consideration. All the instructions asked by the plaintiffs in error assumed its efficacy for the purposes to which they referred.

The instructions were therefore properly refused.

It is assumed in the assignment of errors, and in the printed arguments of the learned counsel for the plaintiffs in error, that the admission in evidence of the record from the Circuit Court of Adams county, was objected to, the objection overruled, and exception taken. No such exception appears in the record.

In an action of ejectment the plaintiff must recover, if at all, upon the strength of his own title. The weakness of his adversary's cannot avail him.

The only exception which remains to be considered is to the charge of the court, that the plaintiff had shown title in fee and was entitled to recover. That exception is thus set out in the record: "To which opinion and decision of the court the defendant then and there excepted, at the time of the said charge." The chain of the plaintiff's title, as exhibited on the trial, consisted of many links. The exception should have pointed out specifically the link or links deemed defective, and in what the defect was supposed to consist, in order that the court might be duly notified, and have an opportunity to correct the error, if any, into which it had fallen. The exception is insufficient. But this objection has not been insisted upon by the counsel for the defendant in error. We shall, therefore, consider the case as if the exception were sufficiently full and specific to meet the requirements of the rule upon the subject.

The objections taken to the title of the defendant in error are all confined to the judicial proceedings touching the sale by the administrator. Those objections, so far as it is necessary to consider them, are—

That the seisin of Spotts, at the time of his decease, is neither averred nor shown; and that the contrary appears.

That the authority to sell was given to Williams, the administrator, specially appointed, when the general administrator for the county should have been appointed, and the authority given to him; and that the description of the premises in the petition of the administrator is insufficient and a nullity.

It is insisted that these defects are jurisdictional, and that the proceeding was *coram non judice* and void.

The petition sets forth "that the said Samuel Spotts heretofore, to wit, before the first day of January, A. D. 1836, died, *leaving* in this State the real property described in the copy of the inventory marked Exhibit 'A,' filed herewith." The term *leaving* used in this connection is the synonym of *owning*. It is idiomatic rather than dialectic, and is believed to obtain in this sense throughout the country where so applied. This is sufficient. Such a petition need not follow the language of the statute and be drawn with the accuracy of an indictment. Nothing is required but the substance of what is necessary to be stated, intelligibly expressed. The deed of Spotts to Lucas is relied upon to disprove the seisin. That deed we have shown can have no such effect. The record of deeds in the proper office as it stood, showed the seisin of the decedent, and that was sufficient. No one was bound to look further, and it was conclusive upon all concerned.

It does not appear that Williams was not the public administrator, and if he were not, that there was any such officer for Adams county at that time. If there was not, the appointment of Williams was proper. Error must be shown. It is not to be inferred except where the inference is inevitable. Everything consistent with the record which would have warranted the appointment, will be presumed to have existed and to have been found and acted upon by the court. Conrad Schnell et al. v. The City of Chicago, 38 Illinois, 382. Acts done which presuppose the existence of other acts, to make them legally operative, are presumptive proofs of the latter. Bank U. S. v. Dandridge, 12 Wheat. 70. These views render it unnecessary to consider the construction of the statute contended for by the counsel for the defendant in error, whereby in effect, *and* would be substituted for "*or*;" and also the question whether the statute, not declaring an appointment made contrary to its provisions void, is not merely directory. Sedgwick on Stat. & Com. Law, 368. It was certainly within the jurisdiction of the court to decide both these points. The form of the letters issued to the general administrator, and to other persons when appointed, is the same. Gales' Stat., 702, sec. 62.

It is insisted that the description contained in the petition is so defective by reason of the omission to name the meridian east or west of which the land is situated, that its terms are equally applicable to another tract in another county. Admitting this to be so, it is averred in the petition, and shown by the evidence, that the tract in question belonged to Spotts, while no such fact appears as to the other tract, and it is not pretended that it exists. This is sufficient. The decree finds all the allegations of the petition to be true. Proof of the ownership by Spotts of the tract sold was admissible to locate the description upon the proper premises, and to remove the ambiguity which was found to exist. Doagher v. Purdy, 18 Illinois, 207. In that case, as in this, the meridian was omitted in the description, and the ambiguity was the same as here.

The land is correctly described in the schedule attached to the notice of the intended application to the court for authority to sell. This might be resorted to, if necessary, to supply the defect in the petition subsequently filed. Schnell v. Chicago, 38 Illinois, 383. It will be presumed that the land described in the petition is the same with that described in the notice, as the descriptions harmonize as far as the former extends. Under certain circumstances an averment fatally defective in a declaration may be remedied by a fuller averment in the replication. Lafayette Ins. Co. v. French, 18 How. 405.

It was proved upon the trial of this case that the premises are situated in the military bounty tract. We take judicial notice of the fact that this entire tract is situated between the Illinois and Mississippi rivers, and all of it west of the fourth principal meridian. This, also, identifies the land in question. White v. Herman, 51 Illinois, 245. The judicial proceedings are not defective in the particular under consideration.

The deed of the administrator to Hennen, made pursuant to the sale, is correct. No exception was taken to it. The fact that the report of the sale by the administrator, found in the clerk's office after his death, was not filed, approved, and recorded until the 30th of May, 1851, is unimportant. In Wheaton v. Sexton, 4 Wheat. 503, there had been a sale under execution and a deed by the marshal. The execution was never returned. This court said: "The purchaser depends upon the judgment, the levy and the deed. All other questions are between the parties to the judgment and the marshal. Whether the marshal sells before or after the return, whether he makes a correct return, or any return at all, to the writ, is immaterial to the purchaser, provided the writ was duly issued and the levy made before the return."

The notice was correct. Goudy v. Hall, 36 Ill. 313. This has not been seriously questioned. The word "recorded," in the sentence at the foot of the list of lands, is evidently a misprint for *situated*. It may be so read or regarded as surplusage. In either case the effect will be the same.

But there is a comprehensive and more conclusive answer to all the objections to the sale which have been considered, and to others suggested, which have not been adverted to.

Upon the filing of the notice with the proof of publication, and the subsequent filing of the petition of the administrator for authority to sell, the circuit court had jurisdiction of the case. No presumption on that subject is necessary. Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding being *coram judice*, can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error. The order of sale before us is within this rule. Grignon's Lessor v. Astor et al., 2 How. 319 was, like this, a case of a sale by an administrator. In that case (pp. 341, 342) this court said: "The purchaser under it is not bound to look beyond the decree. If there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error; and so where an appeal is given, but not taken, in the time allowed by law."

This case and the case of The Bank of the United States v. Vorhees, 10 Peters, 449, are the leading authorities in this court upon the subject. Other and later cases have followed and been controlled by them. Stow v. Kimball, 28 Ill. 93, affirms the same doctrine.

The judgment of the Circuit Court is affirmed.

Recent Decisions.

PENNSYLVANIA.

[Our thanks are due to P. F. Smith, Esq., State Reporter, for advance sheets of Vol. 20 of his reports (Vol. 70 Pa. State Reports). We make the following selections from them.]

HARRIS v. HARRIS.

1. The measure of damages for breach of a parol contract to convey land, is the consideration and compensation for improvements in reliance on the contract, deducting a reasonable rental of the premises; except when there has been fraud on the part of the vendor in the *original contract*.

2. Failure to convey is not such fraud, although the vendor had power to convey.

3. A vendor by parol agreed to convey land; the vendee paid the purchase money, went into possession and was evicted by a subsequent vendee under articles from the same vendor. In an action by the first vendee against the vendor for breach of the contract more than five years afterwards: *Held*, that the limitation in the 6th section of act of April 22d, 1856, was not a bar.

4. The vendor continuing to promise to convey until his agreement to sell to the other vendee, there was no breach of the contract until then.

5. The vendee being in possession under the contract, was not guilty of laches in not demanding a conveyance or damages for refusal.

6. Clark v. Trindle, 2 P. F. Smith, 492, analogous.

November 13th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Fayette county: No. 58, to October and November Term, 1871.

CHADWICK et al. v. OBER et al.

1. A scire facias was issued against four, and returned "nihil" as to three; the one served filed an affidavit of defence to the action as to all. An alias scire facias was issued against the three, and returned "nihil." Judgment was taken against the three and was set aside. The defendant served pleaded, the other three pleaded a separate plea, the plaintiff took a writ of error to setting aside the judgment. *Held*, that a writ of error would not lie.

2. The action was an unit, and there should be final judgment before a writ of error would lie.

November—1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the court of Common Pleas of Venango county: No. 103, to October and November Term, 1871.

LEGAL GAZETTE.

Friday, July 18, 1873.

JOHN H. CAMPBELL,
EDITOR.

THEODORE F. JENKINS,
ASSOCIATE EDITOR.

THE JUDICIARY ARTICLE.

The following are the remaining sections of the judiciary article as passed by the Constitutional Convention on second reading:

SECT. 27. In the cities of Pittsburgh and Allegheny, there shall be but one alderman to every 10,000 inhabitants. Districts of as nearly equal population as may be, and formed of compact and contiguous territory, shall be established in a manner to be prescribed by law, in each of which districts but one alderman shall be elected, reside and hold office. Their term of office shall be five years. They shall be compensated only by fixed salaries, to be determined and paid by the city in which they shall hold office. They shall exercise such jurisdiction and powers as are now exercised by aldermen in said cities, excepting as the same may be changed or modified by law: *Provided*, That their civil jurisdiction shall not be increased to amounts exceeding one hundred dollars.

All fees and perquisites received by said aldermen shall be paid by them into the treasury of the city in which they hold office, and be accounted for in such manner as may be provided by law.

SECT. 28. All laws relating to courts shall be general, and of uniform operation, and the organization, jurisdiction and powers of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process and judgments of such courts shall be uniform, and the Legislature is hereby prohibited from creating other courts to exercise the powers vested by this constitution in the judges of the Courts of Common Pleas and Orphans' Courts.

SECT. 29. It shall be the duty of the Supreme Court, as soon as practicable, and within one year after this constitution shall take effect, and from time to time thereafter, as may be necessary, to provide rules and regulations for a general system of practice in all the courts of record of the State, which shall be uniform in all courts of the same class or grade, and shall not be changed except by the Supreme Court: *Provided*, That special rules may be provided for cities exceeding one hundred thousand inhabitants, and special rules may be added thereto by the presiding judge in any judicial district, with the consent and approval of the Supreme Court.

SECT. 30. The parties by agreement filed, may in any civil case dispense with the trial by jury, and submit the decision of such case to the court having jurisdiction thereof, and such court shall hear and determine the same. The evidence taken, and the law as declared, shall be filed of record, with right of appeal from the final judgment, as in other cases, and with like effect as appeals in equity.

SECT. 31. The Legislature shall have authority to abolish the office of associate judge, after the term of office of the present incumbents shall have expired.

SECT. 32. Whenever a county shall contain 40,500 inhabitants, it shall constitute a separate judicial district, and shall elect one judge, learned in the law, and the Legislature shall provide for additional judges, as the business of the said districts may require. Counties containing a population less than is sufficient to constitute separate districts, shall be formed into convenient single districts, or if necessary, may be attached to contiguous districts, as the Legislature may provide. The office of associate judge not learned in the law, is abolished excepting in counties not forming separate districts, but the several associate judges in office when this constitution shall be adopted, shall serve for their unexpired terms.

New York.

THE UNITED STATES v. SUSAN B. ANTHONY.

1. The thirteenth, fourteenth and fifteenth amendments to the Constitution of the United States were designed mainly for the protection of the newly emancipated negroes, but full effect must be given to the language employed.
2. The fourteenth amendment created and defined citizens of the United States, and provided that no State should abridge their privileges or immunities.
3. The rights of citizens of the States as such, are not affected by either of the said amendments.
4. Each State has the right to enact what shall be the qualifications of its voters, provided, that electors of representatives in Congress shall have the qualifications requisite for electors of the most numerous branch of the State Legislature, and that the right of a citizen of the United States to vote shall not be denied or abridged on account of race, color or previous condition of servitude.
5. The statute of New York limiting the right to vote to the male sex, is constitutional.
6. Though to constitute a crime there must be a criminal intent, knowledge of the facts of the case supplies the intent.
7. On the trial of a criminal case, the facts being undisputed and the case clearly proved, the court may direct the jury to find a verdict of guilty.

Opinion by Mr. Justice HUNT.

The defendant is indicted under the act of Congress of 1870, for having voted for representatives in Congress in November, 1872. Among other things that act makes it an offence for any person knowingly to vote for such representatives without having a right to vote. It is charged that the defendant thus voted, she not having a right to vote, because she is a woman. The defendant insists that she has a right to vote; that the provision of the constitution of this State limiting the right to vote to persons of the male sex is in violation of the fourteenth amendment of the Constitution of the United States, and is void.

The thirteenth, fourteenth and fifteenth amendments were designed mainly for the protection of the newly emancipated negroes, but full effect must, nevertheless, be given to the language employed. The thirteenth amendment provided that neither slavery nor involuntary servitude should longer exist in the United States. If honestly received and fairly applied, this provision would have been enough to guard the rights of the colored race. In some States it was attempted to be evaded by enactments cruel and oppressive in their nature; as that colored persons were forbidden to appear in the towns except in a menial capacity; that they should reside on and cultivate the soil without being allowed to own it; that they were not permitted to give testimony in cases where a white man was a party. They were excluded from performing particular kinds of business, profitable and reputable, and they were denied the right of suffrage. To meet the difficulties arising from this state of things, the fourteenth and fifteenth amendments were enacted.

The fourteenth amendment created and defined citizenship of the United States. It had long been contended and had been held by many learned authorities, and had never been judicially decided to the contrary, that there was no such thing as a citizen of the United States, except as that condition arose from citizenship of some State. No mode existed, it was said, of obtaining a citizenship of the United States except by first becoming a citizen of some State. This question is now at rest. The fourteenth amendment defines and declares who shall be citizens of the United States, to wit: All persons born or naturalized in the United States and subject to the jurisdiction thereof. The latter qualification was intended to exclude the children of foreign representatives and the like. With this qualification every person born in the United States or naturalized, is declared to be a citizen of the United States and of the State wherein he resides.

After creating and defining citizenship of the United States, the amendment provides that no State shall make or enforce any law which shall abridge the privileges or immunities of *the citizens of the United States*. This clause is intended to be a protection, not to all our rights, but to our rights as citizens of the United States only; that is, to rights existing or belonging to that condition or capacity. [The words "or citizen of a State," used in the previous paragraph, are carefully omitted here.]

In article 4, paragraph 2, of the Constitution of the United States, it had been already provided in this language, viz., "the citizens of each State shall be entitled to all the privileges and immunities of the citizens in the several States." The rights of citizens of the States and of citizens of the United States are each guarded by these different provisions. That these rights are separate and distinct was held in the "slaughter-house cases," recently decided by the United States Supreme Court at Washington.

The rights of citizens of the State as such are not under consideration in the fourteenth amendment. They stand as they did before the adoption of the fourteenth amendment, and are fully guaranteed by other provisions. The rights of citizens of the States have been the subject of judicial decision on more than one occasion. Corfield v. Coryell, 4 Wash. C. C. R. 371; Ward v. Maryland, 12 Wall. 430; Paul v. Virginia, 8 Wall. 140. These are the fundamental privileges and immunities belonging of right to the citizens of all free governments, such as the right of life and liberty; the right to acquire and possess property, to transact business, to pursue happiness in his own manner, subject to such restraint as the government may adjudge to be necessary for the general good. In Cromwell v. Nevada, 6 Wallace, 36, is found a statement of some of the rights of a citizen of the United States, viz.: "To come to the seat of the government to assert any claim he may have upon the government; to transact any business he may have with it; to seek its protection; to share its offices; to engage in administering its functions. He has the right of free access to its seaports through which all operations of foreign commerce are conducted; to the sub-treasuries, land offices and courts of justice in the several States." Another privilege of a citizen of the United States, says Miller, Justice, in the "slaughter-house cases," is to demand the care and protection of the Federal government over his life, liberty, and property, when on the high seas or within the jurisdiction of a foreign government. The right to assemble and petition for a redress of grievances, the privilege of the writ of habeas corpus, he says, are rights of the citizen guaranteed by the Federal Constitution.

The right of voting, or the privilege of voting, is a right or privilege arising under the constitution of the State, and not of the United States. The qualifications are different in the different States. Citizenship, age, sex, residence, are variously required in the different States, or may be so. If the right belongs to any particular person, it is because such person is entitled to it by the laws of the State where he offers to exercise it, and not because of citizenship of the United States. If the State of New York should provide that no person should vote until he had reached the age of 31 years, or after he had reached the age of 50, or that no person having gray hair or who had not the use of all his limbs, should be entitled to vote, I do not see how it could be held to be a violation of any right derived or held under the Constitution of the United States. We might say that such regulations were unjust, tyrannical, unfit for the regulation of an intelligent State; but if the rights of a citizen are thereby violated, they are of that fundamental class, derived from his position as a citizen of the State, and not those limited rights belonging to him as a citizen of the United States, and such was the decision in Corfield v. Coryell, supra.

The United States rights appertaining to this subject are those first under article 1, paragraph 2, of United States Constitution, which provides that electors of representatives in Congress shall have the qualifications requisite for electors of the most numerous branch of the State Legislature; and second, under the fifteenth amendment, which provides that the right of a citizen of the United States to vote shall not be denied or abridged by the United States, or by any State on account of race, color or previous condition of servitude. If the Legislature of the State of New York should require a higher qualification in a voter for a representative in Congress than is required for a voter for a member of Assembly, this would, I conceive, be a violation of a right belonging to one as citizen of the United States. That right is in relation to a Federal sub-

ject or interest, and is guaranteed by the Federal Constitution. The inability of a State to abridge the right of voting on account of race, color, or previous condition of servitude, arises from a Federal guaranty. Its violation would be the denial of a Federal right; that is, a right belonging to the claimant as a citizen of the United States.

This right, however, exists by virtue of the fifteenth amendment. If the fifteenth amendment had contained the word "sex," the argument of the defendant would have been potent. She would have said an attempt by a State to deny the right to vote because one is of a particular sex, is expressly prohibited by that amendment. The amendment, however, does not contain that word. It is limited to race, color, or previous condition of servitude. The Legislature of the State of New York has seen fit to say that the franchise of voting shall be limited to the male sex.

In saying this, there is, in my judgment, no violation of the letter or of the spirit of the fourteenth or of the fifteenth amendment.

This view is assumed in the second section of the fourteenth amendment, which enacts that if the right to vote for Federal officers is denied by any State to any of the male inhabitants of such State, except for crime, the basis of representation of such State shall be reduced in a proportion specified. Not only does this section assume that the right of male inhabitants to vote was the special object of its protection, but it assumes and admits the right of a State, notwithstanding the existence of that clause under which the defendant claims to the contrary, to deny to classes or portions of the male inhabitants the right to vote, which is allowed to other male inhabitants. The regulations of the suffrage is thereby conceded to the States as a State's right.

The case of Myra Bradwell, decided at the recent term of the Supreme Court of the United States, sustains both of the positions above put forth, viz.: First, that the rights referred to in the fourteenth amendment are those belonging to a person as a citizen of the United States and not as a citizen of a State; and second, that a right of the character here involved is not one connected with citizenship of the United States. Mrs. Bradwell made application to be admitted to practice as an attorney and counsellor at law, in the courts of Illinois. Her application was denied, and upon appeal to the Supreme Court of the United States, it was there held that to give jurisdiction under the fourteenth amendment, the claim must be of a right pertaining to citizenship of the United States, and that the claim made by her did not come within that class of cases. Mr. Justice Bradley and Mr. Justice Field held that a woman was not entitled to a license to practice law. It does not appear that the other judges passed upon that question. The fourteenth amendment gives no right to a woman to vote, and the voting by Miss Anthony was in violation of law.

If she believed she had a right to vote, and voted in reliance upon that belief, does that relieve her from the penalty? It is argued that the knowledge referred to in the act relates to her knowledge of the illegality of the act, and not to the act of voting; for it is said that she must know that she voted. Two principles apply here: First, ignorance of the law excuses no one; second, every person is presumed to understand and to intend the necessary effects of his own acts. Miss Anthony knew that she was a woman, and that the constitution of this State prohibits her from voting. She intended to violate that provision—intended to test it, perhaps, but certainly intended to violate it. The necessary effect of her act was to violate it, and this she is presumed to have intended. There was no ignorance of any fact, but all the facts being known, she undertook to settle a principle in her own person. She takes the risk, and she cannot escape the consequences. It is said, and authorities are cited to sustain the position, that there can be no crime unless there is a culpable intent; to render one criminally responsible, a vicious will must be present. A. commits a trespass on the land of B., and B., thinking and believing that he has a right to shoot an intruder upon his premises, kills A. on the spot. Does B.'s misapprehensions of his rights justify his act? Would a judge be justified in charging the jury that if satisfied that B. supposed he had a right to shoot A., he was justified, and they should find a verdict of not guilty? No judge would make such a charge. To constitute a crime, it is true, that there must be a criminal intent, but it is equally true that knowledge of the facts of the case is always held to supply this intent. An intentional killing bears with it evidence of malice in law. Whoever, without justifiable cause, intentionally kills his neighbor, is guilty of a crime. The principle is the same in the case before us, and in all criminal cases. The precise question now before me has been several times decided, viz.: that one, illegally voting was bound and was assumed to know the law, and that a belief that he had a right to vote, gave no defence, if there was no mistake of fact Hamilton v. The People, 57th of Barbour, p. 625; State v. Boyet, 10th of Iredell, p. 336; State v. Hart, 6th Jones, 389; McGuire v. State, 7 Humphrey, 54; 15th of Iowa Reports, 404. No system of criminal jurisprudence can be sustained upon any other principle. Assuming that Miss Anthony believed she had a right to vote, that fact constitutes no defence if in truth she had not the right. She voluntarily gave a vote which was illegal, and thus is subject to the penalty of the law.

The judge directed the jury to find a verdict of guilty.

On the second day thereafter a motion for a new trial was made, and argued by Henry R. Selden, Esq., the counsel for Miss Anthony. In deciding this motion, Judge Hunt further said:

The whole law of the case has been reargued, and I have given the best consideration in my power to the arguments presented. But for the evident earnestness of the learned counsel for the defendant, for whose ability and integrity I have the highest respect, I should have no hesitation. Still I can entertain no doubt upon any point in the case. I do not doubt the correctness of my decision, that the defendant had no right to vote, and that her belief that she had a right to vote, she knowing all the facts, and being presumed and bound to know the law, did not relieve her from the penalty for voting, when in truth she had no right to vote.

The learned counsel, however, insists that an error was committed in directing the jury to render a verdict of guilty. This direction, he argues, makes the verdict that of the court and not of the jury, and it is contended that the provisions of the constitution looking to and securing a trial by jury in criminal cases have been violated.

The right of trial by jury in civil as well as in criminal cases, is a constitutional right. The first article of the constitution of the State of New York provides that "the trial by jury in all cases, in which it has been heretofore used, shall remain inviolate forever." Article 7 of the Constitution of the United States contains a similar provision. Yet in cases when the facts are all conceded, or when they are proved and uncontradicted by evidence, it has always been the practice of the courts to take the case from the jury, and decide it as a question of law. No counsel has ever disputed the right of the court so to do. No respectable counsel will venture to doubt the correctness of such practice, and this in cases of the character which are usually submitted to a jury. People v. Cook, 4 Seld. 67; Godwin v. Bk. of Com., 6 Duer. 76. The right of a trial by jury in a criminal case is not more distinctly secured than it is in a civil case. In each class of cases this right exists only in respect of a disputed fact. To questions of fact the jury respond. Upon question of law the decision of the court is conclusive, and the jury are bound to receive the law, as declared by the court. The People v. Bennett, 49 N. Y. R. 141.

Such is the established practice in criminal as well as in civil cases, and this practice is recognized by the highest authorities. It has been so held by the old Supreme Court and by the present Court of Appeals of this State.

At a Circuit Court of the United States, recently held by Judges Woodruff and Blatchford, upon deliberation and consultation it was decided that in a criminal case the court was not bound to submit the case to the jury, there being no sufficient evidence to justify a conviction, and the court accordingly instructed the jury to find a verdict of not guilty. See the case of Fullerton.

The district attorney now states that on several occasions, since he has been in office, Judge Hall, being of opinion that the evidence did not warrant a conviction, has directed the jury to find a verdict of not guilty.

In the recent case of The People v. Bennett, 49 N. Y. R. 137, the Court of Appeals of the State of New York, through its chief justice, uses the following language: "Contrary to an opinion formerly prevailing, it has been settled that the juries are not judges of the law, as well as the facts, in criminal cases, but that they must take the law from the court. All questions of law during the trial are to be determined by the court, and it is the duty of the jury to regard and abide by such determination. * * * I can see no reason, therefore, why the court may not, in a case presenting a question of law only, instruct the jury to acquit the prisoner, or to direct an acquittal and enforce the direction, nor why it is not the duty of the court to do so. This results from the rule that the jury must take the law as adjudged by the court, and I think it is a necessary result." See pp. 141, 142.

In these cases the direction of the court in each instance was, not as in this case against the defendant, but that a verdict of not guilty be rendered. But the counsel for defendant expressly admits that the authority which justifies a direction to acquit will, in a proper case, justify a direction to convict; that it is a question of power, and if the power may be exercised in favor of the defendant, it may be exercised against him. As I now state this proposition, the counsel again signifies his assent. The reason given by Chief Justice Church in the case just cited, shows that there is no distinction between the cases in this respect. He says the rule results from the principle "that the jury must take the law from the court." P. 142. The duty of the jury to take the law from the court is the same, whether it is favorable to the defendant, or unfavorable to him.

It is laid down in "Colby on Criminal Law," § 125, that no jury shall in any case be compelled to give a general verdict, so that they find the facts and request the court to give judgment thereon. 2 R. S. 421, § 135.

"A special verdict is given when the jury find certain facts to exist, and leave the court to determine whether, according to law, the prisoner is guilty."

"It is not necessary that the jury should, after stating the facts, draw any legal conclusion. If they do so, the court will reject the conclusion as superfluous, and pronounce such judgment as they think warranted by the facts." Ib. Colby, § 125.

All the authorities tend to the same result. It is the duty of the jury to act upon the facts. It is the duty of the court to decide the law. The facts being specially found by the jury, it is the duty of the court, and not of the jury, to pronounce the judgment of guilty or not guilty. The facts being fully conceded, it is the duty of the court to announce and direct what the verdict shall be, whether guilty or not guilty.

I cannot, therefore, doubt the power and the duty of the court, to direct a verdict of guilty, whenever the facts constituting guilt are undisputed.

In the present case, the court had decided as matter of law, that Miss Anthony was not a legal voter. It had also decided as matter of law, that knowing every fact in the case, and intending to do just what she did, she had knowingly voted, not having a right to vote, and that her belief did not affect the question. Every fact in the case was undisputed. There was no inference to be drawn or point made on the facts, that could by possibility alter the result. It was therefore not only the right, but it seems to me upon the authorities, the plain duty of the judge to direct a verdict of guilty. The motion for a new trial is denied.

The defendant was thereupon sentenced to pay a fine of $100 and the costs of the prosecution.

District Court of Philad'a.

SPENCE v. WALLACE.

1. Goods purchased by a married woman having no separate estate, with money loaned to her, are subject to levy by her husband's creditors.
2. The act of April 3d, 1872, includes only the "earnings" of a married woman, it can not be construed to include borrowed money.

Opinion by LYND, J. Delivered July 12th, 1873.

This was a feigned issue upon a sheriff's interpleader. The plaintiff was the wife of the defendant in the execution. She borrowed money and bought therewith the goods levied upon. She had no separate estate. The jury rendered a verdict for the plaintiff, subject to the opinion of the court upon the following reserved question: Whether goods purchased by a married woman who has no separate estate, with money loaned to her, are subject to levy by the creditors of her husband.

Bucher v. Rean, 18 P. F. S. 421, seems to settle this question against the plaintiff. But her counsel points to the act of April 3d, 1872, Brightley's Dig. 1010, §§ 38, 39. "The separate earnings of any married woman of the State of Pennsylvania."

He contends that money borrowed by a married woman, though not upon the credit of her separate estate, is protected from her husband's creditors, by the letter of this legislation. But by the letter of the act "separate earnings" alone are protected. Unless "separate earnings" and "borrowed money" are identical, the letter of the act does not help the plaintiff. That which one earns is entirely different from that which one borrows, is too clear for ratiocination. The clause "whether said earnings shall be as wages for labor, salary, property, business or otherwise," even if much less inelegant and obscure than it is, does not enlarge the operation or scope of the main sentence. The thing comprehended is still "earnings." nothing else. To amplify here would be to waste time.

But again, he contends that the purpose of the act was to still further break down the common law disabilities of married women, and to make her separate earnings, her separate property, free from the control of her husband and of his creditors, and that moneys advanced to her by her friends, to enable her to go into business, and to thus acquire profits or earnings, are as well entitled to protection as are such profits or earnings.

But this view overlooks the fact that a wife, can have no separate credit. For what she borrows, with the concurrence of her husband, he is liable. Personally she is not liable for money loaned to her, although her separate estate, if any, and if properly pledged, may be liable. Robinson v. Wallace, 3 Wr. 129. Why should she have an independent control of that which she acquires at his expense? Why should his other creditors be shut out from such property, when this creditor can come in upon his general property? It was probably because of this that the Legislature did not frame the act, so that "moneys loaned" to a married woman would be clearly within the letter of it.

This would be holding the door for fraud so wide as to imply invitation to enter. Should the law lead its subject into temptation?

It may be, too, that public policy dictated the omission. A failing debtor could contrive many indirect modes of getting his money into the hands of a friend, if that money could be loaned to his wife and be used in business by her, free from the reach of his creditors. Detection by the latter would be almost impracticable.

But even though no reason could be assigned why moneys loaned to a feme covert should not become her separate property, as absolutely as her separate earnings become so under the act in question, we should still deem it our duty, inasmuch as the two things are distinct and independent, to refuse to adopt the construction contended for by the plaintiff. Legislative and judicial functions must not be confounded. If it was the intent of the lawmakers to protect moneys loaned to a wife, let them cause it to be so written.

Judgment for defendant on the point reserved.

Charles H. Downing, Esq., for claimant.

Thomas J. Diehl, Esq., for execution plaintiff.

BEDFORD v. JONES.

A lease contained a covenant that the lessee should "not assign the lease." The lessee with the consent of the lessor, did assign it. *Held*, a surety to the lease was thereby discharged.

Opinion by LYND, J. Delivered July 12th, 1873.

This was an action of covenant against a surety in a lease. The lease contained the following covenant: "The lessee promises the lessor to pay the rent punctually, as above provided for, and during the term to keep, and at the end thereof, or sooner determination of this lease, peaceably deliver up the premises in good order and repair, reasonable wear and tear and damage by accidental fire excepted, and *not to assign this lease*, nor underlet the premises, or any part thereof.

It was not disputed on the trial that the lessee had assigned the lease; that the lessor had approved of said assignment; that the defendant had never consented to it. The breach was non-payment of rent, accrued after the abandonment of the premises, by the assignee of the lessee.

The jury found a verdict for the plaintiffs, subject to the opinion of the court, upon the following reserved question: "Whether the approval by the lessor of the assignment of the lease by the lessee, discharged the surety of the latter?"

That any change by the primary parties to a contract of the terms thereof, without the consent of the surety, is presumed to be injurious to and operate as a discharge of the latter, is the settled law of England. Bonar v. McDonald, 3 H. of L. Cas. 226; and of the United States, Miller v. Stewart, 9 Wheat. 680.

We think too that this is the law of Pennsylvania. Hibbs v. Rue, 4 Barr, 348; Corson v. McAfee, 8 Wr. 289.

By the terms of the lease, it was not to be assigned by the lessee. The lessor and lessee subsequently altered this provision, that is, the latter assigned the lease and the former approved of the assignment. This may not have impaired the capacity of the lessee to pay the rent as it fell due; it may in fact have contributed to his capacity to do so; but the law enters into no such investigation; if by any possibility the change in the contract might be prejudicial to the surety the latter is discharged.

It is certainly easier to pay one dollar than to pay two dollars—it requires greater resources to pay the rent of two buildings than of one building. And in this more difficult of these predicaments, a lessee who assigns his lease is very likely to stand. But is it the law that his surety must *nolens volens* stand with him? We have not been able to reach such a conclusion.

But plaintiff's counsel refers us to Gilbert v. Henck, 6 C. 205. In this case the lease contained a provision that the lessee should not assign without the consent of the landlord; and an assignment by the lessee with his consent was held not to discharge the surety. His honor, Justice, Agnew, Reigert v. White, 2 P. F. S. 441, says of Gilbert v. Henck, it may be remarked it stands upon the very confines, if at all within the contract of guarantee as commercially and legally understood. * * *

The opinion of the learned judge in that case refers to no authorities and gives no reasons, simply stating that the writing was a guarantee. The case of Sherman v. Roberts, 1 Grant 261, decided only three years before, is almost in direct antagonism; while in Allen v. Hubert, 13 Wr. 259, Gilbert v. Henck, is directly referred to as unnecessarily deciding the question of guarantee, and as leaving Marburger v. Potts, 4 H. 9, unshaken.

Whether as the learned judge "refers to no authorities, and gives no reasons, but simply states" that the assignment there in question did not discharge the guarantee, his conclusion upon that branch of the case may not be open to exception, it is not necessary here to consider.

It is enough to say that the lease under consideration provided there should be no assignment of it. That an assignment of it was an alteration of the contract by the lessor and lessee is too clear for argument. It required that both their minds should come together, just as in the making of the original contract. It let a different person into possession of the premises; it gave the lessor a right of action against the latter; and the goods of the lessee were not liable to distress for the rent thereafter accruing.

That it was in fact prejudicial to the surety, it is not necessary for him to establish; it is very plain, however, that the assignee of the lessee assumed the duty of occupying the premises and paying rent therefor till the end of the term; that his failure to do so, left the liability for said rent upon the lessee, and it may be assumed that upon the faith of his assignee's undertaking, he involved himself in additional liability elsewhere for house rent. The surety may very well say to the lessor, when I became surety, I trusted that your lessee would continue to occupy your premises as long as he should not be permitted to assign his lease, and that he could and would pay the rent as long as he should continue to occupy them; but I did not contemplate that he should assume the liability for the rent of another house, or that practically he should become surety for another occupant of your premises, nor that his resources were sufficient to justify his incurring such additional obligations. The terms of your contract with the lessee justified the trust and contemplation just expressed. Without your becoming a party to the assignment, this trust and contemplation would not have been defeated. You did not consult me, and for the result you have yourself only to blame.

We are not able to see any sufficient answer to this.

Judgement for the defendant on the point reserved.

STEWART v. AUSTIN.

1. A defendant in ejectment is not barred from contesting the validity of a will admitted to probate more than five years, he having by action, notwithstanding the will, obtained the property in dispute within the five years.
2. A will devising real estate may be contested either by an issue *devisavit vel non* or by ejectment

Rule for a new trial.

Opinion by BRIGGS, J. Delivered July 12th, 1873.

There will have to be a new trial in this case. It was thought at the trial, that the act of April 22d, 1856, gave conclusive effect to the will of Susan Beam, bearing date December 9th, 1863, and admitted to probate the fifteenth of the same month, because it had not been contested by *caveat* within five years, as provided by the act, notwithstanding the defendant had, within five years, recovered the premises in an action of ejectment, of the defendant's grantor, who claimed the same under another will of the said Susan Beam, bearing date April 2d, 1863, though not admitted to probate.

The usual office of a *caveat* is to stop the proof of the will. But the word "*caveat*," as used in this act, cannot mean that, for the act does not require the *caveat* to be filed till after the probate of the will. The words are: "That the probate by the register of the proper county, of any will devising real estate, shall be conclusive as to such realty, unless, within five years from the date of such probate, those interested to controvert it, shall, by *caveat* and action at law duly pursued, contest the validity of such will as to such realty," &c.

What, then, does it mean? It seems to us, the proper construction is this, that when a person means to claim the devised land through the devisor, and in order to do so must contest the will, he will have to do so within five years from the time of its probate, or be forever thereafter debarred. If the devisee is not in possession, then by an issue *devisavit vel non*, and proceedings thereon duly prosecuted within five years. If, however, the devisee is in possession, the act does not prohibit the adverse party from contesting the devisee's title by an action in ejectment. Indeed, the act takes away none of the remedies existing at the time of its passage. It merely limits a period within which those remedies should be invoked. The defendant having recovered the land within the five years, notwithstanding the will, he is clearly not within the prohibition of the statute, and being in possession at the time the plaintiff acquired title, such possession was at least constructive notice to the plaintiff of the defendant's

title, which affected him alike with his grantor.

Nor can the position assumed by the plaintiff, that it is now too late for the defendant to question the will, avail him. The defendant is not doing so. He stands and defends upon his title as established by his verdict and judgment. That verdict and judgment gave him the possession of the land, and will protect him till they shall be impeached by the plaintiff. The defendant having succeeded, notwithstanding the will, the burden is now cast upon the plaintiff to sustain it, and until he do so, the defendant will be protected by the triumph he has gained.

Rule absolute.

COMMONWEALTH et al. v. KEIL et al.

An administrator filed his account in which he had confused the funds arising from the sale of the real and personal estate. The Orphans' Court adjudged what balance remained after allowing expenses and the payment of decedent's debts. In a suit against the sureties on the bond given by the administrator for the proper distribution of the proceeds of the sale of the real estate, *Held:*

1. It would be presumed in absence of evidence to the contrary that the personal estate was first exhausted before the fund arising from the real estate was used.
2. The sureties were liable to the distributees for the balance found due by the administrator.

Rule for a new trial.

Opinion by BRIGGS, J. Delivered July 12th, 1873.

It is alleged by the counsel for the sureties of the administrator, upon the authority of the case of the Commonwealth v. Hilgert, 5 P. F. Smith, 236, that the admission of the record of the Orphans' Court, showing an adjudication in the plaintiffs' favor, was erroneous, because the record showed a confusion of the proceeds arising from the sale of the real and personal astate.

The auditor, however, restated the account, by charging the administrator with the amount of the proceeds of the real and personal property, and credits him with the debts he proved he had paid; and a further credit of the debts proved and allowed to divers creditors who had not then been paid. He then awards the balance to the residuary distributees of the estate, among whom were the plaintiffs. The amount awarded to them is the exact balance after exhausting the entire proceeds of the personalty, and so much of the realty as were required to pay the balance of the decedent's debts.

But it is argued, that the record does not show that the money appropriated in payment of the debts, was not taken entirely from the proceeds of the real estate.

That is true, nor does it show that it was, or any part of it, until the personalty had been exhausted for that purpose. And the law casts the duty upon the administrator to exhaust the proceeds of the personalty before having recourse to those of the realty, and where debts are shown to be paid (as was the case here), greater than the amount of the personal proceeds, the presumption is, that they were paid in the order, and out of the specific fund first liable for their payment. This presumption continues till overcome by evidence to the contrary. There was no evidence, or offer of evidence on the part of the defendants, that such was not the case.

Nor can we see how it can benefit the defendants to concede that the administrator took the proceeds of the real estate for the payment of debts, when he had in his hands personal proceeds for that purpose. Such would be a violation of his duty to the plaintiffs, for he held that money, as was said by the court in McCoy v. Scott, 2 R. 222, "not absolutely, but *submodo*" for the payment of debts. He held so much of this money not required to pay debts expressly for the plaintiffs. And it surely was no answer to the plaintiffs to allege, "true, the administrator had personal assets in his hands with which to pay the debts; but he has embezzled them, and has taken the money which otherwise would come to you to replace them."

The reply to such an allegation is, "that is none the less a wrong to the plaintiffs, and is just such a breach of duty on the part of the administrator as renders him and his sureties liable to them." The error which the sureties have fallen into, is in supposing that because the real estate may be taken to pay debts even when the administrator had sufficient personal assets to pay them, but which he had embezzled, that, therefore, the sureties are relieved upon showing their actual payment out of the real assets. Not at all, for the equity of the decedent's creditors is superior to that of his heirs, and they must be paid, though the heirs get nothing.

But, as against the administrator, who wrongfully takes the money to pay them, which would otherwise come to the heirs, such default is just as glowing and inexcusable as if he had appropriated it to his own use, when there were no debts. In such case, it would be relieving himself of the first wrongful appropriation by perpetrating the second. It would, nevertheless, be a wrong for which both he and his sureties would be liable to the injured parties.

In the case of Commonwealth v. Hilgert, there was an item in the rejected account, for "rents and profits of real estate." And *non constat* that the balance reported by the auditor in that case, was not made up in whole or in part of those profits. If so, clearly the sureties were in no way liable for them. But, without elaborating, we think this verdict is so manifestly just, that we are loth to disturb it, unless required to do so by some decisions in all respects analogous, or some rule of policy. And not knowing of such requirement, the rule for a new trial is discharged.

REGISTER'S NOTICE. To all Legatees: Creditors, and other persons interested, Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in July, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

May 30, Robert Adams, Guardian of SARAH H. ADAMS, dec'd.
" 30, Mary Schofield, Administratrix of HENRY SCHOFIELD, dec'd.
" 31, Philip Brokate, Administrator of MATILDA ELIZA BROKATE, dec'd.
June 2, Elijah Dallett et al., Administrators of JOHN DALLETT, dec'd.
" 2, August Tecklenburg, Guardian of FISCHER'S Minors, as filed by Louisa Tecklenburg, Administratrix of August Tecklenburg, dec'd.
" 2, Wm. C. Houston et al., Administrators d. b. n. c. t. a. of C. HOUSTON, deceased, acting Trustees for Churchill H. Van Cleve and children, under the will of C. Houston, dec'd.
" 5, William Purves, surviving Executor of JACOB DUNTON, dec'd.
" 5, William Webb, acting Executor of SAMUEL WEBB, dec'd.
" 6, Bernard Owens, Trustee under the will of CATHARINE MONNIER, (formerly Mivelaz), dec'd.
" 6, Elizabeth H. Rowland, Administratrix of WILLIAM ROLAND, deceased.
" 6, Charles S. Mingin, Administrator of JOB MINGIN, dec'd.
" 6, Martha W. Conway, Administratrix of Dr. THOMAS CONWAY, deceased.
" 7, John B. Sidel, Executor of ABRAHAM R. HARPER, dec'd.
" 7, Andrew Wylie, Administrator c. t. a. of EDWIN M. STANTON, dec'd.
" 10, Robert J. Arundel, Executor and Trustee under the will of JAMES A. MAHANY, dec'd, as filed by Eliza Arundel, sole Executrix of his will.
" 11, Sarah A. Oram et al., Executrix of HENRY C. ORAM, as filed by Sarah A. Oram, surviving Executrix.
" 12, Anna C. Peace, Guardian of J. COLEMAN DRAYTON, a minor.
" 13, Peter Keegan, Guardian of WILLIAM McKIEVE, late minor.
" 13, Joseph Singerly, Executor of LEWIS SCOUT, dec'd.
" 14, Jonathan Brock, Administrator of WILLIAM W. WATT, dec'd.
" 14, William G. Porter, Executor of JANE BENEZET, dec'd.
" 14, Joseph T. Pratt, Executor of AMOS CLIFT, dec'd.
" 14, R. O. Lowry et al., Executors of L. D. LOWRY, dec'd.
" 14, Sarah Graham et al., surviving Trustees under the will of THOMAS GRAHAM, dec'd, as filed by Albert S. Ashmead, acting Trustee.
" 16, James Smith et al., Administrators of JAMES B. ROGERS, dec'd.
" 16, Jacob Lewis, surviving Executor of WILLIAM M. BOWEN, dec'd.
" 18, Henry E Long, Executor of HENRY LONG, dec'd.
" 18, Henry E. Long, Administrator of ANN LONG, dec'd.
" 19, Hope A. Richards, Administratrix of WILLIAM H. RICHARDS, dec'd.
" 19, Eli Keen, Administrator of ANNIE ADOLPH, dec'd.
" 19, Margaret Jackson, Administratrix of MARY ANN McDOWELL (formerly Toy), dec'd.
" 20, Jesse T. Vodges, Administrator of ANN VODGES, dec'd.
" 20, Rebecca M. Kratz (late Robertson), Administratrix of ARCHIBALD McINTYRE ROBERTSON, dec'd.
" 20, William F. Dean, acting Executor of WILLIAM ESHER, dec'd.
" 21, Joseph Cairns, Administrator of ANN McGINNISS, dec'd.
" 21, William S. Magee, Administrator d. b. n. c. t. a. of CHARLES PLEASANTS, dec'd.
June 24, Stephen A. Cochran, Executor of GILBERT COMBS, dec'd.
" 24, Samuel C. Cadwallader, Administrator of PHEBE C. TAYLOR, deceased.
" 24, Eliza Arundel, Executrix of R. J. ARUNDEL, dec'd.
" 24, Jacob Rush, Administrator of HENRY C. KIRBY, dec'd.
" 24, Catharine Kratz, Administratrix of ISAAC A. KRATZ, dec'd.
" 24, Henry C. Townsend, Executor of JAMES PROSSER, dec'd.
" 25, Dr. Jennett Johnson et al., Executors of SAMUEL JOHNSON, dec'd, as rendered by Israel H. Johnson, accounting Executor.
" 25, Dr. Israel H. Johnson, surviving Executor of GEORGE KNORR, dec'd.
" 25, Lewis H. Phillips et al., Administrators of LEWIS P. JACOBY, dec'd.
" 25, George Alexander, Executor of MARY JOHNSON, dec'd.
" 25, Edward Twaddell, surviving Executor and Trustee of JAMES TWADDELL, dec'd.
" 26, Rt. Rev. James F. Wood, Administrator d. b. n. c. t. a. of Dr. JOHN GEGAN, dec'd.
" 26, The Girard Life Ins. Co., &c., Trustee of SARAH E. RICHARDS, under the will of Sarah E. Richards, dec'd.
" 26, John Craig, Administrator of GEORGE GRAIG, JR., dec'd.
" 26, Philadelphia Trust Safe Deposit Company, &c., Executors of WILLIAM W. GERHARD, M. D., deceased.
" 26, Curwen Stoddart et al., Executors of ELIZA BABCOCK, dec'd.
" 26 John Thornley et al., Executors of PHILIP S. WHITE, dec'd.
" 26, Benjamin F. Day et al., Executors of JOSEPH DAY, dec'd.
" 27, Clement C. Biddle et al., Trustees under the will of JOSEPH DUGAN, dec'd.
" 27, Augustus J. Pleasanton et al., Trustees under the will of JOSEPH DUGAN, dec'd.
" 27, Augustus J. Pleasanton et al., Trustees under the will of JOSEPH DUGAN, dec'd.

WILLIAM M. BUNN,
jul 11-4t Register.

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE AMERICAN EXCHANGE BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to three million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled the INDEPENDENCE HALL BANK, to be located in Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE DRY GOODS BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE ARTISANS' BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE MARKET BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE DELAWARE RIVER BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE GROCERS' BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the conferring of the powers of a Bank of Deposit, Discount and Issue upon the Philadelphia Banking Company, incorporated in accordance with the Act of Assembly approved March 11th, 1870, and an increase of capital to five million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania or the incorporation, in accordance with the laws of the Commonwealth, of THE SECURITY BANK, to be located in Philadelphia, with a capital of fifty thousand dollars, with the right to increase the same to five hundred thousand dollars jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE THIRD STREET BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with a right to increase the same to twenty-five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE CHESTNUT HILL BANK, to be located at Philadelphia, with a capital of fifty thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE STATE OF PENNSYLVANIA BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to ten million dollars. jul 4-6m

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United States Supreme Court.

MICHIGAN CENTRAL RAILROAD CO. v. MINERAL SPRINGS MANUFACTURING CO.

A. delivered to plaintiff goods to be carried to a point beyond its line. Plain iff carried them to the terminus of its road, but the carrier that should have completed the transit not being ready, and that it would not be, plaintiff knew at the receipt of the goods, they were stored in the plaintiff's warehouse. They remained there six days, when they were accidentally destroyed by fire. Plaintiff, by its charter, was to be "liab e for goods on deposit in any of its depots, awaiting delivery, as warehousemen." On the back of the receipt given the shipper, was a general notice, that all goods, &c., while in the plaintiff's warehouse should be at the risk of the owner, except as to the negligence of its servants. *Held:*

1. While property is in process of transportation it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line, and to deliver to the next carrier in the route beyond.
2. If there be a necessity for storage, it will generally be considered a mere accessory to the transportation, and not as changing the nature of the bailment.
3. It may be that circumstances may arise justifying the carrier in warehousing goods, but if he had reasonable grounds to anticipate such adverse circumstances when he received the goods, and did not notify the shipper, he cannot by storing them change his liability.
4. The exception in plaintiff's charter, referred only to goods that had reached their final destination.
5. A carrier cannot restrict his liability by a general notice printed on the back of his receipt for goods.
6. A carrier has no right to assume, in discharge of his obligation, that an offer to deliver will be met with a refusal to receive.

Mr. Justice DAVIS delivered the opinion of the court.

If the plaintiffs in error are to be considered as warehousemen at the time the wool in question was burned, they are not liable in this action, because the fire which caused its destruction was not the result of any negligence on their part. If, on the contrary, their duty as carriers had not ceased at the time of the accident, and there are no circumstances connected with the transaction which lessen the rule applicable to that employment, they are responsible, for carriers are substantially insurers of the property entrusted to their care. The controversy is as to the nature of the bailment when the fire took place.

The jury, under the instructions of the court, found that the railroad company were chargeable as carriers, and this writ of error is prosecuted to reverse that decision. The case, as contained in the bill of exceptions, is, in substance, this:

In October, 1865, at Jackson, a station on the Michigan Central Railroad, about seventy-five miles west of Detroit, one Bostwick, delivered to the agent of the company, for transportation, a quantity of wool consigned to the defendant in error, at Stafford, Connecticut, and took a receipt for its carriage, on the back of which was a notice that all goods and merchandise are at the risk of the owners while in the warehouses of the company, unless the loss or injury to them should happen through the negligence of the agents of the company. Verbal instructions were given by Bostwick that the wool should be sent from Detroit to Buffalo, by lake, in steamboats, which instructions were embodied in a bill of lading sent with the wool. Although there were several lines of transportation from Detroit eastward by which the wool could have been sent, there was only one transportation line propelled by steam on the lakes, and this line was and had been for some time, unable, in their regular course of business, to receive and transport the freight which had accumulated in large quantities at the railroad depot in Detroit. This accumulation of freight there, and the limited ability of the line of propellors to receive and transport it, were well known to the officers of the road, but neither the consignor, consignee or the station master at Jackson, were informed on this subject. The wool was carried over the road to the depot in Detroit, and remained there for a period of six days, when it was destroyed by an accidental fire. During all the time it was in the depot it was ready to be delivered for further transportation to the carrier upon the route indicated. The charter of the company, which was pleaded and offered in evidence, contains a clause that in all cases the company shall be responsible for goods on deposit, in any of their depots awaiting delivery, as warehousemen, and not as common carriers.

On this state of facts the Circuit Court refused to charge the jury that the liability of the plaintiffs in error was the limited one of a warehouseman, importing only ordinary care, but on the contrary, charged that they were liable for the wool as common carriers, during its transportation from Jackson to Detroit, and after its arrival there, for such reasonable time as, according to their usual course of business, under the actual circumstances in which they held the wool, would enable them to deliver it to the next carrier in the line, but that the defendant in error took the risk of the next carrier line not being ready and willing to take said wool, and submitted to the jury to say whether, under all the circumstances of the case in evidence before them, such reasonable time had elapsed before the occurrence of the fire.

It is not necessary in the state of this record to go into the general subject of the duty of the carriers in respect to goods in their custody which have arrived at their final destination. Different views have been entertained by different jurists of what the carrier is required to do when the transit is ended in order to terminate his liability, but there is not this difference of opinion in relation to the rule which is applicable while the property is in process of transportation from the place of its receipt to the place of its destination.

In such cases it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line and to deliver to the next carrier in the route beyond. This rule of liability is adopted generally by the courts in this country, although in England at the present time, and in some of the States of the Union, the disposition is to treat the obligation of the carrier who first receives the goods as continuing throughout the entire route. It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country, but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction. Public policy, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route, without delivery or an attempt to deliver to the connecting carrier. If there be a necessity for storage it will be considered a mere accessory to the transportation, and not as changing the nature of the bailment. It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by an act indicating an intention to renounce the obligation of a carrier, will not change or modify even his liability. It may be that circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them, but if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot by storing them change his relation towards them.

Testing the case in hand by these well-settled principles, it is apparent that the plaintiffs in error are not relieved of their proper responsibility, unless through the provisions of their charter, or by the terms of the receipt which was given when they received the wool. They neither delivered nor offered to deliver the wool to the propeller company. Nor did they do any act manifesting an intention to divest themselves of the character of carrier and assume that of forwarder.

It is insisted that the offer to deliver would have been a useless act, because of the inability of the line of propellers, with their means of transportation, to receive and transport the freight which had already accumulated at the Michigan Central depot for shipment by lake. One answer to this proposition is, that the company had no right to assume, in discharge of its obligation to this defendant, that an offer to deliver this particular shipment would have been met by a refusal to receive. Apart from this, how can the company set up, by way of defence, this limited ability of the propeller line when the officers of the road knew of it at the time the contract of carriage was entered into, and the other party to the contract, had no information on the subject?

It is said, in reply to this objection, that the company could not have refused to receive the wool, having ample means of carriage, although it knew the line beyond Detroit selected by the shipper was not at the time in a situation to receive and transport it. It is true the company were obliged to carry for all persons, without favor, in the regular course of business, but this obligation did not dispense with a corresponding obligation on its part to inform the shipper of any unavoidable circumstances existing at the termination of its own route in the way of a prompt delivery to the carrier next in line. This is especially so when, as in this case, there were other lines of transportation from Detroit eastward by which the wool, without delay, could have been forwarded to its place of destination. Had the shipper at Jackson been informed, at the time, of the serious hindrances at Detroit, to the speedy transit of goods by the lake, it is fair to infer, as a reasonable man, he would have given a different direction to his property. Common fairness requires that at least he should have been told of the condition of things there, and thus left free to choose, if he saw fit, another mode of conveyance. If this had been done there would be some plausibility in the position that six days was an unreasonable time to require the railroad company to hold the wool as a common carrier for delivery. But under the circumstances of this case the company had no right to expect an earlier period for delivery, and cannot, therefore, complain of the response of the jury to the inquiry on this subject submitted to them by the Circuit Court.

It is earnestly argued that the plaintiffs in error are relieved from liability under the provisions of their charter, if not by the rules of the common law. Is this so?

The whole section of the charter from which the exemption from liability is claimed is as follows: "The said company may charge and collect a reasonable sum for storage upon all property which shall have been transported by them upon delivery thereof at any of their depots,

and which shall have remained at any of their depots more than four days: *Provided*, That elsewhere than at their Detroit depot, the consignee shall have been notified if known, either personally or by notice left at his place of business or residence, or by notice sent by mail, of the receipt of such property at least four days before any storage shall be charged, and at the Detroit depot such notice shall be given twenty-four hours (Sundays excepted) before any storage shall be charged; but such storage may be charged after the expiration of said twenty-four hours upon goods not taken away: *Provided*. That in all cases the said company shall be responsible for goods on deposit in any of their depots awaiting delivery, as warehousemen, and not as common carriers."

It is quite clear that this section refers to property which has reached its final destination, and is there awaiting delivery to its owner. If so, how can the proviso in question be made to apply to another and distinct class of property? To perform this office it must act independently of the rest of the section, and enlarge rather than limit, the operation of it. This it cannot do, unless words are used which leave no doubt the Legislature intended such an effect to be given to it.

It is argued, however, that there is no difference between goods to be delivered to the owner at their final destination and goods deliverable to the owner, or his agent, for further carriage. That in both cases, as soon as they are "ready to be delivered" over, they are "awaiting delivery." This position, although plausible, is not sound. There is a clear distinction, in our opinion, between property in a situation to be delivered over to the consignee on demand, and property on its way to a distant point to be taken thence by a connecting carrier. In the former case it may be said to be awaiting delivery; in the latter, to be awaiting transportation. And this distinction is recognized by the Supreme Court of Michigan in the case of the present plaintiffs in error v. Hale. 6th Michigan, 243. The court in speaking on this subject say, "that goods are on deposit in the depots of the company either awaiting transportation or delivery, and that the section (now under consideration) has reference only to goods which have been transported and placed in the company's depots for delivery to the consignee." To the same effect is a recent decision of the Court of Appeals of New York, Mills v. Michigan Central R. R. Co., 45 New York, 626, in a suit brought to recover for the loss of goods by the same fire that consumed the wool in this case, and which were marked for conveyance by the same line of propellers on Lake Erie.

It is insisted, however, by the plaintiffs in error, if they are not relieved from liability as carriers by the provisions of their charter, that the receipt taken by the consignor, without dissent, at the time the wool was received, discharges them. The position is, that the unsigned notice printed on the back of the receipt is a part of it, and that, taken together, they amount to a contract binding on the defendants in error.

This notice is general, and not confined, as in the section of the charter we have considered, to goods on deposit in the depots of the company awaiting delivery. It is a distinct announcement that all goods and merchandise are at the risk of the owners thereof while in the company's warehouses, except for such loss or injury as may arise from the negligence of the agents of the company. The notice was doubtless, intended to secure immunity for all losses not caused by negligence or misconduct during the time the property remained in the depots of the company, whether for transportation on their own line or beyond, or for delivery to consignees. And such will be its effect if the party taking the receipt for his property is concluded by it. The question is, therefore, presented for decision whether such a notice is effectual to accomplish the purpose for which it was issued.

Whether a carrier when charged upon his common law responsibility can discharge himself from it by special contract, assented to by the owner, is not an open question in this court, since the cases of the New Jersey Steam Navigation Company v. The Merchants' Bank, 6th Howard, and York Company v. Central Railroad, 3 Wallace. In both these cases the right of the carrier to restrict or diminish his general liability by special contract, which does not cover losses by negligence or misconduct, received the sanction of this court. In the case in Howard the effect of a general notice by the carrier seeking to extinguish his peculiar liability was also considered, and although the remarks of the judge on the point were not necessary to the decision of the case, they furnish a correct exposition of the law on this much controverted subject.

In speaking of the right of the carrier to restrict his obligation by a special agreement, the judge said: "It by no means follows that this can be done by any act of his own. The carrier is in the exercise of a sort of public office, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may, or may not, be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. If any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment."

These considerations against the relaxation of the common-law responsibility by public advertisements, apply with equal force to notices having the same object, attached to receipts given by carriers on taking the property of those who employ them into their possession for transportation. Both are attempts to obtain, by indirection, exemption from burthens imposed in the interests of trade upon this particular business. It is not only against the policy of the law, but a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other, there might be some show of reason for assuming acquiescence from silence, but in the nature of the case this equality does not exist, and therefore, every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights.

It can readily be seen, if the carrier can reduce his liability in the way proposed, he can transact business on any terms he chooses to prescribe. The shipper, as a general thing, is not in a condition to contend with him as to terms, nor to wait the result of an action at law in case of refusal to carry unconditionally. Indeed, such an action is seldom resorted to, on account of the inability of the shipper to delay sending his goods forward. The law, in conceding to carriers the ability to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow. To relax still further the strict rules of common law applicable to them, by presuming acquiescence in the conditions on which they propose to carry freight when they have no right to impose them, would, in our opinion, work great harm to the business community.

The weight of authority is against the validity of the kind of notices we have been considering. See 2 Parsons on Contracts, p. 238, note N., fifth edition, and the American note to Coggs v. Bernard, 1 Smith's Leading Cases, seventh American edition; Redfield on Law of Railways, p. —, 16 Michigan; McMillan v. M. S. & N. I. R. R. Co., p. 109, and following. And many of the courts that have upheld them have done so with reluctance, but felt themselves bound by previous decisions. Still they have been continued, and this persistence has provoked legislation in Michigan, where this contract of carriage was made, and the plaintiffs in error have their existence. By an act of the Legislature, passed after the loss in this case occurred, it is declared "that no railroad company shall be permitted to change or limit its common law liability as a common carrier by any contract or in any other manner, except by a written contract, none of which shall be printed, which shall be signed by the owner or shipper of the goods to be carried." Statutes of Michigan, compilation of 1871, p. 783, section 2386.

It is fair to infer that this kind of legislation will not be confined to Michigan if carriers continue to claim exemption from common law liability through the medium of notices like the one presented in defence of this suit.

These views dispose of this case, and it is not necessary to notice particularly the instructions which the court below gave to the jury. If the court erred at all it was in charging more favorably for the plaintiffs in error than the facts of the case warranted.

The judgment is affirmed.

MIDDLE DISTRICT.

Supreme Court of Pennsylv'a.

HARTMAN v. DANNER.

The extension of a note upon the payment of usury, will not discharge a surety.

Error to the Court of Common Pleas of Adams county.

Opinion of the court by SHARSWOOD, J.

The facts of this case, as presented on this record, appear to be that on April 3d, 1867, Daphorn, with Danner as his surety, executed and delivered a sealed note binding them to pay Hartman $500 on or before April 3d, 1868, with interest from date. At the time the note was given, Daphorn, without the knowledge of Danner, agreed to pay two per cent. extra interest, and gave his due bill for the usury, which was afterwards paid. A short time before the note fell due, Hartman agreed to extend the time for another year, upon Daphorn's giving his due bill for two per cent. extra interest, which was also afterwards paid. In the spring of 1869, the time was again, in like manner, extended, Daphorn giving to Hartman and his wife $10 worth of goods for the extra two per cent., which would not have been due under this arrangement, supposing it to be valid, until April, 1870. Danner was ignorant of these transactions. Had all this, or any of it, the effect of discharging the surety, Danner? This evidently depends upon another question—were the agreements to extend the time founded upon a sufficient consideration, so as to be legally binding upon the parties?

A payment of part of a debt, either principal or interest, before it is legally demandable, will be a sufficient consideration to support an agreement to give time. Flynn v. Madd, 27 Ill. 323; Manufacturers' and Mechanics' Bank v. Bank of Pennsylvania, 7 Watts & Sergeant, 340. But such payment, after maturity of the debt, has no such effect, for the plain reason that in a legal sense it is neither a benefit to the creditor, who is entitled to the whole, nor an injury to the debtor, who ought to have done this, and more, without any promise from the creditor. Papodie v. Peters, 4 Verm. 104; Halstead v. Brown, 17 Indiana, 202; Weidman v. Weitzel, 13 S. & R. 96. For the same reason, payment of part of a debt, though received in satisfaction, if without a release under seal, will not have the effect of extinguishing the whole. Latapee v. Pechollier, 2 W. C. C. Rep. 180; Geiser v. Kershner, 4 Gill. & Johns. 305; Lowrie v. Verner, 3 Watts, 319; Savage v. Everman, 20 P. F. Smith, 319. It is clear, as held by the learned judge below, that the due bills to pay the usurious interest were void contracts under the statute, and could not be a good consideration for any undertaking based upon them. Payne v. Powell, 14 Texas, 600. What effect then did the payment of the due bill given just before the maturity of the note produce? Assuming it to have been paid after the note had fallen due, it was in law a part payment on account of the debt and lawful interest. It cannot be doubted that either Daphorn or Danner, when sued on the note, could have insisted upon a credit for this amount. Such is clearly the provision of the act of May 28th, 1858, Ph. Laws, 622. "It shall be lawful for such

borrower or debtor, at his option, to retain or deduct such excess from the amount of any such debt." What the principal had a right to deduct as payment; the surety may certainly avail himself of. It follows logically that the payment of this due bill—and the same principle applies to the subsequent payment in goods—having been made after the maturity of the debt, formed no sufficient consideration for the contract to give further time.

It may be that where there is a contract to pay interest for a specified period on a debt already due, so that the debtor, without the consent of the creditor is thereby precluded from paying the debt and interest until the time expires, there is an appreciable benefit to the creditor as well as an injury to the debtor. Chute v. Patton, 37 Maine, 102. But nothing upon which to found such a point appears in the evidence in this case. By the original contract, the obligors could have discharged the debt at any time on or before April 2d, 1868, and the extensions were evidently of that contract with this provision.

It may appear to be a very refined technicality that a part payment on account of a debt, twenty-four hours before it is due, will, and twenty-four hours after will not form a sufficient consideration for an agreement to extend the time. We must remember, however, that the law pays no regard to the adequacy of a consideration. There must be some legal benefit to the one party or injury to the other, though it may be of the slightest kind. It must be a benefit or injury, which the law can recognize and appreciate, not the performance in part or in whole of that which is an ascertained matured obligation.

The application of these principles to the answers to the points presented and the charge below, shows that the learned judge fell into an error in holding that the payment of the usury, though it may have been after the maturity of the debt, constitutes a sufficient consideration for the agreement to give time so as to discharge the surety.

Judgment reversed, and *venire facias de novo* awarded.

MOIST'S ADMR'S APPEAL.

1. Proof that a firm of which a decedent was a member, had agreed to pay for services, and that the surviving partners had paid what they considered the services were worth, is good evidence in the distribution of his estate to establish the contract of service and its value.
2. The administrator having allowed the firm a credit for the amount so paid, should not be surcharged therewith.

Appeal from the decree of the Orphans' court of Mifflin county.

Opinion by WILLIAMS, J. Delivered July 3d, 1873.

It is clear that the decree in this case must be reversed. The evidence in support of Runk's claim for services rendered the partnership, was sufficient to justify the administrators in allowing the surviving partner credit for its payment, even if they would be chargeable for allowing the credit if the claim had not been shown to be valid. The testimony of Jonas Moist was positive and uncontradicted, that all the partners agreed to pay Runk wages for all the time he stayed with them; and that the surviving partners settled with him, and paid him the amount they thought they honestly owed him. How, then, can it be said that there was no evidence of a contract or express promise to pay for the services? The evidence, if believed, was clearly sufficient not only to establish the contract, but the value of the services. What better evidence then could have been given to show that the claim was valid, and that the credit for its payment was properly allowed? If it is not just, why should the surviving partners have paid it, when two-thirds of the amount came out of their own pockets? There is no pretence that they were guilty of fraud or collusion in making settlement. The auditor failed to discover any evidence of fraud or collusion. We do not believe, say the court, that any fraud was intended here on their part. If then the settlement was made in good faith, it was binding on the administrators, and they had no right to refuse the credit. If it had been made in the lifetime of the deceased partner, it is clear that he would have been bound by it, unless he could have shown that it was fraudulently and collusively made. Why then should it not be binding on his administrators? The principle which governs the decisions of this case, is that the acts of one partner within the scope of his authority, are binding on his co-partners, and if he acts in good faith, he is not responsible to them for any loss arising from mere mistake or error of judgment. It was the duty of the surviving partners to make the settlement, and as it was honestly and fairly made, the administrators were bound by it. The Orphans' Court was therefore in error in surcharging the administrators with the sum of four hundred dollars, and directing that they should pay the costs of the proceeding, including the costs of the audit.

Decree reversed, and the report of the auditor confirmed, with the exception of so much thereof as finds the costs of the audit be paid out of the money of Mores Moist, in the hands of M. F. H. Kinsel and Wm. R. B. Catton, his administrators. And it is further ordered and decreed that the costs of the audit, and of the proceedings in the Orphans' Court, and the costs of this appeal, be paid by the appellees.

Recent Decisions.

PENNSYLVANIA.

[Our thanks are due to P. F. Smith, Esq., State Reporter, for advance sheets of Vol. 20 of his reports (Vol. 70 Pa. State Reports). We make the following selections from them.]

RIDER v. MAUL and wife.

1. The admission of a deposition was objected to by defendant on the ground that the statements of the witness were hearsay, and he offered another deposition of the same witness, taken six years afterwards, in which she testified that the statements were hearsay. The court would not then hear the second deposition, and admitted the first, saying that they would rule it out, if, when defendant gave his evidence, the first appeared to be hearsay. The second deposition so showed, and the court instructed the jury to disregard the first. *Held*, to be a matter of discretion, and not error.

2. Generally, a party is entitled to a full and unqualified answer to his point. But where the point may mislead the jury, if not qualified, or the evidence requires, the court should so qualify the answer as to turn the attention of the jury to the true question in the *cause*.

3. Jacobs and Rider bought land together by articles, and made partition; Jacobs gave Rider money to pay the taxes; the whole tract was sold for taxes in 1849; the purchaser assigned his title to Rider; he fraudulently obtained the articles from Jacobs, and obtained new articles from the original vendor to himself for the whole; he went into possession, paid the taxes for the whole, and sold part of the Jacobs lot. Jacobs died in 1849, leaving a minor child (the plaintiff), who came of age December 6th, 1855; in 1853 Rider obtained from the vendor a deed, which was recorded September 25th, 1854. *Held*, that these facts were not notice of a *fraud*, or such as would lead to its discovery by reasonable diligence, under the act of April 22d, 1856.

4. The facts would be sufficient notice of a *trustee* not *ex maleficio*.

October 17th, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Jefferson county: of October and November Term, 1870. No. 52.

JONES' APPEAL.

1. Timber-land was purchased by partners in lumbering, with partnership funds and for the purposes of their business; but the deeds conveyed the land to them without recognizing the partnership. The legal title was in them as tenants in common.

2. One partner died intestate; the other, as surviving partner, was declared bankrupt; the intestate's interest was sold for the payment of his debts; the money was the proceeds of his estate, and would go to his creditors, who were all partnership creditors, and not to the surviving partner or his assignee in bankruptcy.

3. Abbott's Appeal, 14 Wright, 234; distinguished.

November — 1870. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Appeal from the decree of the Orphans' Court of Jefferson county: No. 184, to October and November Term, 1870. In the distribution of the estate of Samuel Burns, deceased.

HOPE v. EVERHART.

1 A sale on a *fi. fa.* under a waiver to which the defendant had not capacity to assent, is invalid, if the purchaser be aware of his incapacity.

2. The act of February 24th, 1806, sect. 28, gives the prothonotary, under a warrant of attorney, no authority to do anything more than enter judgment for the amount which may appear due on the instrument and the stay mentioned in it.

3. An obligation was executed with warrant of attorney, to confess judgment "waiving inquisition," &c., which was noted on the docket with the judgment. *Held*, that the waiver was no part of the judgment.

4. The waiver is binding on the defendant, if capable of executing it, but is no part of the warrant, it is the act of the defendant and not the sentence of the law.

5. After a sale on a *fi. fa.* under the waiver, the defendant was found to be a lunatic, his lunacy antedating the execution of the warrant and waiver. If the purchaser knew that the defendant had not capacity to assent to a waiver, he took no title by his purchase.

6. Titles under judicial sales made under legal forms, should not be set aside, except on clear proof of such facts as should avoid the sale.

7. Sect. 28, act February 24th, 1806, considered and construed.

November — 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Mercer county: Of October and November Term, 1871, No. 212.

TOBIN v. MORGAN.

1. In voting a tax it was stated in the minutes that all the school directors were present, and that the vote was unanimous, but the names of the members voting in the "affirmative and negative," were not entered on the minutes. *Held* to be a substantial compliance with the 4th section of April 11th, 1862.

2. The section contemplates recording the ayes and nays, only when there are votes on both sides.

3. A bounty tax was assessed on Tobin, warrant issued and demand made, afterwards he entered into the military service of the United States. *Held*, that he was not exempt under the 4th section of bounty act of March 25th, 1864, exempting property of soldiers.

4. He was liable to the tax when it was levied, his subsequent enlistment did not release him.

November — 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Fayette county: No. 186, to October and November Term, 1871.

MILLER v. SPRINGER et al.

1. In election, if the language of a will admit of being restricted to property disposable by the testator, the inference is that he did not intend it to apply to that over which he had no power of disposal.

2. A general devise of real estate shows an intention in the testator to give nothing more than what strictly belongs to him, although he owns no real estate on which the devise can operate.

3. Evidence dehors the will, that the testator considered the land to belong to him, and intended it should pass under the will is inadmissible.

4. A legatee and executor, as attorney and agent for the testatrix in her life, and as her executor, had treated land as hers and intended to be passed by her will, although the title appeared to be in him. He was estopped from setting up an adverse title against her estate.

November — 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Fayette county: Of October and November Term, 1871, No. 214.

LEGAL GAZETTE.

Friday, July 25, 1873.

JOHN H. CAMPBELL,
EDITOR.

THEODORE F. JENKINS,
ASSOCIATE EDITOR.

U. S. Circuit Court, S. D. New York.

In re GEORGE MACDONNELL

1. These are proceedings in the case of a prisoner held in custody, under a warrant issued by the United States commissioner, for surrender to the authorities of Great Britain, pursuant to the treaty of August 9th, 1842, which warrant is held to be no conclusive bar to further inquiry into any questions which may properly be raised upon a return of the whole proceedings. It is decided, however, that the grounds upon which the discharge of the prisoner is sought ought not to prevail.
2. The discharge of a prisoner for want of evidence does not operate reactively to make his precedent holding and arrest illegal.
3. A new warrant of arrest is not invalid because issued pending proceedings on habeas corpus, though its operations is not to withdraw the prisoner from custody, but to require his continued detention when discharged on the prior warrant.
4. There may be as many demands of surrender, and as many proceedings preliminary to surrender, as there are offences subject to indictment; and, though the Executive may be called upon to guard against abuse, or against oppressive proceedings, where the case is such as properly appeals to the sense of justice which this government always entertains, a further mandate may be issued on a second requisition, and proceedings under it will be legal.
5. Depositions which are so authenticated as to entitle them to be received for similar purposes by the tribunals of a foreign country, are to be received in evidence here, and the certificate to their authenticity of the "principal diplomatic or consular officer of the United States, resident in such foreign country," is in its nature a judicial act which neither the commissioner nor this court can disregard or overrule.
6. By the terms of the treaty, our government is bound to respect only such evidence of criminality as would justify an apprehension and commitment for trial if the offence had been committed where the fugitive is found, but the enactment of Congress as to what shall be admissible to establish criminality in the inquiry under the treaty, is the law of the place where the prisoner is found, for all the purposes of the proceedings under the treaty.
7. The relation of the court to the commissioner is not that of an appellate tribunal; it is exercising an independent and original jurisdiction, and it does not follow by any legal rule that an error on the part of the commissioner in the reception of evidence should work the discharge of the prisoner. "No case has yet gone so far as to say that because some evidence was introduced which was not legal or competent, or because the court, upon a review of the evidence, was of opinion that it would have come to a different conclusion upon the evidence, therefore the proceedings were illegal and the prisoner should be discharged."
8. A fugitive is to be surrendered upon such evidence only as, being submitted to the jury, would properly secure his conviciton of the offence alleged.—*Int. Rev. Rec.*

Proceedings under writs of habeas corpus and certiorari.

Before Judges WOODRUFF and BLATCHFORD, June 2d, and 3d, 1873.

This case came before the court on the 2d of June, 1873, on writs of habeas corpus and certiorari. The prisoner was produced by the marshal, in obedience to the writ of habeas corpus addressed to him, returnable to this court. By the return to the writ it appeared that the prisoner was held in custody under a warrant issued by United States Commissioner Gutman, committing him to the custody of the marshal, for surrender to the authorities of Great Britain, pursuant to the treaty of August 9th, 1842, 8 U. S. Stat. at Large, 572, upon a charge of sundry specified forgeries, and the utterance of forged paper; and that, since the issuing of the writ, a warrant from the secretary of State of the United States has been received by the marshal, directing him to surrender the prisoner to the agents of the British Government. The said commissioner, to whom the writ of certiorari was addressed, returned a copy of the proceedings had before him, upon which he made the commitment of the prisoner for surrender, and that he had made his report of the proceedings to the Executive of the United States, upon which the warrant of the secretary of State had since issued.

The prisoner had previously been proceeded against pursuant to a requisition of the British Government, and a mandate of the Executive issued thereupon, on the 13th of March, 1873, under a complaint made before the same commissioner, March 18th, 1873, charging the crimes of forgery and the utterance of forged paper, to wit, certain two bills of exchange, for £1,000 each, on which a warrant was issued by him on that day. Under that warrant the prisoner was arrested and held. The proceedings upon that complaint were continued until the 24th of April, 1873. In the meantime the validity of the proceedings had been examined, under writs of habeas corpus and certiorari, before Judge Woodruff, and their validity affirmed, and the prisoner returned to the custody of the marshal.

On the 23d of April a second warrant of arrest was issued by the same commissioner, founded upon another mandate of the Executive, issued on the 8th of April, 1873, and another complaint made to the commissioner by the British consul general, charging the prisoner with the crimes of forgery and the utterance of forged paper, to wit, with forging and uttering eleven separate bills of exchange, which were particularly described, with date, time, place, amount, etc. Such warrant of arrest was delivered to the marshal on the same day, April 23d, and the prisoner (then in custody under a prior warrant) was notified thereof. On the morning of the 24th of April, the counsel conducting the prosecution under the first proceedings announced to the commissioner that they had no further evidence to offer under such previous proceedings, and the commissioner thereupon, deeming the evidence then before him insufficient to justify a commitment, discharged the prisoner from the said prior warrant of arrest. The prisoner was, however, detained by the marshal under and by virtue of such second warrant of arrest, and proofs were thereupon taken, which resulted in the warrant of commitment for surrender under which he was held to await the action of the Executive at the time the writ of habeas corpus was issued, which warrant of commitment was soon after followed by the warrant for his surrender to the agents of the British Government, mentioned in the return to the writ.

The prisoner answered the return to the habeas corpus, insisting therein upon the illegality of the proceedings, the discharge from the former arrest, as an acquittal, the errors of the commissioner in admitting incompetent evidence, and the insufficiency of the proof to warrant his commitment, and claiming to be discharged from custody. Some other facts, and the grounds urged by his counsel in support of his claim to be discharged, appear in the observations of the court in announcing the decision.

Charles W. Brooke, Esq., for the prisoner.

Clarence A. Seward and *Charles M. Da Costa, Esqs.*, for the Bank of England.

Francis F. Marbury, Esq, for the British consul.

James C. Carter, Esq, for the marshal.

WOODRUFF, J. (on the 3d of June, the counsel for the prisoner having been fully heard on the previous day), stated the conclusions of the court orally as follows:

The court have given such attention to this case, during the progress of the argument, and in the interval since the adjournment, as seemed to us due to its importance, to the earnestness and zeal with which the claims on behalf of the prisoner have been urged upon our attention, and to the gravity of some of the questions which have been agitated; such as seemed to us to be necessary to a safe and right conclusion upon the questions involved, having due regard, also, to the rights of the citizen, and a proper respect to the foreign government, and the good faith of our own, in the execution of its treaty. The result is, that we do not think it necessary to hear the counsel for the prosecution, upon the questions either of law or of fact, which were raised and discussed herein by the counsel for the prisoner. Nor do we think it necessary on this occasion at least, to consider the grounds upon which the court is moved, in behalf of the prosecution, to quash the writ of certiorari. Ex parte Van Orden, 3 Blatchf. C. C. R. 166; In re Martin, 5 Id. 303 and 311.

The conclusions which we have reached upon the points urged in behalf of the prisoner, render it unnecessary that we should say anything of the power of the court to issue the writ of certiorari, in a case arising under a treaty providing for the extradition of fugitives, or of the effect of the warrant of the President for the surrender of the prisoner, upon the proceedings, as a *supersedeas*, if a writ of certiorari has been properly issued. It is, however, proper to say that the power to issue such a writ, in cases of this description, has been frequently affirmed and exercised; and that the warrant of surrender, issued by the government of the United States, for the delivery of the prisoner to the agents of the demanding government, has not, so far as we can discover, or are advised, been heretofore held a conclusive bar to further inquiry into any questions which may properly be raised upon a return of the whole proceedings. On that subject we go no further, because, assuming that the writ was properly issued, and that the warrant for the surrender of the prisoner should have no effect to preclude further inquiry, and no effect to render valid proceedings which could not otherwise be sustained, our conclusion is, that the grounds upon which the discharge of the prisoner is sought under these writs, ought not to prevail.

Without discussing all the questions that have been raised by counsel, at great length, or attempting to review all the arguments, or seeking to array against them, in any considerable detail, reasons for not giving them the force which they seem to possess in the mind of the counsel by whom they were urged, we shall content ourselves with disposing of the objections substantially in the order in which they were presented.

The first practical question, as expressed by the counsel, in the course of his argument is, whether the arrest of the prisoner in this proceeding was a legal arrest. The facts out of which that question arises, appear by the return to the certiorari, to be these: A mandate had been issued by the president, directing proceedings against the prisoner in compliance with a requisition by the government of Great Britain, and a complaint had been made before the same commissioner, at an earlier day, in which the charge of forgery by the prisoner was made, that charge being only particularized by the statement that he had been guilty of forgery, in the making of two certain bills of exchange for one thousand pounds each, with intent to defraud the governor and company of the Bank of England. Upon that complaint a warrant had been issued for the arrest of the prisoner, he had been arrested, and inquiry into the question of his criminality in the matter thus charged had begun. The question whether, in the proceedings had upon that complaint, the commissioner, and the marshal who executed his warrant, acted legally, had been brought under judicial inquiry, and the proceedings and warrant had been pronounced by one of the judges of this court, after full argument, legal.

Still entertaining the views which governed that decision, we are bound now to pronounce that arrest and that detention legal—legal then, and legal always. So that on the 24th of April, before the discontinuance of the proceedings under that arrest (or, to use the other form of expression, before the discharge of the prisoner from that arrest), he was held in legal custody. While he was in that custody, the warrant of arrest now in question was placed in the hands of the marshal, and thereafter, on the following morning, on the suggestion of the prosecuting counsel that they had no further evidence to offer in support of that prior charge (and plainly upon the face of the proceedings, because the evidence produced did not establish that charge sufficiently to warrant any other result), the commissioner discharged the prisoner from that arrest. It is now argued, that, by some legal retroaction, the discharge of the prisoner from that arrest establishes, and establishes conclusively, that he was, up to that time, held under illegal arrest. That reason we cannot affirm. All that that decision affirmed was, that the demanding government, or those who represented the demanding government, in that prosecution had failed to establish the charge; but down to the time of that decision, the detention of the prisoner was legal, as had already been pronounced,

SHERIFF'S SALE.

Abstract of Properties to be sold by WM. R. LEEDS, ESQ., *Sher*

On Monday, August 4, 1873,

At the New County Court House,

Sixth street below Chestnut street, at 4 o'clock, P. M.

CONDITIONS OF SALE.

Fifty dollars of the price or sum at which the property shall be struck off, must be paid to the Sheriff at the time of sale, unless the purchase-money be less than that sum, in which case only the purchase-money is to be paid. Otherwise the property will again be immediately put up and sold. The balance of the purchase-money must be paid to the Sheriff, at his office, within TEN DAYS from the time of sale, without any demand being made by the Sheriff therefor. Otherwise the property may be sold again at the expense and risk of the person to whom it is struck off, who, in case of any deficiency at such resale, shall make good the same.

EXPLANATION.

For the benefit of our unprofessional readers, who do not understand the meaning of the letters and figures following the defendant's names, we make the following explanation: D. C., District Court; C. P., Court of Common Pleas; S. C., Supreme Court—indicate the Courts out of which the writ of execution issues under which the sale is made; V. E. or Ven. Ex., Venditioni Exponas; Lev. Fac. or L. F., Levari Facias—show the kind of writ—a Levari Facias is the writ of sale upon a *Mortgage* or *Mechanic's Lien*; a *Venditioni*, upon an ordinary *Debt*, or for *Ground rent*; 223, J. 69, means No. 223, June Term, 1869, the number and term of the docket entry; the following figures show the amount of debt and the *name* following is that of the attorney issuing the writ.

The arrangement of the sale being made according to alphabetical sequence of the counsels' names; commencing at A one month, and at Z the other, and so alternately, this is done in order that each counsel's writs may come together.

Henry Glenn and Wesley Hartley.
D. C. Ven. Ex. 1292. J. 73.
$2,211. A. Zane, Jr.
Lot, W. side Beach st., 127 ft. 6 in. N. of Cherry st., 23 ft. 3¾ in. front, 60 ft. deep.

Abraham Shetsline.
D. C. Ven. Ex. 1293. J. 73.
$140 40. A. Zane, Jr.
Lot, N. E. side Wood st., 108 ft. S. E. of Duke st., 18 ft. front, 108 ft. 1 in. deep.

Wm. Wright and Wife.
D. C. Lev. Fa. 1320. J. 73.
$743 05. A. Zane, Jr.
3 story brick house and lot, N. side Otis st., 150 ft. W. of Amber st., 18 ft. front, 83 ft. deep.

Caleb Jones.
D. C. Lev. Fa. 1386. J. 73.
$6,628 92. J. M. West.
3 story brick house, with brick back buildings and lot, E. side 21st st., 144 ft. S. of Race st., 18 ft. front, 81 ft. 6 in. deep.

Thos. Clark.
D. C. Lev. Fa. 1330 to 1333. J. 73.
$7,103 70 each. W. N. West.
No. 1. Unfinished 2 story brick house with green stone front and Mansard roo and lot, S. side Locust st., 75 ft. E. of 39th st., 25 ft. front, 100 ft. deep.
No. 2. Unfinished 2 story brick house with green stone front and Mansard roo and lot, S. side Locust st., 50 ft. E. of 39th st., 25 ft. front, 100 ft. deep.
No. 3. Unfinished 3 story brick house, with green stone front and Mansard roof and lot, S. side Locust st., 25 ft. E. of 39th st., 25 ft. front, 100 ft. deep.
No. 4. Unfinished 2 story brick house, with green stone front and Mansard roo and lot, S. E. cor. 39th and Locust sts., 25 ft. front, 100 ft. deep.

Henry M. Boyd.
D. C. Lev. Fa. 1334 and 1335. J. 73.
$3,063 50 each. W. N. West.
No. 1. Brick house, with marble front and Mansard roof, and lot, S. side Chestnut st., 252 ft. E. of 33d st., 18 ft. front, 120 ft 2 in. deep.
No. 2. Brick house, with marble front and Mansard roof, and lot, S. side Chestnut st., 162 ft. E. of 33d st., 18 ft. front, 120 ft. 2 in. deep.

Geo. W. Wisner and Geo. W. Marks.
D. C. Ven. Ex. 1309. J. 73.
$250. J. White.
Buildings, improvements and lot, N. E. cor. 6th and Mifflin sts., thence E. 50 ft., N. 58 ft. 4½ in., N. E. 36 ft. 10 in., N. W. 89 ft. 3¾ in., S. 129 ft. 3½ in.

Edward Hughes.
D. C. Ven. Ex. 1399 to 1402. J. 73.
$1,913 33, each. J. Q. Williams.
No. 1. 2 story brick house and lot, N. side Madison sq., 336 ft. 8 in. W. of 22d st., 25 feet 10 in. front, 25 ft. deep.
No. 2. 2 story brick house and lot, N. side Madison sq., 233 ft. 4 in. W. of 23d st., 25 ft. 10 in. front, 25 deep.
No. 3. 2 story brick house and lot, N. side Madison sq., 362 ft. 6 in. W. of 22d st., 25 ft. 10 in. front, 25 ft. deep.
No. 4. 2 story brick house and lot, N. side Madison sq., 285 ft. W. of 23d st., 25 ft 10 in. front, 25 ft. deep.

Jos. M. Thomas.
D. C. Lev. Fa. 1359. J. 73.
$1,200. E. Wilson, Jr.
Brick house and lot, W. side Warnock st., 114 ft. N. of Berks st., 16 ft. front, 56 ft. deep.

Patrick Cassady.
D. C. Lev. Fa. 1317. J. 73.
$649 01. Wrigley.
3 story brick house and lot, S. side Federal st., 167 ft. W. of 10th st., 16 ft. front, 100 ft. deep. G. R. $30.

Calhoun M. Derringer.
D. C. Lev. Fa. 1390. J. 73.
$168. Vanderslice.
3 story brick house and lot, S. E. cor. Front and Derringer sts., 52 ft. S. of Oxford st., 16 ft. front, 36 ft. deep.

James Cahill.
C. P. Ven. Ex. 329. J. 73.
$246 87½. Tennery.
Right, title and interest in 2 two-story brick houses and lots, E. side 12th st., 56 ft. N. of Vine st., 36 ft. front, 70 ft. deep.

James Cahill.
C. P. Ven. Ex. 330. J. 73.
$240 50. Tennery.
Right, title and interest in blacksmith and coach shop and lot, E. side 12th st., adjoining N. E. cor. 12th and Vine sts. (No. 303), 18 ft. front, 70 ft. deep.

Jos. G. Wills.
D. C. Al. Lev. Fa. 1406 to 1408. J. 73.
$900 each. Shapley.
No. 1. 2 story brick house and lot, W. side Orkney st., 88 ft. S. of York st., 14 ft. front, 39 ft. deep.
No. 2. 2 story brick house and lot, W. side Orkney st., 102 ft. S. of York st., 14 ft. front, 39 ft. deep.
No. 3. 2 story brick house and lot, W. side Orkney st., 116 ft. S. of York st., 14 ft. front, 39 ft. deep.

Jacob Leonard.
D. C. Lev. Fa. 1409. J. 73.
$1,114 60. Shapley.
3 story brick house and lot, N. E. cor. Montgomery av. and 13th st., 18 ft. front, 50 ft. deep.

John E. Young.
D. C. Lev. Fa. 1363. J. 73.
$20,287 50. Sharp & Alleman.
Buildings, improvements and lot, on the line of Walnut av., 22d Ward, thence S. 42° 15′ W. 140 ft., N. 48° 11′ W. 324 ft., N. 42° 15′ 140 ft., S. 48° 11′ E. 324 ft.

C. M. S. Leslie.
D. C. Ven. Ex. 1299. J. 73.
$7,000. T. D. Smith.
No. 1. Triangular lot, S. E. side Gray's Ferry road, at cor. of Catharine st., thence N. E. 249 ft. 6 in., S. 183 ft. 6¾ in., W. 167 ft. 3½ in. Mortgage, $8,000.
No. 2. 26 lots, S. side St. Alban's place, between 22d and 23d sts., containing together 415 ft. front, 62 ft. deep. Mortgage, $10,600.

Wm. C. Lobb.
D. C. Al. Ven. Ex. 1305. J. 73.
$2,500. T. D. Smith.
2 story brick house and lot, W. side Germantown road, Rising Sun Village, 40 ft. front, 375 ft. deep; 38 ft. wide on rear end. Mortgage $1,500.
$100 to be paid of time of sale.

Alexander Smith.
D. C. Lev. Fa. 1327 and 1328. J. 73.
$6,363 38 and $3,446 25. T. D. Smith.
No. 1. 3 story brick house, with double three story back buildings and lot, E. side Franklin street, 46 ft. S. of Noble st., 16 ft. front, 67 ft. 5¾ in. deep on N. line, 66 ft. 7 in. deep on S. line. Mortgage, $3,000.
No. 2. Brick house and lot, S. E. cor. Carter and Stapleton sts., 43 ft. 5 in. front, 57 ft. 2 in. deep. Mortgage, $0,000.

Wm. H. Gesner.
D. C. Al. Ven. Ex. 1418. J. 73.
$2,010. Smithers.
One undivided sixth part in brickyard and lot, S. E. side Kingsessing av., 125 ft. N. E. of 66th st., thence S. 40° 32′ 30″ E. 541 ft. 6½ in., S. 49° 27′ 30″ W. 8 ft. 1 in., S. 41° 5′ 11″ E. 498 ft. 1⅛ in., N. 49° 27′ 30″ E. 689 ft. 1⅜ in., N. 74° 17′ 26″ W. 1250 ft. 1½ in. Containing 8 acres 46 25-100 perches.

Chas C. Haines.
D. C. Ven. Ex. 1419. J. 73.
$2,000. Smithers.
House and lot, E. side Otis st., 48 ft. S. of Belgrade st., 14 ft. front, 87 ft. deep.

C. M. S. Leslie.
D. C. Ven. Ex. 1373 & 1374. J. 73.
$3,000 each. J. H. Stevenson.

No. 1. Yearly ground rent of $50 out of 2 story brick house and lot, N. side Montrose st., 70 ft. W. of 23d st., 14 ft. front, 36 feet deep.

No. 2. Yearly ground rent of $50 out of 2 story brick house and lot, N. side Montrose st., 84 ft. W. of 23d st., 14 ft. front, 36 ft. deep.

No. 3. Yearly ground rent of $50 out of 2 story brick house and lot, N. side Montrose st., 42 ft. W. of 23d st., 14 ft. front, 36 ft. deep.

No. 4. Yearly ground rent of $50 out of 2 story brick house and lot, N. side Montrose st., 56 ft. W. of 23d st., 14 ft. front, 36 ft. deep.

Grace A. Town.
C. P. Ven. Ex. 343. J. 73.
$96 50. Read & Pettit.

House and lot (No. 240), W. side 11th st., 150 ft. S. of Locust st., 16 ft. 8 in. front, 56 ft. deep.

Jas. M. Keenan.
D. C. Lev. Fa. 1319. J. 73.
$18,962. Ridgway.

No. 1. 2 story brick house and lot, N. side Madison sq., 26 ft. 8 in. W. of 23d st., 25 ft. 10 in. front, 25 ft. deep. Mortgage $1,750.

No. 2. 2 story brick house and lot, N. side Madison sq., 52 ft. 6 in. W. of 23d st., 25 ft. 10 in. front, 25 ft. deep. Mortgage $1,750.

No. 3. 2 story brick house and lot, N. side Madison sq., 78 ft. 4 in. W. of 23d st., 25 ft. 10 in. front, 25 ft. deep. Mortgage $1,750.

No. 4. 2 story brick house and lot, N. side Madison sq., 104 ft. 2 in. W. of 23d st , 25 ft. 10 in. front, 25 ft. deep. Mortgage $1,750.

No. 5. 2 story brick house and lot, N. side Madison sq., 155 ft. 10 in. W. of 23d st., 25 ft. 10 in. front, 25 ft. deep. Mortgage $1,750.

No. 6. 2 story brick house and lot, N. side Madison sq., 181 ft. 8 in. W. of 23d st., 25 ft. 10 in. front, 25 ft. deep. Mortgage $1,750.

No. 7. 2 story brick house and lot, N. side Madison sq., 207 ft. 6 in. W. of 23d st., 25 ft. 10 in. front, 25 ft. deep. Mortgage $1,750.

No. 8. 2 story brick house and lot, N. side Madison sq., 233 ft. 4 in. W. of 23d st., 25 ft. 10 in. front, 25 ft. deep. Mortgage $1,750.

No. 9. 2 story brick house and lot, N. side Madison sq., 259 ft. 2 in. W. of 23d st., 25 ft. 10 in. front, 25 ft. deep. Mortgage $1,750.

No. 10. 2 story brick house and lot, N. side Madison sq., 285 ft. W. of 23d st., 25 ft. 10 in. front, 25 ft. deep. Mortgage $1,750.

No. 11. 2 story brick house and lot, N. side Madison sq., 310 ft. 10 in. W. of 23d st., 25 ft. 10 in. front, 25 ft. deep. Mortgage $1,750.

No. 12. 2 story brick house and lot, N. side Madison sq., 336 ft. 8 in. W. of 23d st., 25 ft. 10 in. front, 25 ft. deep. Mortgage $1,750.

No. 13. 2 story brick house and lot, N. E. cor. 24th st. and Madison sq., 26 ft. 8 in. front, 25 ft. deep. G. R. $120

James Boal.
D. C. Ven. Ex. 1397 and 1398. J. 73.
$101 65 each. Robins.

No. 1. 3 story brick house, store and lot, S. side South st., 102 ft. W. of 21st st., 16 ft. front, 75 ft. deep. G. R. $180.

No. 2. 3 story brick house, store and lot, S. side South st., 70 ft. W. of 21st st., 16 ft. front, 73 ft. 6 in. deep. G. R. $180.

Frederick Flurer and Wife.
D. C. Al. Lev. Fa. 1375. J. 73.
$3,150 50. Quin.

3 story brick house, store, slaughter house and lot. E. side Church st., 138 ft. 10 in. N. of Moore st., 30 ft. 10 in. front, 128 ft. 9 in. deep on N. line, 129 ft. 6 in. deep on S. line. G. R. $22.

Charles Biermann.
D. C. Lev. Fa. 1415. J. 73.
$4,600 73. Pancoast

3 story brick house and lot, S. side Columbia av., 34 ft. W. of 13th st., 16 ft. front, 63 ft. deep.

Chas. B. Roberts.
C. P. Ven. Ex. 323. J. 73.
$62 30. Parrish.

No. 1. 3 story brick house and lot, N. E. side Fulton st., 64 ft. S. E. of Trenton av., 16 ft. front, 51 ft. deep. G. R. $30.

No. 2. 3 story brick house and lot, N. E. side Fulton st., 80 ft. S. E. of Trenton av., 15 ft. 9½ in. front, 51 ft. deep. G. R. $30.

N. B.—Mr. Roberts has no interest.

C. M. S. Leslie.
D. C. Ven. Ex. 1252 to 1255. J. 73.
$2,063 each. Paschall.

No. 1. 3 story brick house and lot, S. side St. Alban's place, 63 ft. 6 in. W. of 23d st., 16 ft. front, 62 ft. deep. G. R. $150.

No. 2. 3 story brick house and lot, S. side St. Alban's place, 79 ft. W. of 23d st., 16 ft. front, 62 ft. deep. G. R. $150.

No. 3. 3 story brick house and lot, S. side St. Alban's place, 95 ft. 6 in. W of 23d st., 16 ft. front, 62 ft. deep. G. R. $150.

No. 4. 3 story brick house and lot, S. side St. Alban's place, 111 ft. 6 in W. of 23d st., 16 ft. front, 62 ft. deep. G. R. $150.

John Derbyshire.
D. C. Lev. Fa. 1376. J. 73.
$5,208 33. Paschall.

3 story brick house and lot, N. W. side Beach st., 145 ft. ⅜ in. S. W. of Shackamaxon st., thence N. 22° 25′ 10″ W. 100 ft. 4½ in., S. W. 40 ft. ⅜ in., S. 22° 25′ 10″ E. 100 ft. 4½ in., N. E. 40 ft. ⅜ in.

Dan'l G. Irvine and Dan'l Montague.
C. P. Ven. Ex. 344. J. 73.
$64 71. J. S. Price.

3 story brick house and lot, W. side Warnock st., 48 ft. N. of Thompson st., 16 ft. front, 72 ft. 6 in. deep. G. R. $62, silver.

Geo. E. Henderson.
D. C. Ven. Ex. 1322 to 1324. J. 73.
J. Sergeant Price.

No. 1. Yearly ground rent of $60 out of lot, W. side Alexander av., 178 ft. N. of Wharton st., 14 ft. front, 44 ft. 7 in. on the N. line, and 44 ft. 6½ in. on the S. line.

No. 2. Yearly ground rent of $60 out of lot, W. side Alexander av., 192 ft. N. of Wharton st., 14 ft. front, 44 ft. 7½ in. on the N. line, and 44 ft. 7 in. on the S. line.

No. 3. Yearly ground rent of $60 out of lot, W. side Alexander av., 206 ft. N. of Wharton st., 14 ft. front, 44 ft. 8 in. on the N. line, and 44 ft. 7½ in. on the S. line.

No. 4. Yearly ground rent of $60 out of lot, W. side Alexander av., 122 ft. N. of Wharton st., 14 ft. front, 44 ft. 5 in. on the N. line, and 44 ft. 4½ in. on the S. line.

No. 5. Yearly ground rent of $60 out of lot, W. side Alexander av., 136 ft. N. of Wharton st., 14 ft. front, 44 ft. 5½ in. on the N. line, and 44 ft. 5 in. on the S. line.

No. 6. Yearly ground rent of $60 out of lot, W. side Alexander av., 150 ft. N. of Wharton st., 14 ft. front, 44 ft. 6 in. on the N. line, and 44 ft. 5½ in. on the S. line.

No. 7. Yearly ground rent of $60 out of lot, W. side Alexander av., 164 ft. N. of Wharton st., 14 ft. front, 44 ft. 6½ in. on the N. line, and 44 ft. 6 in. on the S. line.

No. 8. 4 story brick house and lot, N. side Lombard st., 103 ft. E. of 19th st., 17 ft. front, 60 ft. deep.

Michael Darcey.
D. C. Al. Ven Ex. 1382. J. 73.
$300. Nichols.

2 story brick house with summer kitchen, arranged for a tavern and dwelling, and lot, W. side of 17th st., 18 ft. S. of Federal st., 16 ft. front, 50 ft. deep.

Jeremiah Rhodes.
D. C. 2d Pl. Ven. Ex. 1388. J. 73.
$455 29. J. P. Norris.

3 story brick house and lot, N. E. cor. 6th and Huntingdon sts., 20 ft. front, 136 ft. 10½ in. deep. Mortgage $1,7000.

Alex Smith.
D. C. Lev. Fa. 1302. J. 73.
$3,110 50. McAllister.

No. 1. House and lot, S. side Carters st., cor. of a house and lot of Darby Savage, thence S. 23 ft. 9 in., thence W. 10 ft. 11 in., thence S. in., thence W. 4 ft. 4 in., thence S. 3 ft. 2 in., thence W. 3 ft. 3 in., thence N. 27 ft. 2 in., thence E. 18 ft. 6 in.

No. 2. Lot, beginning at about 15 in. E. of the W. cor. of the kitchen wall of No. 1, thence southerly 8 ft. 3 in., thence E. 15 in., thence S. 3 ft. 7 in., thence W. 3 ft. 10 in., thence N. 5 ft. 7 in., thence W. 3 ft. 2 in., thence northerly 6 ft. 4 in., thence easterly 4 ft. 4 in., thence N. 3 in., thence E. 1 ft. 10 in.

No. 3. Lot, situate to the S. and in the rear of Nos. 1 and 2, beginning at a point 30 ft. 6 in. W. of Exchange pl., and 42 ft. S. of Cedar st., thence N. 11 ft. 8 in., thence W. 3 ft. 2 in., thence N. 3 ft. 2 in., thence W. 3 ft. 3 in., thence S. 14 ft. 10 in., thence E. 6 ft. 6 in.

Subject as respects Nos. 1 and 2, to a yearly ground rent of £4, and subject to payment of $1,500, on the decease of a certain William Winn, unto his children.

N. B.—There is erected a 3 story brick house on above premises.

☞ The above described lots will be sold as one property.

Harrisson Grambo.
D. C. Lev. Fa. 1342. J. 73.
$27,313 76. McGeorge.

2 story pictou stone and French roof house, and brick stable and lot, N. side Walnut st. (No. 2109), 126 ft. W. of 21st st., thence N. 180 ft., W. 10 ft. 8½ in., N. 55 ft., W. 19 ft. 3½ in., S. 114 ft. 6 in., W. 8 ft., S. 120 ft. 6 in., E. 38 ft.

Mortgage $35,000, and also subject to building restrictions.

Saml. Minner.
D. C. Lev. Fa. 1275. J. 73.
$1,571. C. Matlack.

3 story brick house, with 2 story single back buildings and lot, W. side Mascher st., 172 ft. S. of York st., 14 ft. front, 49 ft. 6 in. deep.

Jos. V. Peterman.
D. C. Ven. Ex. 1338. J. 73.
$1,600. E. Spencer Miller.

No. 1. Lot, W. side Howard st., 201 ft. N. of Cumberland st., 14 ft. front, 57 ft. 6 in. deep.

No. 2. Lot, W. side Howard st., 215 ft. N. of Cumberland st., 14 ft. front, 57 ft. 6 in. deep.

No. 3. Lot, W. side Howard st., 229 ft. N. of Cumberland st., 14 ft. front, 57 ft. 6 in. deep.

No. 4. Lot, W. side Howard st., 243 ft. N. of Cumberland st., 14 ft. 2 in. front, 57 ft. 6 in. deep.

No. 5. Lot, W. side Howard st., 257 ft. 2 in. N. of Cumberland st., 14 ft. 6 in. front, 57 ft. 6 in. deep.

No. 6. Lot, W. side Howard st., 271 ft. 8 in. N. of Cumberland st., 14 ft. front, 50 ft. 6 in. deep.

Howard Tilden.
D. C. Ven. Ex. 1389. J. 73.
$183 89, silver. Letchworth.
4 story brick house and lot, W. side Broad st., 100 ft. N. of Brown st., 20 ft. front, 160 ft. deep. G. R. $360, silver.

Wm. Evans.
D. C. Ven. Ex. 1273. J. 73.
$109. W. W. Ker.
Lot, N. W. side 2d st., 26 ft. S. of Nicetown lane, 18 ft. front, 121 ft. 9 in. deep. G. R. $54.

Eliza Jane Harshaw.
C. P. Ven. Ex. 331. J. 73.
$24. Jones.
Yearly ground rent of $48 out of lot, S. side Morris st., 191 ft. W. of 9th st., 15 ft. front, 52 ft. deep.

Joel R. Leidy.
C. P. Ven. Ex. 347. J. 73.
$84 31. Ingram.
3 story brick house and lot, N. side York st., 16 ft. E. of Lawrence st., 15 ft. front, 60 ft. deep.

John Wirth, owner, M. J. A. Kline, contractor.
D. C. Lev. Fa. 1364. J. 73.
$260. Hannis.
3 story brick house and lot, E. side Germantown road, 110 ft. S. of Wager st., 19 ft. front, 113 ft. deep on N. line, 106 ft. deep on S. line.

Barnard Mullen.
D. C. Ven. Ex. 1365. J. 78.
$557 80. Hannis.
Right, title and interest in 40 3 story brick houses and lot, E. side Hancock st., 80 ft. N. of Cumberland st., 282 ft. front, 92 ft. 6 in. deep. 20 of said houses being on Hancock st., and 20 on Mutter st.

C. M. S. Leslie.
D. C. Ven. Ex. 1366 to 1370. J. 73.
Hannis.
No. 1. Lot, N. E. cor. Gray's Ferry road and Fitzwater st., thence N. E. 226 ft. 4½ in., thence S. E. 154 ft., thence S. 106 ft. 1 in., thence W. 293 ft. 7 in.
No. 2. Lot, S. side Catharine st., between 23d and 24th sts., 415 ft. front, 60 ft. deep.
No. 3. Lot, S. side Christian st., 129 ft. 7⅛ in. W. of 22d st., thence W. 285 ft. 4½ in., thence S. 76 ft., thence E. 249 ft. ⅛ in., thence N. E. 84 ft. 2¾ in.
No. 4. Lot, N. E. cor. 23d and Montrose sts., 171 ft. front, 50 ft. deep.
No. 5 Lot, S. E. cor. 25th and Christian sts., thence E. 308 ft. 9⅜ in., thence S. 80 ft., thence E. 150 ft., thence S. 58 ft. 3 in., thence N. W 470 ft. 10⅜ in., thence N. 32 ft.
No. 6. Lot, N. side Christian st., between 22d and 23d sts., 415 ft. front, 60 ft. deep.

Alex. Smith.
D. C. Lev. Fa. 1871 & 1872. J. 73.
$2,500, each. Hannis.
No. 1. Yearly ground rent of $150 out of 3 story brick house and lot, S. side St. Alban's place, 191 ft. 6 in. W. of 23d st. 16 ft. front, 62 ft. deep.
No. 2. Yearly ground rent of $150 out of 3 story brick house and lot, S. side St. Alban's place, 175 ft. 6 in. W. of 23d st., 16 ft. front, 62 ft. deep.

Bernard Mullen.
D. C. Ven. Ex. 1395. J. 73.
$1,735 50. Hannis.
No. 1. 3 story brick house and lot, W. side Beechwood st., 112 ft. S. of Montgomery av., 14 ft. front, 48 ft. deep.
No. 2. 3 story brick house and lot, W. side Beechwood st., 126 ft. S. of Montgomery av., 14 ft. front, 48 ft. deep.

Wm. Roe, with notice to Alfred Pharazyn
C. P. Ven. Ex. 332 to 335. J. 73.
$15 14. C. Hart.
No. 1. 2 story brick house and lot, N. side Peters st., 182 ft. 2 4–5 in. W. of 12th st., 14 ft. front, 46 ft. deep on W. line, 46 ft. 4 in. deep on E. line. G. R. $30.
No. 2. 2 story brick house and lot, S. side Francis st., 154 ft. W. of 12th st., 14 ft. front, 46 ft. 8 in. deep on W. line, 47 ft. deep on E. line. G. R. $30.
No. 3. 2 story brick house and lot, S. side Francis st., 168 ft. W. of 12th st., 14 ft. front, 46 ft. 4 in. deep on W. line, 46 ft. 8 in. deep on E. line. G. R. $30.
No. 4. 2 story brick house and lot, S. side Francis st., 182 ft. W. of 12th st., 14 ft. front, 46 ft. deep on W. line, 46 ft. 4 in. deep on E. line. G. R. $30.
N. B.—Mr. Roe has no interest.

James Mooney.
D. C. Ven. Ex. 1206. J. 73.
$5,000. W. Hartman.
3 story brick house and lot, N. W. cor. Lombard and 18th sts., 18 ft. front, 59 ft. deep.

James J. Mullin.
D. C. Ven. Ex. 1294. J. 73.
$400. A. A. Hirst.
No 1. House and lot, N. E. cor. Alexander and Clymer sts., 14 ft. 4½ in. front, 31 ft. 8 in. deep. G. R. $30.
No. 2. House and lot, E. side Alexander st., adjoining No. 1, 14 ft. 3 in. front, 31 ft. 8 in. deep. G. R. $30.
No. 3. 2 story brick house and lot, N. side McClellan st., 130 ft. E. of Moyamensing av., 14 ft. front, 53 ft. deep. G. R. $48.50.

James Boal.
C. P. Ven. Ex. 338. J. 73.
$79 03. Hunn.
Lot, N. W. cor. 22d and Pine sts., 15 ft. 6 in. front, 50 ft. deep.

Geo. M. McKeever.
C. P. Ven. Ex. 328. J. 73.
$49. Hunt.
No. 1. Lot, N. E. cor. 38th and Aspen sts., 45 ft. front, 180 ft. deep. G. R. $67.50.
No. 2. Lot, N. E. side 38th st., 45 ft. N. E. of Aspen st., 45 ft. front, 180 ft. deep. G. R. $67.50.

Edw. H. Hunt, dec'd.
D. C. Lev. Fa. 1358. J. 73.
$4,086 66. Hunter.
House and lot, E. side Holly st., 120 ft. N. of Hutton st., 65 ft. front, 115 ft deep.

John Bateson.
C. P. Ven. Ex. 325. J. 73.
$102 16. W. W. Fell.
3 story brick house and lot, W. side Hope st., 474 ft. S. of Dauphin st., 14 ft. front, 42 ft. deep. G. R. $48.

David C. Montgomery.
D. C. Ven. Ex. 1291. J. 73.
$286 13. K. J. Fenner.
Buildings, improvements and lot, N. E. cor. 10th and Scott sts., 82 ft. front, 70 ft. deep. Mortgage $1,200.

McKenna & Larkin.
D. C. Ven. Ex. 1410. J. 73.
$200. Ferguson.
2 story brick house and lot, W. side 16th st., 63 ft. N. of Catharine st., 15 ft. front, 50 ft. deep.

Sam'l Bell.
C. P. Ven. Ex. 339. J. 73.
$88 22. Fletcher & Stevenson.
3 story brick house and lot, E. side 11th st., 82 ft. N. of Federal st., 16 ft. front, 65 ft. 8⅜ in. deep on N. line, 65 ft. 7½ in. deep on S. line. G. R. $76.

Harriet M. Shoemaker.
D. C. Lev. Fa. 1377. J. 73.
$1,716 80. Fletcher.
Brick house and lot, N. side Carpenter st., 182 ft. W. of 20th st., 16 ft. front, 70 ft. deep. G. R. $90.

August C. Miller.
D. C. Ven. Ex. 1385. J. 73.
$403 38. J. T. Ford.
No. 1. Lot, N. side Spring Garden st., 151 ft. 10⅜ in. W. of Ridge av., thence W. 20 ft., N. 80 ft. 11⅛ in., S. E. 2 ft. 11½ in., still S. E. 20 ft. 1 in., S. 69 ft. 7½ in.
No. 2. Improvements and lot, S. E. side Salmon st., 194 ft. N. E. of Huntingdon st., 111 feet 7½ in. front, 75 ft. deep.
No. 3. 3 story brick house, stable and lot, S. W. cor. Wallace and 13th sts., thence S. 35 ft. 5 in., W. 45 ft., N. 38 ft. 8 in., E. 45 ft. G. R. $71.

Edw. Hughes.
D. C. Lev. Fa. 1379. J. 73.
$1,916 25. R. Evans.
Lot N. side Madison sq., 207 ft. 6 in. W. of 23d st., 25 ft. 10 in. front, 25 ft. deep.

John McLaughlin.
D. C. Ven. Ex. 1422. J. 73.
$414 55. H. M. Dechert.
No. 1. 3 story brick house and lot, N. side Race st., 88 ft. E. of 23d st., 22 ft. front, 114 ft. 6 in. deep.
No. 2. 3 story brick house and lot, N. side Race st., 110 ft. E. of 23d st., 22 ft. front, 114 ft. 6 in. deep.
Nos. 1 and 2 subject to a G. R. of $132.
No. 3. 3 story brick house and lot, S. side Race st., 137 ft. W. of 22d st., 16 ft. front, 67 ft. 6 in. deep. G. R. $36.

Wm. J. Bell.
D. C. Ven. Ex. 1265. J. 73.
$5,200. Dedrick.
1 story market house, 2 story brick house on Edgemont st., and 2 story brick house on Newkirk st., and lot, N. side Edgemont st., 61 ft. 3⅜ in. N. of Cumberland st., thence N. W. 80 ft. 10 in., N. E. 66 ft. 8⅜ in., S. E. 80 ft. 1⅛ in., S. W. 74 ft.

Leonhard Rheinstrom.
D. C. Lev. Fa. 1329. J. 73.
$10,132 13. Dickson.
One-third part of
No. 1. House, barn and lot, a small distance from Nicetown lane, at a corner of land formerly of Daniel Swan, thence W. S. W. 113 ft. N. N. W. 22 8–10 perches, E. N. E. 113 perches, S. S. E. 122 8–10 perches. Containing 16 acres.
No. 2. Lot, adjoining No. 1 on the W., thence N. 61° 15′ E. 16 1-10 perches, N. 26° 45′ W. 2 4–10 perches, S. 61° 15′ W. 17 1–16 perches, S. 60° 15′ E. 2 9–10 perches. Containing 40 square perches.
No. 3. Lot, N. E. side of a road leading to Frankford, at a corner of land of John Pope, thence S. 46° E. 28 9–10 perches, N. 20° E. 11 2–10 perches, S. 76° E. 4 4–10 perches, N. 38° E. 55 perches, S. 62½° W. 71 perches. Containing 6 acres.
N. B.—There is erected on above premises a 2½ story frame dwelling, with 1½ story stone back buildings, and other buildings and sheds.
To be sold together as one property.

Wm. T. James.
D. C. Ven. Ex. 1283. J. 73.
$334 94. Diehl.
Lot, S. E. cor. Race and 23d sts., 32 ft. front, 66 ft. deep. G. R. $96.

John Buchanan.
D. C. Lev. Fa. 1393. J. 73.
$2,969 10. Dolman.
No. 1. 3 story brick house and lot, N. W. side Indian Queen lane, 777 ft. 6 in. S. W. of Phila. and Norristown R. R., 25 ft. front, 107 ft. deep on N. E. line, 104 ft. 10 in. deep on S. W. line.
No. 2. 3 story brick house and lot, W. side Indian Queen lane, 762 ft. 6 in. S. W. of Phila. and Norristown R. R., 25 ft. front, 104 ft. 10 in. deep on S. W. line, 109 ft. 1 in. on N. E. line.

George Looke.
D. C. Ven. Ex. 1423. J. 73.
$2,800. J. Dolman.
No. 1. Lot, N. W. side Springfield av., cor. land of Charles Schaffer; thence S. 41¼° W. 33 ft., 175 ft. deep.

No. 2. Lot, N. W. side Springfield av., adjoining No. 1, 33 ft. front, 175 ft. deep.

No. 3. Lot, in Chestnut Hill, beginning at corner of land of Henry W. Jordan; thence S. 39° W. 36 perches, N. 51° W. 18 perches, N. 39° E. 36 perches, S. 41° E. 18 perches. Containing 4 acres and 8 perches.

No. 4. Lot. in Chestnut Hill, on line of land of John Roop; thence S. 39° W. 33 18-100 perches, N. 51° W. 29 perches, N. 39° E. 33 18-100 perches, S. 51° E. 29 perches. Containing 6 acres.

John Eckes.
D. C. Lev. Fa. 1392. J. 73.
$102 04. Downing.
3 story brick store and dwelling, with 2 story back building and lot, E. side York av., 86 ft. S. of Buttonwood st., 16 ft. 16 ft. front, 109 ft. 7½ in. deep.

Wm. Idell, Jr.
C. P. Ven. Ex. 326. J. 73.
$10 68. Calvert.
Lot, S. E. side Sharpnack st., 193 ft. 4½ in. S. W. of Musgrove st., 30 ft. front, 118 ft. deep. G. R. $21.

Sam'l Benison, dec'd.
D. C. Lev. Fa. 1404. J. 73.
$377 81. Carroll.
House and lot, W. side Broad st., 102 ft. 9 in. N. of Fitzwater st., 16 ft. 10½ in. front 58 ft. 6 in. deep. G. R. $44.30.

Saml. Benison, dec'd.
D. C. Lev. Fa. 1405. J. 73.
$377 81. Carroll.
House and lot, N. W. cor. Lloyd and Brazier sts., 32 ft. front, 58 ft. deep. G. R. $44, silver.

Harriet M. Shoemaker.
D. C. 2d Pl. Ven. Ex. 1411 to 1413. J. 73.
Carroll.
House and lot, E. side Napa st., 74 ft. N. of Reed st., 14 ft. front, 51 ft. deep.

Harriet M. Shoemaker.
D. C. 2d Pl. Ven. Ex. 1412. J. 73.
$1,400. Carroll.
2 brick houses and lot, E. side Napa st., 102 ft. N. of Reed st., 28 ft. front, 51 ft. deep.

Harriet M. Shoemaker.
D. C. 2d Pl. Ven. Ex. 1413. J. 73.
$800. Carroll.
House and lot, E. side Napa st., 88 ft. N. of Reed st., 14 ft. front, 51 ft. deep.

Wm. B. Hazzard.
D. C. Lev. Fa. 1391. J. 73.
$2,400. Caven.
3 story brick house and lot, N. side Hazlan st., 266 ft. E. of 20th st., 14 ft. front 60 ft. deep. Mortgage $1600.

Stephen P. Bancroft.
C. P. Ven. Ex. 336. J. 73.
$43 30. Coxe.
Lot, W. side Clarion st., 236 ft. 8 in. N of Wharton st., 15 ft. 4 in. front, 50 ft deep. G. R. $42.

Theodore Marsh.
C. P. Ven. Ex. 345. J. 73.
$19 12. Croasdale.
2 story brick house and lot, W. side 10th st., 64 ft. N. of Tasker st., 16 ft. front, 64 ft. deep.

Geo. Fisher.
C. P. Ven. Ex. 346. J. 73.
$99 97. Croasdale.
3 story brick house and lot, with carpenter shop on rear end, S. side Otter st., 172 ft. W. of Frankford rd., thence S. 54 ft. 9 in., S. parallel with Leopard st. 54 ft. 9 in., W. 23 ft. 7-8 in., N. 104 ft. 3 1-8 in. E. 15 ft. 9½ in.

Wm. S. McIlhenney.
D. C. Ven. Ex. 1280. J. 73.
$226 34. Croasdale.
Right, title and interest in large brick hotel and lot, N. side Arch st. (No. 628) 179 ft. 2 in. W. of 6th st., 33 ft. 8 in. front 153 ft. deep.

Gottleib Elsasser.
D. C. Ven. Ex. 1282. J. 73.
$400. Croasdale.
Lot, E. side 8th st., 230 ft. S. of Dauphin st., 20 ft. front, 135 ft. 7¾ in. deep on N. line, 136 ft. 1¼ in. deep on S. line. G. R $25.

Theodore Bomeisler.
D. C. Ven. Ex. 1420. J. 73.
$1,034 20. T. Cuyler.
3 story brick house and lot, W. side Howard st., 341 ft. 8 in. N. of Cumberland st., 14 ft. front, 51 ft. deep.

Joseph Green.
S. C. Al. Ven. Ex. 15. July 73.
$2,500. Booth.
Lot, N. side Poplar st., 36 ft. E. of 28th st., 36 ft. front, 90 ft. deep.

Levi R. King.
D. C. Ven. Ex. 1224 to 1233. J. 73.
Booth.
No. 1. Lot, N. W. cor. Catharine and 23d sts., 15 ft. 6 in. front, 62 ft. deep.
No. 2. Lot, N. E. cor. Catharine and 24th sts., 15 ft. 6 in. front, 62 ft. deep.

No. 3. Lot, N. side Catharine st., 15 ft. 6 in. W. of 23d st., 16 ft. front, 62 ft. deep.
No. 4. Lot, N. side Catharine st., 31 ft. 6 in. W. of 23d st., 16 ft. front, 62 ft. deep.
No. 5. Lot, N. side Catbarine st., 47 ft. 6 in. W. of 23d st., 16 ft. front, 62 ft. deep.
No. 6. Lot, N. side Catharine st., 63 ft. 6 in. W. of 23d st., 16 ft. front, 62 ft. deep.
No. 7. Lot, N. side Catharine st., 335 ft. 6 in. W. of 23d st., 16 ft. front, 62 ft. deep.
No. 8. Lot, N. side Catharine st., 351 ft. 6 in. W. of 23d st., 16 ft. front, 62 ft. deep.
No. 9. Lot, N. side Catharine st., 367 ft. 6 in. W. of 23d st., 16 feet front, 62 ft. deep.
No. 10. Lot, N. side Catharine st., 383 ft. 6 in. W. of 23d st., 16 ft. front, 62 ft. deep.

John Lamplue.
D. C. Ven. Ex. 1234 to 1245. J. 73.
$2,500, each. Booth.
No. 1. Lot, S. side of Catharine st., 175 ft. 6 in. W. of 22d st., 16 ft. front, 60 ft. deep.
No. 2. Lot, S. side of Catharine st., 255 ft. 6 in. W. of 22d st., 16 ft. front, 60 ft. deep.
No. 3. Lot, S. side of Catharine st., 271 ft. 6 in. W. of 22d st., 16 ft. front, 60 ft. deep.
No. 4. Lot, N. side of Catharine st., 95 ft. 6 in. W. of 22d st., 16 ft. front, 62 ft. deep.
No. 5. Lot, N. side of Catharine st., 111 ft. 6 in. W. of 22d st., 16 ft. front, 62 ft. deep.
No. 6. Lot, N. side of Catharine st., 287 ft. 6 in. W. of 22d st., 16 ft. front, 62 ft. deep.
No. 7. Lot, N. side of Catharine st., 303 ft. 6 in. W. of 22d st., 16 ft. front, 62 ft. deep.
No. 8. Lot, N. side of Catharine st., 335 ft. 6 in. W. of 22d st.; 16 ft. front, 62 ft. deep.
No. 9. Lot, S. side of Catharine st., 191 ft. 6 in. W. of 22d st., 16 ft. front, 60 ft. deep.
No. 10. Lot, S. side of Catharine st., 207 ft. 6 in. W. of 22d st., 16 ft. front, 60 ft. deep.
No. 11. Lot, S. side of Catharine st., 223 ft. 6 in. W. of 22d st., 16 ft. front, 60 ft. deep.
No. 12. Lot, S. side of Catharine st., 239 ft. 6 in. W. of 22d st., 16 ft. front, 60 ft. deep.

O. M. S. Leslie.
D. C. Ven. Ex. 1246. J. 73.
$1,800. Booth.
No. 1. Yearly ground rent of $105 out of lot, S. side Madison sq., 181 ft. 8 in. W. of 22d st., 25 ft. 10 in. front, 25 ft. deep.
No. 2. Yearly ground rent of $105 out of lot, S. side Madison sq., 207 ft. 6 in. W. of 22d st., 25 ft. 10 in. front, 25 ft. deep.
No. 3. Yearly ground rent of $105 out of lot, S. side of Madison sq., 233 ft. 4 in. W. of 22d st, 25 ft. 10 in. front, 25 ft. deep.
No. 4. Yearly ground rent of $105 out of lot. S. side Madison sq., 259 ft. 2 in. W. of 22d st., 25 ft. 10 in. front, 25 ft. deep.
No. 5. Yearly ground rent of $105 out of lot, S. side Madison sq., 285 ft. W. of 22d st., 25 ft. 10 in. front, 25 ft. deep.
No. 6. Yearly ground rent of $105 out of lot, S. side Madison sq., 310 ft. 10 in. W. of 22d st., 25 ft. 10 in. front, 25 ft. deep.
No. 7. Yearly ground rent of $105 out of lot, S. side Madison sq., 336 ft. 8 in. W. of 22d st., 25 ft. 10 in. front, 25 ft. deep.
No. 8. Yearly ground rent of $105 out of lot, S. side Madison sq., 362 ft. 6 in. W. of 22d st., 25 ft. 10 in. front, 25 ft. deep.
No. 9 Yearly ground rent of $120 out of lot, S. E. cor. Madison sq. and 23d st., 26 ft. 8 in. front, 25 ft. deep.
No. 10. Yearly ground rent of $120 out of lot, N. E. cor. Madison sq. and 23d st., 26 ft. 8 in. front, 25 ft. deep.

Jos. Green.
D. C. Ven. Ex. 1247. J. 73.
$3,000. Booth.
3 story brick house and lot, W. side Mascher st., 207 ft. 6 in. S. of York st., 14 ft. front, 49 ft. 6 in. deep.

Cyrus C. Phelps.
D. C. Ven. Ex. 1248 to 1251. J. 73.
$2,533 34, each. Booth.
No. 1. Brick house and lot, S. side Westmoreland st., 100 ft. E. of 21st st., 20 ft. front, 112 ft. 6 in. deep.
No. 2. Brick house and lot, S. side Westmoreland st., 120 ft. E. of 21st st., 20 ft. front, 112 ft. 6 in. deep.
No. 3. Brick house and lot, N. side Delaware st., 120 ft. E. of 21st st., 20 ft. front, 112 ft. 6 in. deep.
No. 4. Brick house and lot, N. side Delaware st., 100 ft. E. of 21st st., 20 ft. front, 112 ft. deep.

John R. Fenner.
D. C. Lev. Fa. 1356. J. 73.
$770 70. Booth.
2 story brick house and lot, W. side Lee st., 262 ft. N. of Cumberland st., 12 ft. front, 60 ft. deep.

as we still affirm. To hold now that the discharge of the prisoner from arrest under that charge for want of sufficient evidence to justify his commitment, operated retroactively to make the precedent holding and arrest illegal, is to hold, if it be extended, as the principle of the argument must extend it to other and kindred cases, that, whenever a party once charged with crime has been arrested and subsequently discharged, whether for informality, for want of proof, on verdict, or on other legal grounds, *ipso facto*, all who were actors in the previous arrest were trespassers, and liable to be proceeded against as such as if the arrest and all prior proceedings were void *ab initio*. No such result is due to the fact that the prisoner having been arrested, is discharged from custody. Such a doctrine, we think, would be fruitful of mischief that could not be tolerated. It, therefore, is not true that the arrest on the present warrant was illegal, because the prisoner was, at the time it was issued to the marshal, illegally detained; and if so, that branch of the argument fails and must be overruled.

It is, however, suggested, that the prisoner being in custody under a warrant of arrest, if the view which we have just discussed be not taken, then he was in legal custody; that it was irregular to issue another warrant of arrest and place it in the hands of the marshal, and that, if proceedings against him with a view to another or subsequent charge were to be instituted, it ought to have been done by a detainer lodged with the jailer, and not by a warrant of arrest delivered to the marshal. Without entering into the discussion of a mere question of practice, it is enough to say, that we are of opinion that such a technical objection has no place in proceedings for the execution of this treaty, and has no application to this subject. The prisoner had not then been committed to any jail. He was kept in the custody of the marshal, who used such place of safe keeping as was available to him, and the new warrant of arrest must necessarily be delivered to the marshal. Such new warrant operated to make it the duty of the marshal to detain the prisoner to await proceedings under it.

It was insisted that the decision of this court in a former case involved, as a necessary result, a proposition which, if maintained, rendered the arrest under the present warrant illegal. In the case of In re Farez, 7 Blatchf. C. C. R. 34, before this court on habeas corpus, the opinion was expressed by the judge that while in the custody of the court, by virtue of a writ of habeas corpus, a prisoner was to be protected against arrest upon a new warrant, and obviously because it was a direct interference with the power of the court then engaged in inquiring whether there was ground for detaining the prisoner under the subsisting arrest; and that the court owed it to itself, and to its necessary power to exercise its own jurisdiction, to see to it that no prisoner in its custody held on habeas corpus, was withdrawn from it pending the proceeding. Such a case has no application to the present point. The prisoner was not in the custody of any court. He was held by a ministerial officer, with a view to an inquiry into a charge of crime, and there was nothing inconsistent with the course of that inquiry, that another warrant of arrest issued by the same commissioner, directing that he be brought before him, should be placed in the hands of the marshal, to the end that an inquiry might be had upon a fresh charge. It was not held in the case of Farez, that a new warrant of arrest was invalid because issued pending the proceedings on habeas corpus, but only that while the prisoner was in the custody of the court, it could not be executed, so as to withdraw him from that custody. So here the present warrant of arrest was not invalid because issued while the prisoner was held under a prior warrant. In the most favorable view that can be taken, it operated when he was discharged from the prior warrant to require the marshal to detain him in custody. No power of any court was invaded. There was no conflict with any requirement or duty of any court to see to it that its jurisdiction was not interfered with. That case as we think has no application to the subject before us; and we therefore hold that there was nothing in the circumstances relied upon, which invalidates the arrest and detention under the second warrant.

The discussion of the point last considered was deemed by the counsel of the prisoner, to involve the question whether, in truth this second arrest was or was not for the same charge. The counsel hereupon insists that, upon the same charge for which the prisoner was first arrested, he was not liable to a second arrest, not only for the reasons above referred to, but because the discharge from the first arrest operated as an acquittal, and that, therefore, if we do not sustain the grounds for discharge already considered, the prisoner must nevertheless be discharged unless the second arrest was based upon a charge of a distinct offence. That the second arrest was for the same offence as the first is claimed by the prisoner's counsel, upon, in substance this reasoning: Inasmuch as the treaty of extradition (8 U. S. Stat. at Large, 576, section 10) provides that upon the requisition of the demanding government, setting forth that the alleged fugitive is charged with the offence of forgery, he shall in the manner pointed out in the treaty, be surrendered to the demanding government for trial, therefore, if forgery be charged, it, *ex vi termini*, means all forgeries up to that time committed; and, therefore, although it may be true that a second application or requisition for surrender proceeds upon an allegation of the forgery of distinct and separate instruments, there is therein, nevertheless, but the charge of forgery, and it is, therefore, the same offence, because forgery was charged in the first requisition. The fallacy of that view of the subject is quite apparent when it is suggested that every forgery is an offence; that, as there may be several forgeries, so there may be, and so there are several offences; and that there may be as many indictments, as many trials, as many convictions, and we may add, we think is the necessary consequence, as many demands of surrender and as many proceedings preliminary to surrender as there are instruments forged, or in other words, in the view that we take of the subject, as there are offences. It is unnecessary to add that there need not be so many warrants of surrender, for the obvious reason, that when the prisoner has been once surrendered, a further warrant of surrender would be useless, and, therefore, the Executive need not be called upon to make more than one, unless perhaps, for some cause, the first warrant of surrender had not been executed. In that case, a second warrant of surrender might be issued.

The requisition, mandate, and complaint under which the second warrant of arrest was issued, and under which the proceedings now in question were taken, charge the prisoner with forging and uttering eleven different bills of exchange, each specifically described. The first proceeding related to two bills of exchange, described in such general terms that while they may answer the description of two of those named in the second proceeding, they are not clearly identical therewith, and the other nine are plainly distinct and separate forgeries. It is, however, insisted that the discharge from arrest under the first warrant was such an acquittal as precluded another arrest under the second warrant. The reasons which we have given for our view of the other points in the order in which they were presented by the counsel, lead necessarily to the answer which we give, decidedly that it has no such legal effect. Not only so; we purposely refrain from even affirming, or admitting, that, if the offence charged had been identical in both complaints, the prior discharge would have operated as a necessary legal bar to a subsequent arrest, commitment, and surrender, when the demanding government was able to produce proper evidence to sustain it. Be that as it may, we do hold that such discharge has no legal operation or effect upon proceedings for the surrender of a fugitive, based upon complaint of a distinct offence. The Executive may be called upon to guard against abuse, or against oppressive proceedings. The Executive may, perhaps, be justified in saying to the demanding government: "You have had your day. You have had your opportunity. We have, in good faith, given you the benefit of the instrumentalities pointed out in the treaty, in order to effect the surrender of the alleged fugitive whom you demand; but we will see to it that needless or vexatious prosecutions be not indulged in." On the other hand, we unhesitatingly say, that, if the government be satisfied that a failure to procure a surrender in the first instance was due to circumstances explainable, consistently with good faith, and consistently with proper respect to our government, and the case be such as properly appeals to the sense of justice which this government always entertains, a further mandate may be issued on a second requisition, and the proceedings that will follow, conducted by the judicial officers of the government, will be legal. Indeed, on that subject, we apprehend, that the magistrate before whom the prisoner is brought has no right to entertain the question. And, in reference to this point, we add that there is no necessary legal obligation, on the part of the demanding government, to place in its original requisition all the offences of which it may suppose that the fugitive has been guilty. What may, in fairness and candor, be due between the two governments, and whether the President would grant further and successive mandates, where the proceedings were rendered unnecessarily vexatious, by witholding the information which the demanding government possesses, and so instituting several successive prosecutions, when one is sufficient, is, we think, a question for the Executive, and not for the court or the commissioner

The next point in the order of the discussion was, that, if the proceedings before the commissioner thus far be held to be legal, the prisoner should, nevertheless, be discharged from custody, because the commissioner, in the conduct of the inquiry into the criminality of the fugitive, received incompetent evidence. The supposed illegal evidence consists of depositions of two classes. The first class embraces depositions which are certified to have been taken before the Lord Mayor of London, before a warrant of arrest, which forms a part of the documents produced on the hearing before the commissioner was there issued. The other class consists of depositions which were taken successively on two supplemental informations and inquiries, at dates subsequent to the issuing of that warrant of arrest.

In respect to the first class, it seems to us sufficient to refer to the language of the acts of Congress under which these proceedings have been conducted, and to state that the necessary construction of those acts involves the correctness of the commissioner's ruling in this respect. We think we might place the decision of that point upon the act of August 12th, 1848, alone (9 U. S. Stat. at Large, 302); but, under that act, as supplemented by the act of June 22d, 1860 (12 Id. 84), it seems to us that there can be no reasonable doubt. Section 2 of the act of 1848 provides that, "in every case of complaint as aforesaid" (referring to proceedings under a treaty for the extradition of criminals), "and of a hearing upon the return of the warrant of arrest" (issued by the magistrate), "copies of the depositions upon which an original warrant in any such foreign country may have been granted, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended." It will be seen, that the principles upon which this act proceeds is, that evidence which, in the foreign country, was held sufficient to authorize the arrest of the fugitive, ought to be received as evidence here upon the same charge. But, to identify that evidence and show that the documents produced do contain the evidence received in such foreign country, they must be authenticated as true copies. The authentication which this statute contemplates is a certificate under the hand of the person or persons issuing such warrant, and attestation, upon oath, that they

are true copies of the original depositions. That these depositions are certified under the hand of the person issuing the warant in the case now before us, to wit, the Lord Mayor of London, is not questioned.

Congress, in 1860, evidently conceiving that exigencies might arise, doubtless knowing that exigencies had arisen, in which there was difficulty in furnishing seasonable oral proof by the oath of the party producing the depositions, provided, in the act of 1860, that such depositions, or copies thereof, if they shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, shall be received in evidence. Here, again, Congress recognizes the propriety of receiving in evidence here depositions which are so authenticated as to entitle them to be received for similar purposes by the tribunals of the foreign country. Such depositions are, in their nature and by express terms, made admissible here. Had the act stopped there, the question arising on the offer of such depositions would not be, are such depositions admissible, but are they so authenticated that they are ent tled to be read in the foreign country for similar purposes. How are the tribunals of this country to be advised of the sufficiency of the authentication? That question might have created embarrassment had the act of Congress gone no further. Should oral proof be taken? What official certificates from the foreign tribunals, or government, or officers would establish it? To relieve all doubt or embarrassment, the act declares what may be taken as proof, and conclusive proof, of such authentication, which the court must recognize, and by which that fact is established, in these words: "The certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any paper or other document so offered is authenticated in the manner required by this act." It seems to us, that that removes all doubt from this question. Such certificate is not merely evidence, it is proof of such due authentication. The certificate of our minister at the court of St. James was produced before the commissioner. That certificate is unqualified, in its certification, that the depositions are authenticated in the manner required by the act, to wit, so authenticated as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party is alleged to have escaped. It seems to us that that certificate is, in its nature a judicial act, which neither the commissioner nor this court can disregard or overrule. Moreover, that certificate states, on its face, that it is given and made under and pursuant to the provisions of the act of 1860. It may, therefore, be regarded, by its reference thereto, as incorporating the act itself, so far as the details of its requirements are involved in the certificate. It follows, that, in regard to the first class of depositions, there is no room to hesitate, in affirming the correctness of the ruling of the commissioner in receiving them as evidence.

It is suggested, that this construction of the acts of Congress involves an interference with the rights of the prisoner, as creating a species of evidence which the treaty did not contemplate. 8 U. S. Stat. at Large, 576, sec. 10. We are aware, that, by the terms of the treaty, the proof which the Government of the United States is bound, and which alone it is bound to respect, as creating an obligation on its part to surrender a fugitive, is such evidence of criminality as, according to the laws of the place where the fugitive or person charged is found, would justify his apprehension and commitment for trial, if the offence had been there committed. In the first place, this language has especial reference to the degree, *quantum*, or weight of the evidence, rather than to the instruments of evidence themselves; and an act of Congress prescribing what instruments or vehicles of evidence shall be received, and how they may be authenticated, is in no inconsistency with the treaty. But more than this; it was just as competent, as a question of power, for the government of the United States, by act of Congress, as it was competent in the treaty itself, to say upon what evidence of criminality it would perform the stipulations in the treaty; and, therefore, when Congress declared, by their act, for the guidance of judicial officers, what shall be admissible to establish criminality, in the inquiry which, by the terms of the treaty, the government is bound to institute, they made their enactment the law of the place where the prisoner is found, for all the purposes of the proceedings under the treaty. Therefore, it is true—technically and literally true—that the evidence by which the prisoner in the present case has been charged, so far as it conforms to the provisions of the act of Congress, was evidence competent, in its nature, to justify any conclusion which is properly deducible therefrom, in the place where the prisoner was found, and where he was apprehended.

As to the supplemental depositions taken after the warrant was issued, their admissibility depends entirely upon the construction of the act of 1860. There are two grounds upon which we may hold that their admission does not invalidate the proceedings had before the commissioner in this case. If the construction which we have intimated of the act of 1860, namely, that the certificate of the principal diplomatic or consular officer of the United States, resident in the foreign country, is proof, plenary and conclusive, that the documents offered in evidence are so authenticated that they are entitled to be received for similar purposes by the tribunals of England, be correct, then, by the terms of the act of 1860, it was the duty of the commissioner to receive them in evidence, and they were competent, because so pronounced by the diplomatic officer to whom that question is referred by the act of Congress itself. If it were profitable, we might occupy time in suggesting reasons for the enactment, showing its propriety and its convenience; and we might even go further (if it were proper for the court to attempt to justify an act of the supreme Legislature) in support of the construction of the act of 1860, above stated. But we do not think that is necessary, and for the further reason that without resting the disposition of this case, in any respect, upon the conclusive effect of the certificate of the American minister, we are of opinion that even though the second class of depositions were inadmissible, their reception furnishes no ground for the discharge of the prisoner.

The arguments urged upon our attention proceed very much upon an assumption, which is entirely erroneous, to wit, that in this proceeding, under the writ of habeas corpus, we are sitting as an appellate tribunal. That is not our relation to the commissioner. A judge issuing a writ of habeas corpus, or a court issuing a writ of habeas corpus, in these cases, is exercising an independent and original jurisdiction, with a right to inquire, doubtless, whether the prisoner is legally held. What shall be the scope and extent of that inquiry, has been very much controverted in the courts of this circuit. We say on that subject, first, that we are not sitting as an appellate tribunal, for the purpose of reviewing the proceeding before the commissioner, as upon allegation of error. This is not a writ of error. The inquiry here is not to be conducted upon the rigid technical rules applicable to a writ of error, which is in the same proceeding. Sometimes, it is true, a writ of error is called a new suit, but in its relation to the subject matter, and in its ultimate result, it is so connected therewith, that it may be properly called a continuation of the same proceeding. It may result in reversing. What then? If the case is one which calls for it, a *venire de novo* may be had, which reaches back to the point where the error occurred which requires the proceedings to be reversed. If the decision is one of affirmance, it then adds an additional record sanction to what the inferior tribunal has done. This proceeding has no such relation to the proceedings of the commissioner. The question to be determined upon habeas corpus, in these cases is, as we apprehended, is the prisoner rightly held, or is he to be discharged? If the commissioner, having acquired jurisdiction of the subject matter and of the prisoner, commits an error in the reception of evidence, it does not follow by any legal rule, that his proceedings are to be held for naught, and void for error. The prisoner may, nevertheless, be legally held.

Our conclusion in regard to the case, as it stands upon the evidence, calls upon us to say, that whether the supplementary depositions were or were not admissible, the prisoner is legally held. Without those depositions the proofs justify the conclusion of the commissioner, and his commitment of the prisoner for surrender.

This brings us to notice the questions of fact, in relation to which what we have to say will be very brief. It is claimed that even with the evidence that we have last adverted to, a case was not made out justifying the commitment of the prisoner. Before, however, discussing that point, we desire to call attention to the state of the adjudications in this circuit. Three views have been taken of the power and duty of the court, on habeas corpus and certiorari, to entertain the question of the sufficiency of the evidence to warrant the commitment for surrender.

It was held, and held successively for many years, In re Veremaitre, 9 N. Y. Legal Obs. 129; In re Kaine, 10 Id. 257; In re Heiebronn, 12 Id. 65; Ex parte Van Aerman, 3 Blatchf. C. C. R. 160, that if it appeared to the judge, or to the courts issuing the writs, that the commissioner had acquired jurisdiction by a conformity of the proceeding to the requirements of the treaty and acts of Congress, and that he had not exceeded his jurisdiction; that was an end to the inquiry, that whether the evidence received by him was sufficient or insufficient was a question to be determined by him; that no tribunal had been provided by the treaty, and no jurisdiction had been given by any act of Congress to any judge, magistrate, or court to review that decision; that the only review possible was a review by the Executive, to whom the proceedings had before the commissioner were to be returned; that the Executivehad power to examine for himself and determine whether a case had been made within the treaty, and whether a case had been made which called upon him, as the Executive of the government of the United States, to surrender the fugitive, and that as this special jurisdiction in a special proceeding not theretofore within the jurisdiction, original or appellate, of any court or magistrate of the United States, had been conferred by law upon the magistrate acting under the act of Congress, and it was made his duty to certify his conclusion as the basis of executive action, without giving any right of appeal, in any form to any other magistrate or to any court, there was no appeal and no supervisory authority to be exercised, except by the Executive.

The next stage in the history contained an opinion which is supposed to go one step further. We may say, without disrespect to the decision itself, in any wise, that the decision in which the opinion was pronounced, In re Kaine, 3 Blatchf. C. C. R. 1, 4, had other grounds upon which it was deemed to be called for. The decision was that the commissioner never acquired jurisdiction, but the opinion nevertheless, went further, and held that in the case under consideration, there was no competent evidence before the commissioner, that is to say, there was no legal evidence upon which the commissioner could act, for if the evidence was not competent, it was not legal, that if there was no competent evidence before the commissioner, the proceedings before the commissioner were to be treated, whenever presented to any other tribunal, as an arbitrary act of commitment, upon mere complaint, and that the question became, therefore a question of law, not a question of fact, before the court on habeas corpus whether a commissioner could, upon complaint, issue a warrant of arrest, and upon the appearance of the prisoner before him, commit him for surrender. With that view of the subject, and with the assertion of the right to inquire, upon habeas corpus, whether the proceedings of the commissioner had been, in that sense legal, or in other words, whether he had not departed from his jurisdiction, which was a jurisdiction to inquire into and ascertain facts, and not to declare facts without any evidence before him, we are

not disposed at present, to raise any controversy.

The next step in the consideration of this subject elicited the opinion, In re Henrich, 5 Blatchf. C. C. R. 414, that the court, acting in the proceedings instituted by habeas corpus and certiorari, was not confined to the mere inquiry whether there was any evidence, but that if it could see that there was a substantial defect of evidence, it might and ought not necessarily to discharge the prisoner, but to hold that the warrant of commitment was illegally granted.

That view of the subject was followed in its next step, or perhaps in its consequence, by the holding, In re Farez, 7 Blatchf. C. C. R. 345 and 491, that it was not the duty of the court to discharge when an error in rejecting evidence for the prisoner had been committed, but to remand that the error might be corrected, and the proofs be continued, if it was so desired, to the end that the facts might be ascertained, and that if the prosecuting government was able, it might yet establish a case against the prisoner. Indeed in the previous case to which we have referred, to wit, where the judge was of opinion that there was no legal evidence. In re Kaine, 3 Blatchf. C. C. R. 1, 4, he offered upon announcing the conclusion that he had reached, to detain the prisoner to the end that the inquiry might proceed, the defects be supplied, and proper and competent evidence be produced before him.

In no view of the subject, therefore, should we be called upon to discharge the prisoner upon the idea that the evidence was not sufficient. No case has yet gone so far as to say that because some evidence was introduced which was not legal or competent, or because the court, upon a review of the evidence, was of opinion that it would have come to a different conclusion upon the evidence, therefore the proceedings were illegal and the prisoner should be discharged. The inconveniences and the evils of such a rule, applicable to this subject are so great that the assertion and maintenance of that view of the meaning of the treaty might be assailed as evidence of bad faith. It has been deemed settled by the law of England, and the doctrine has been reiterated in this country, that a determination of one judge, or a determination of one court, touching a question of discharge under habeas corpus, is not a bar to the issuing of another writ by another court, or by another magistrate, and that practically a person held in detention may have successive writs of habeas corpus, so long and so often as he may find a judge or a court to whom he may address his petition. That practice applied to this subject, works this result. If the judge or the court, in these cases where extradition is sought, is at liberty, on habeas corpus, to weigh the evidence before the commissioner, and inquire whether they would have reached the same conclusion, the result is that the finding of the commissioner, and the findings of successive courts and judges issuing successive writs of habeas corpus, so long as judges can be found, instead of having any force or effect, can be assailed and assailed again, until at last, perhaps some doubting mind may be found who will say, "I would have reached a different conclusion upon the evidence," and thereupon discharge the prisoner. To that view of the duty of the court, touching the weight of evidence before the commissioner, we cannot subscribe. We are not called upon by any decision heretofore made, to assert any such rule. We feel conscious not merely of the inconvenience, but as we apprehend, of the great injustice that would result from any such construction of the treaty and the acts of Congress. Even in the case most relied upon, the Henrich Case, 5 Blatchf. C. C. R. 414, notwithstanding what is stated in the previous portion of the opinion, the conclusion of the court leaves this question open to consideration, and as we think, in the form and manner in which we have stated our views, for although the power is there asserted to reverse or overrule a proceeding before a commissioner, for the want of sufficient evidence, still it is stated that it is not to be done upon slight grounds.

Assuming, nevertheless, for the purposes of this case, that inquiry into the evidence is open to us, in these proceedings, we are brought finally to the question whether, upon the evidence, a case is made out which would justify the commitment of the prisoner for trial. We have carefully examined the evidence in its details, enlightened by the views urged upon us by the counsel for the prisoner, and we are constrained to conclude, that the commissioner (even without the testimony in respect to which exception was taken) would have been derelict in his duty if he had not made the commitment for surrender which he was called upon by the prosecuting parties to make. This is not a trial of the prisoner. Much that was urged upon us, much that was urged touching the admissibility of evidence, much that was urged with regard to the sufficiency of the testimony, proceeded upon the principles which govern a court and a jury when the question of guilt or innocence is finally to be determined. A fugitive is not to be surrendered upon slight grounds. There should be reasonable cause to believe, and in conformity with the case last referred to, we might go further, perhaps, and say that there should be such *prima facie* case made by proof, as being submitted to the jury, and being found by them to sustain the charge, would make it the duty of a court to sustain the verdict. Such testimony, we think, is found in this case. We are, therefore, not called upon to say anything more touching the power or the duty of the court to examine and weigh the evidence. If such be our duty, we find it sufficient. If there being some evidence tending to establish the prisoner's criminality, we are not to review the finding of the commissioner upon the weight of the evidence, the result in this case is the same.

The objection has been urged by the counsel for the prisoner, that it is not sufficiently proved that the Lord Mayor of London had jurisdiction to issue a warrant of arrest, or to take the depositions in the first instance. Opinion of four judges of the Supreme Court, in Ex parte Kaine, 14 Howard, 115. If what we have said in regard to provision of the act of 1860, touching the certificate of our minister plenipotentiary, be adopted as the rule of decision, that disposes of this question, for in that case his certificate that the depositions which are offered are so authenticated as to entitle them to be read in the courts of that country, is the conclusive test of the admissibilty of the evidence before the commissioner here. But we are of opinion that the jurisdiction of the Lord Mayor is sufficiently established. It is not necessary that we should refer to the statute of Edward III, which defined and conferred the powers of justices of the peace in England, or inquire to what extent the tribunals of this country are at liberty or are bound to take judicial notice of the existence of such officers, from that period down to the time of our Revolution, or to recognize the existence of their jurisdiction and authority, and to dispense with proof that such officers have jurisdiction to keep the peace, and as magistrates, to arrest on charge of crime, and hold to bail and detain for trial. Much might be said, it seems to us, in support of that view of the subject, and to sustain the jurisdiction of the Lord Mayor, who appears by these proceedings to be a justice of the peace, without any other proof, whatever. But we think that if evidence is necessary, evidence was produced competent to prove it. We have in the testimony, the affirmative fact that he is the chief criminal magistrate of the city of London. That is testified under oath. There was no cross-examination, there was no inquiry into the sources of the witness' knowledge, and nothing offered in impeachment of the vefity of what was testified. The certificate of the government of Great Britain, in any form, would have told no other tale. At least it establishes that he is, in fact, in the exercise of the power and authority of the chief criminal magistrate of the city of London. It might be plausibly suggested, were it not for some things that have been said in former cases, that when the act of Congress of 1848 provided that the depositions on which a warrant had been granted in the foreign country, certified by the person issuing such a warrant, might, when proved to be true copies, be received in evidence, there was no room for inquiry here into the jurisdiction of that person. We do not, however, propose to go so far. We do say that the proof adduced before the commissioner, in connection with the certificate of the Lord Mayor, and the authentication or certification, ample and full as it is, by our minister, completes the chain of evidence, and sufficiently establishes the jurisdiction of that officer.

To conclude, we find nothing that will justify our further interference with the custody of the prisoner, under the warrant of commitment by which he is held, subject to the warrant of the Executive for his surrender. The prisoner is remanded to the custody from which he was taken, and the writs are discharged.

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Supreme Court of Pennsylv'a.

THE COMMONWEALTH OF PENNSYLVANIA v. THE PITTSBURG, FORT WAYNE AND CHICAGO RAILWAY COMPANY.

1. The mere nominal or arithmetical increase of the shares of a corporation without any transfer to the shareholders of anything out of the treasury or property of the corporation, the mere watering of stock, is not a dividend either made or declared.
2. Nor does the fact that its new form gives to the stock a greater commercial value, constitute it a dividend of any profit or property of the company.
3. The letter of the auditor of a company unaccompanied by proof of his authority to represent the company in the matter, or that his duties extend to this business, not evidence.
4. The causes of the commonwealth must be tried according to the same rules of evidence which apply to other suitors.—*Legal Opinion.*

Error to the Court of Common Pleas of Dauphin county.

Opinion of the court by AGNEW, J.

The whole question in this case depends on the fact whether the increase in the stock of this company was a stock dividend. If it was, it must be conceded that this increase is the subject of the tax of one-half mill for every one per cent. of dividend, under the fourth section of the act of May 1st, 1868. 2 Bright. Dig., p. 1,382, pl. 157. A stock dividend is a thing well understood, and has been passed upon by this court in several instances. In the Commonwealth v. Cleve., Pains. & Ash. R. R. Co., 5 Casey, 370, it was said that "in assessing the tax, no difference can be made between the dividends actually paid to the stockholders, and stock dividends, which are profits added to the stock of each corporator." Nor is it necessary that the corporation should formally declare the dividend payable in stock. This was determined in the Lehigh Crane Iron Co. v. Commonwealth, 5 P. F. Smith, 448. There a company with a capital of $100,000, from time to time increased its capital from its earnings until its stock reached to $900,000, and we held that the increase having resulted from earnings, was liable to the half mill tax. It was a dividend made though not so declared. We said then that the earnings of the original capital belonged to the owners of the stock, in proportion to their shares. So long as they remained in the profit and loss account, there was no division, express or implied, but when added to the capital and made a basis of dividends to the stockholders, they then reaped the actual benefit of the earnings of their stock.

On the question, what is the true capital of a company as the basis of dividends, a converse of the last case is that of the Citizens' Passenger Railway Co. v. The City of Philadelphia, 13 Wright, 251. The authorized capital of that company, on which it declared its dividend, was $500,000, but its actual capital paid in was but $192,750, and the question was whether the tax should be estimated on the authorized or on the paid up capital. The estimate on the nominal capital drew the dividend below six per cent., the charter limit, and hence the controversy. This court, by Thompson, J., held that the paid up stock, not the nominal amount, was the true basis of taxation, and on that the dividend exceeded six per cent. The obvious reason is that the earning or profits of the stockholders on their actual investment, is the real ground on which the tax is laid. This purpose is manifested by the letter of the act as well as its spirit. The fourth section of the act of May 1st, 1868, is in these words: "The capital stock of all companies whatever, incorporated, etc., shall be subject to and pay into the treasury of the commonwealth annually at the rate of one-half mill for each one per cent. of dividend made or declared by such company." A dividend is not capital, but the product of capital, and this product it is which the law by its own terms makes both the criterion and the measure of the taxation of the capital. Thus, if a profit upon the actual capital or investment be either made or passed over to the stockholders without a declaration of dividend, or if a dividend be declared to them, the sum so made or so declared becomes the measure of the tax. If it be made and added to the investment of the shareholders in the form of new capital, though not declared as a dividend, still it must be taken and deemed to be a dividend of the earnings of their original capital, and the new stock is called a stock dividend. This is the point decided in the Lehigh Crane Iron Works' case, *supra*. On the other hand, if a dividend be declared and set apart to the shareholders, the stock is taxable on the basis of this declaration, of which it makes return by law to the auditor general. The company is estopped by its declaration and report, whether the dividend be earned or not. Atlantic and Ohio Telegraph Company v. Commonwealth, 16 P. F. Smith, 57. The late chief justice said, in the last case, the only question was whether the court below erred in regarding the returns as the true evidence of what dividends were declared as the basis of the auditor general's settlement. He remarked, "She (the commonwealth) is dealing with her own corporation, and acting solely on the evidence of its doings in regard to the subject of its liability to taxes, viz.: dividends made or declared. This is shown by its proper officer, the treasurer, in his return to the auditor general; and the basis of that taxation is the dividends declared and paid." And again, "By whomsoever the stock is held, the measure of the tax is upon the dividends declared, and no such thing as partial dividends is ever to be presumed. When a dividend is declared (he continues) that gives the measure and furnishes the rule for the tax." This ruling derives greater force from the language of the original act of 29th April, 1844, the prototype of the act of 1859, from which the fourth section of the act of May 1st, 1868, was taken. The act of 1844 was that the amount of the tax chargeable on the capital stock, on which a dividend or profit of six per cent. per annum or more shall be made and declared, shall be at the rate of one-half mill on each one per cent. of such dividend or profit. This "profit" was the legislative synonym of the dividend which should measure the tax. In the case of the Phœnix Iron Co. v. Commonwealth, 9 P. F. S. 104, the legislation on the subject of the tax on the capital stock is traced, and the difference is shown between the State tax on dividends specifically and on the capital stock as measured by the dividends. In that case the difference between the acts of 1844 and 1859, was pointed out, which is that instead of a valuation of the stock, as per act of 1844, when the dividend fell below six per cent., the act of 1859 required payment of the tax at the rate of half a mill for each one per cent. of dividend made or declared, and provided for the valuation of the stock according to the act of 1844, only when the corporation failed to make or declare any dividend. But when dividends are made or declared, they still continue to be the criterion and the measure of the tax. In this aspect, therefore, the law is still the same as under the act of 1844, which expressly denominates the dividend as profit.

These two cases, the Lehigh Crane Iron Works and the Atlantic and Ohio Telegraph Company, have, therefore, settled the interpretation of the fourth section of the act of May 1st, 1868, according to its letter and its spirit, and they now furnish the rule for taxation. This is, that when a corporation has actually made dividends from its profits or property without formally declaring them, by adding them to the stock of the shareholders, or where it has declared dividends and returned them, whether earned or not, the sum thus added to the stock of the shareholders, or the sum thus declared and set apart to him, becomes the measure of the tax, the legislative intent being to make the profit transferred by the corporation to its shareholders from its treasury or property the measure of the taxation of its capital. Hence, it is clear that a mere nominal or arithmetical increase of the shares, without a transfer to the shareholders of anything out of the treasury or property of the corporation, is not a dividend or profit either made or declared. It is a mere change in the form of the capital or investment—a transaction of one form into another. A dividend *ex. vi. termini* is a product of the stock, it is the legislative synonym of profit, not the capital which made it. But capital, no matter what new form it may take, either by the increase or diminution of the number or nominal amount of its shares, so long as no new product is added to it from the treasury or property of the corporation, is still the same capital in substance and effect Nor does the fact that its new form gives to the stock a greater commercial value, constitute it a dividend of any profit or property of the company. It resembles a non-negotiable note converted by consent of parties into a negotiable form. No new sum passes from the debtor to the creditor, the debt is the same, but the new form has given to the instrument a new commercial value in the hands of the creditor. The mere watering of stock, therefore, which has only subdivided existing shares and has transferred nothing from the treasury or property of the corporation to the pocket of the stockholder, is not a dividend either made or declared, within the letter or spirit of the act, and furnishes no basis for additional taxation upon the corporation. It must be remembered that the question before us concerns only the corporation. If the new form of the stock makes the shareholder amenable to additional taxation for more stock, as he was under the act of 1844, and still is to a certain extent, that is his concern, and he must pay any new burthen the increase in his stock may impose upon him. But the Legislature having made the corporation amenable to taxation only according to the dividends it declares, or the product of its capital actually invested in its shareholders in the form of new stock, the State can impose under the act of 1st May, 1868, no additional burthen founded only on a mutation in the form of its capital. This being the true interpretation of the fourth section of that act, which is almost a literal transcript of the act of 1859, the solution of the present case is free from difficulty. The resolution of the stockholders under which the change in the form of the stock took place, recites: That under the lease of the railway to the Pennsylvania Railroad Company, a perpetual dividend fund is provided equal to pay twelve per cent. on the existing stock of the company, and that it is expedient that a guaranteed stock entitled to dividends, at the rate of seven per cent. should be created in substitution of

the now existing stock. Authority is then conferred on the directors to carry out this purpose. In pursuance of this authority, it was ordered that "there should be issued to the stockholders new certificates, to be called 'guaranteed dividend stock,' in exchange for the old certificates, at the rate of 171 shares of new stock for each 100 shares of the old." This was but a change in the form of the stock, the new certificate representing precisely the same stock covered by the old certificate, altered only by a numerical subdivision of shares, which made 100 by the former computation to stand as 171 by the latter. Nothing new in the shape of profit or property, so far as it appears from the evidence, passed from the company to the stockholders. The existing shares summed up a capital of $11,497,700, on which twelve per cent. would yield a dividend of $1,379,724. The new, or guaranteed, stock at the rate of increase, gives a capital of $19,665,000, on which seven per cent. gives a dividend of $1,376,550, a shade less than the old form yielded. A further calculation shows also that the increased number of shares in the new form counterbalances the decreased percentage in the dividend, and that the commonwealth loses nothing in her tax.

Thus standing on the report of the company, which according to the case of the Atlantic and Ohio Telegraph Company, must be taken to be true in the absence of other evidence, no dividend or profit was made to the stockholders, and consequently the increase in the number of the shares was not a stock dividend and not a basis of taxation.

But had the rejected evidence been admitted, a new aspect might have been given to the case. A grave question would then have arisen, whether the increase of the stock was not an increment, arising from an actual appreciation of the entire property of the corporation, which it sought to transfer to its stockholders, under color of a mere transmutation in the form of stock. If this were the case, it cannot be doubted that the value thus transferred in the form of stock, would constitute a stock dividend, and be the measure of the tax. The rejection of the evidence becomes, therefore, an important assignment of error. It involves a nice discrimination, and yet we think the court was right in its ruling. The document offered was not issued by the company, but was framed and circulated by the trustee in the mortgage given to secure the bond creditors of the company. As a document its assertions were not binding on the company without evidence of their previous authority or subsequent adoption. There was no evidence of either, excepting what shall be found in the letter of Mr. Farley, the auditor of the company, to the auditor general, in response to an inquiry of the latter. There was no evidence of Mr. Farley's authority to represent the company in this matter, or that the duties of an auditor of the companies extend to this business. His authority, therefore, can only be an implication, and the extent of it cannot exceed the terms of the letter itself. Then, assuming an implication of authority to Mr. Farley, the document to which he refers, he adopted only to the extent of those parts to which he refers the auditor general, as explanatory of the action of the railroad company. Beyond these parts of the document, there is no evidence of adoption by the company, actual or inferential. To infer that the statements of a trustee for a different purpose, with no evidence of his authority to make them, outside of the portions adopted by another person without evidence of his authority to adopt the entire document, are binding on the company, and would stretch the doctrine of presumptions beyond the boundaries of safety. Such a presumption would leave the company at the mercy, whim, caprice or prejudice of a jury. It was in the power of the commonwealth or her officers, had they made the effort, to supply the evidence of authority, if it existed, or the evidence of the facts themselves recited in the circular. In regard to the facts, the causes of the commonwealth must be tried according to the same rules of evidence which apply to other suitors, she must supply the evidence of them, and if by loss or a want of evidence she fails, the misfortune or the fault is her own. The absence of evidence cannot be supplied by presumptions at war with justice as well as with the ordinary rules of evidence. The error of the argument which, without evidence, demands a presumption of a dividend of profits from a mere increase of capital, will be treated of in an opinion to be read in the case of the Erie and Pittsburg Railroad Company v. Commonwealth. There being no evidence on the trial that there was a dividend either made or declared by the company, there was nothing to be submitted to the jury.

Judgment affirmed.

THE COMMONWEALTH v. EVANS. EVANS v. THE COMMONWEALTH.

1. Mr. Evans was appointed a "special agent," under a joint resolution of the Legislature, P. L. 1867, p. 1343, which authorized the governor to appoint a special agent to collect certain claims against the United States—whose compensation shall not exceed ten per centum of the amounts thus collected, and shall be paid out of such collections. *Held*, That he was a public officer.
2. All persons, who by authority of law are entrusted with the receipt of public moneys—through whose hands money due to, or belonging to the public, passes in its way to the public treasury, must be so considered, by whatever name or title they may be designated in the law authorizing their appointment, and whether the service be special or general, transient or permanent.
3. *Held*, That he was an agent liable to account under the act of March 30th, 1811, the fourteenth section of which provides—"that no allowance for commissions shall in any instance be made by the accounting officers, in case of refusal or neglect to furnish accounts."—*Legal Opinion.*

Writs of error to the Court of Common Pleas of Dauphin county.

Opinion of the court by SHARSWOOD, J. Delivered July 2d, 1873.

These are writs of error by both parties to a judgment of the Court of Common Pleas of Dauphin county, upon the verdict of a jury rendered in a suit by the commonwealth against George O. Evans. The case was tried by the learned president of the court with his accustomed ability and impartiality. We have examined carefully all his rulings on the subject of evidence which have been complained of in this court by either party, and find nothing upon which he can be convicted of error. Nor can any of the errors assigned to his answers and charge be sustained, except as to those points which in different forms appear in several of the specifications by the commonwealth. It will be unnecessary to consider these several specifications more in detail.

We are of the opinion that the defendant below was a public officer within the purview of the first section of the act of July 12th, 1842, Pamph. C, 339, which excepts from the provision of that act abolishing imprisonment for debt, proceedings for the recovery of "moneys collected by any public officer." It may sometimes, indeed, be a difficult matter to distinguish between a public officer and a person employed by the government to perform some special service by contract. It is clear that it is not all public debtors who are within the exception of the act of 1842, nor all parties who under the act of March 30th, 1811, 5 Smith, 225, are bound to account to the auditor general. But we are of the opinion that all persons who by authority of law are entrusted with the receipt of public moneys, through whose hands money due to the public, or belonging to it, passes on its way to the public treasury, must be so considered, by whatever name or title they may be designated in the law authorizing their appointment, and whether the service be special or general, transient or permanent. It is quite unnecessary to discuss the authorities which have been cited upon this point. None of them bear any resemblance to this case, except, perhaps, The United States v. Maurice, 2 Brock. 96, and that we think sustains the conclusion at which we have arrived. It was there held that an agent for fortifications, appointed under the army regulations, which had received the sanction of Congress, was a public officer from whom the government had a right to exact an official bond with sureties, and that such bond was therefore a valid obligation. The appointment then as here was for an indefinite period. Nor does it seem to us to distinguish this case from that, that this appointment was to collect a single claim, or rather a single set of claims against a particular debtor. No one can doubt that collectors of public taxes are within the letter of the exception of the act of 1842. Suppose a special tax laid for a temporary purpose, is it susceptible of any more doubt that a person appointed by authority of law to collect such tax—call him special collector or special agent—would be equally within the exception, and moneys collected by him be "moneys collected by a public officer?" Can it make any difference that a person is commissioned by the government as a general agent to collect all claims of the commonwealth, or as a special agent to collect only one particular claim? We think not. Mr. Evans was appointed by virtue of a joint resolution of the Legislature, approved March 22d, 1867. Pamph. L. 1,343, by which it was provided that the governor be and he is hereby authorized to appoint a special agent to collect the disallowed and suspended claims of the State against the United States. Under this resolution the governor appointed Mr. Evans, and very properly issued and delivered to him a commission under the great seal of the State. This commission is in the usual form of an official commission. In like manner he required of him to give bonds with two sureties. The bond is to the commonwealth, and is conditioned that "the above bounden George O. Evans, special agent as aforesaid, shall faithfully perform his official duties under said joint resolution." It is an official bond. It is true that it does not appear that he took the oath required of all officers, executive and judicial, by the eighth article of the constitution, but it does not follow that he was not bound to take such oath in order to render his qualification complete. Riddle v. Bedford County, 7 S. & R. 386. He certainly had official duties under the joint resolution, as his bond acknowledged, which when he accepted the position he was bound to perform with fidelity. It is not a case of service rendered to the commonwealth under a contract. The joint resolution did not empower the governor to make any contract, and as the learned judge rightly decided upon an offer of evidence, he had no authority outside of the resolution to do so. Even if the fact were that Evans did enter into a contract or contracts with the governor and auditor general, it did not change his character and responsibility as an officer. "If," says Mr. Chief Justice Marshall, "it may be converted into a contract, it must be a contract to perform the duties of the office of agent, and such an office must exist with ascertained duties, or there is no standard by which the extent of the condition can be measured." 2 Breck. 103. A contract to perform duties of an office is implied on the part of every person who accepts it. 3 Bl. Com. 165. We think, therefore, that the moneys collected by Evans were moneys collected by a public officer within the exception of the act of 1842, and the learned judge below ought so to have instructed the jury, and not that the defendant was entitled to a verdict in his favor on the second count of the declaration.

There was a further error in the charge upon the subject of the compensation of Evans for his services in the matter of the claims placed in his hands for collection by Auditor General Hartranft. The jury were directed, "you must fix the amount, and can say that it shall be three, five or ten per cent. as you may think just and reasonable." He had before rightly directed the jury that the defendant could not be allowed more than ten per cent. on the amount actually collected by virtue of his appointment under the joint resolution. He does not in this case limit the commission to the amount actually collected. But we think it clear from the letters of Governor Geary to Auditor General Hartranft, dated March 29th, 1870, and from the paper signed by the latter, dated March 30th, 1870, that the vouchers for these claims were handed over to Evans as the special agent, under the joint resolution requiring the auditor general to furnish him with these vouchers. Governor Geary names and describes him as "special agent of the State under the joint resolution of the Legislature of March 22d, 1867," and Auditor General Hartranft carefully stipulates that his compensation for these services shall be "out of the commission of ten per cent. allowed by the joint resolution."

That is, as we think it must be, reasonably construed. The services rendered in the matter of these claims should be considered in determining the rate of commission to be fixed under joint resolution, and not in the whole to exceed the maximum of that commission, since it is to be paid out of it.

One other point remains to be considered upon the subject of the forfeiture by Evans of his right to any commission. The learned judge undoubtedly laid down the rule correctly as between private principal and agent. But that was not the relation between the commonwealth and Mr. Evans. Admitting even that he was not a public officer, it cannot be questioned that he was an agent liable to account under the act of March 30th, 1811. The first section of that includes, as such expressly, "persons intrusted with the receipt, or who now or hereafter may become possessed of public money." Evans indisputably fell within this category. The fourteenth section of that act provides "that no allowance for commissions shall in any instance be made by the accounting officers, in case of refusal or neglect to furnish accounts." It cannot, with any show of reason, be maintained that this provision applies only to the accounting officers. It is a rule of forfeiture, applicable in all cases between the State and her agents, who are bound to account, and is to be applied whether the question arises upon an appeal from a settlement or in a common law action, if the commonwealth chose to resort to that remedy. The Legislature has laid down a very simple and just rule—essential to the safety of the State—and which can never work injustice to her honest agents. She ought, in no case be compelled to pay double or treble commissions for the collection of her claims—first to the original agent, and then to the agent or attorney employed to collect of that agent, and so on, as it may be, until the whole claim is exhausted in commissions. The simple rule laid down, and which she had an undoubted right to lay down, is to furnish accounts. She says to her agents, report the amount you have collected—make whatever offsets you may think yourself entitled to; the accounting officers will then have the means of making a settlement with you, and if you are dissatisfied with their decision you can appeal. Evans was bound, under the act of 1811, to account promptly—at least within a reasonable time, and besides it was a part of the condition of his official bond that he would "make semi-annual reports to the State treasurer of the amounts collected and of the sources from which derived." It is not pretended that he made any reports or furnished any accounts within a reasonable time, or within the time named in his bond. He received from the United States, May 1st, 1867, $78,516.39, October 27th, 1868, $105,651..46, and August 20th, 1870, $136,846.09. He furnished no accounts whatever until July 21st, 1871. He said on his examination as a witness in court: "I reported to the governor how I was succeeding in my collections. I did not report in writing, because it was not considered expedient, and against the interest of the State. The State had a large balance unsettled, and if reported and got into the newspapers would damage our claims. The governor requested that no public report should be made for the good of the State to facilitate the claims." Governor Geary was not alive at the time of the trial to meet this allegation. It is too clear for argument that the governor had no power to release the agent from one of the plainest of his duties, as well as the condition of his official bond, upon any such notions of expediency. The attention of the learned judge does not appear to have been distinctly called to the provision of the fourteenth section of the act of 1811, and if this was the only question in the cause, we might hesitate to reverse upon it. It is, however, necessarily involved in the answer to the defendant's fourth point, which forms the subject of the sixth assignment of error by the commonwealth.

Judgment reversed, and *venire facias de novo* awarded.

Recent Decisions.

NEW HAMPSHIRE.

[Head notes of decisions of Supreme Court of New Hampshire, to appear in vol. 52, N. H. reports Received from John M. Shirley, Esq., State Reporter.]

BELL v. LAMPREY.

The statute of limitations runs against a claim, unless the debtor is both absent from and residing out of the State.

He may have his legal residence out of the State, and yet be present in the State within the meaning of that provision.

During every absence of the debtor from the State, whether temporary or permanent, which is such that the creditor cannot, during the same, make legal service upon him, the statute of limitations will not run.

But during any return to or presence in the State of the debtor, whether permanent or temporary, with the knowledge of the creditor, or so open and notorious, and of such continuance as to amount to notice to him, and such that the creditor might, by ordinary diligence, have obtained service upon him, the statute of limitations will not run.

To a plea of discharge in insolvency in another State, the plaintiff replied that the defendant committed perjury in swearing to his schedule; and, also, that within a year before filing his petition, and being and knowing himself to be insolvent, paid, in part, borrowed money and pre-existing debts and liabilities, and that he procured the assent of creditors to his discharge by a pecuniary consideration, and made an assignment and transfer of property, in contemplation of insolvency in fraud of creditors, &c.;—upon demurrer,—*held*, that these replications were bad, because they did not specify time, place, persons, and circumstances, when, where, with whom, and under, and in connection with which the acts charged were committed and done.

ROCKINGHAM TEN CENT. SAVINGS BANK v. PORTSMOUTH.

Under the statute of 1869, ch. 4, all the deposits and accumulations in the several savings banks in this State, however such deposits and accumulations may be invested, are to be taxed to the banks; and such taxes are to be paid to the State, in the first instance. And such deposits, &c., are not liable to any other tax.

Real estate owned by a savings bank, and purchased with the deposits and accumulations of the bank, is not, under said statute, subject to taxation as real estate in the place where the same is located.

A fundamental principle in taxation is, that the same property shall not be subject to a double tax payable by the same party.

Thus, when it is decided that a certain class or kind of property is liable to be taxed under one provision of the statute, it follows, as a legal conclusion, that the Legislature could not have intended that the same property should be subject to another tax.

This court has no jurisdiction by bill in equity to restrain a town or the collector thereof from the collection of a tax which is illegally assessed, as the party has a plain and adequate remedy at law.

An application for abatement is the proper remedy in such cases, not only when the assessment is made upon an over valuation, but also when the whole assessment is illegal.

A bill in equity, one of the prayers in which (with others) is that the court will abate the tax, may be considered and treated as a simple application for abatement, if the necessary preliminary steps have been taken.

CLEMENTS v. MARSTON.

Under our statutes neither interest nor infamy is any disqualification as a witness, whether as a party or otherwise.

Nor are those disqualifications any longer operative, which, being founded upon grounds of public policy, such as the fear of producing dissensions and strife in families and encouraging perjury, were held at common law sufficient to exclude husbands and wives from testifying for or against each other in all cases.

Instead, therefore, of the common law rule that the wife could not testify for or against her husband, and *vice versa*, for the double reason that their interests were identical, and that it was also contrary to sound public policy, the rule in this State now is that husband and wife may elect and be compelled to testify for or against each other in all cases where the court can see that their examination as witnesses upon the points to which their testimony is offered, will not lead to a violation of marital confidence.

Therefore, when one party to a suit is an executor or administrator, and does not elect to testify, although the other party is thus precluded from being a witness, yet his wife may be called as a witness, either for or against her husband, where no violation of marital confidence is involved.

Conversations between the husband and third persons, and which were heard by the wife, would not ordinarily come within this exception.

And when the wife acted as the agent of the husband, in a matter requiring no special confidence, and where no such confidence is bestowed, and where any other person could have acted just as well, she may ordinarily state any facts learned in the course of such agency.

Where any part of the consideration of a contract is illegal, that may vitiate the whole contract; but where a part of the consideration of a contract with one party is a contract of the other party, which is void or voidable, but not illegal, that does not taint the whole consideration, or make void what would otherwise be valid.

Crawford v. Parsons, 18 N. H 293, questioned.

BREWSTER Ex'R, v. BREWSTER ET AL. Ex'RS.

A., being indebted to his sister. B., in the sum of $1,500, gave her a writing, by the terms of which he promised to pay her, "during her lifetime, $90 per year, semi-annually, being the interest, at six per cent., of $1,500; the principal to be paid to her personally when she may require it, but to no other person.—This obligation will bind my heirs in case of my decease, and release them from any obligation beyond her lifetime."

A., having paid to be B. $45 every half year during his life, died August 4th, 1868. Subsequently, his executors continued to make half-yearly payments of $45 each to her, until and including July 1st, 1869. On the 9th of August, 1869, in response to her written demand for the payment of the principal sum of $1,500, they paid her $393.50, and on January 1st, 1870, they paid her $33.20, being the interest then due upon the remainder of said principal sum. May 12th, 1870, after making a further demand on that day for the balance due upon said writing, B. died. The executor of B. brought an action against the executors of A. to recover said balance. Their action was commenced more than three years after the grant of letters of administration to the defendants as the executors of A., and after they had settled their account as executors in the probate court, and distributed the balance of the estate found in their hands according to the will of A.; but the action was commenced within two years after the original grant of administration upon the estate of B.

Held—1. The principal sum of $1,500 was due and owing to B. whenever she might demand its payment, whether or not such payment were requisite for her comfort or convenience. 2. The cause of action survived, and was capable of prosecution by the executor of A. 3. By virtue of sec. 7, ch. 179, Gen. Stats., such an action may be sustained if brought at any time within two years after the grant of administration upon the estate of the creditor, notwithstanding more than three years have elapsed since the granting of administration upon the estate of the debtor. 4. The operation of the statute, limiting the time within which an action may be brought against an executor for a cause of action against the deceased (Gen. Stats., ch. 179, sec. 5), is suspended during the period when, administration of the estate of a deceased creditor not having been granted, there is no representative of the deceased creditor entitled to bring suit. 5. The payments made by the defendants do not amount to successive new promises, suspending the operation of the statute of limitations. Gen. Stats., ch. 179, sec. 5.

The date of a writ, and not the date of its service, indicates the time of the commencement of an action.

LEGAL GAZETTE.

Friday, August 1, 1873.

JOHN H. CAMPBELL, EDITOR.

THEODORE F. JENKINS, ASSOCIATE EDITOR.

Court of Common Pleas, Philadelphia County.

THE WEST PHILADELPHIA PASSENGER RAILWAY CO. v. THE CITY OF PHILADELPHIA, et al.

1. The authority of the city of Philadelphia over its streets and highways includes the right to lay out and establish streets, determine their lines and grades, pave and keep them in repair, and generally to see that the free and common right to an unobstructed passage over them is secure to the public.
2. The Legislature may enlarge, abridge or abrogate this authority; but a grant to a private corporation to control or override such authority, must be clear, and if there be any ambiguity, the charter will be construed in favor of the public.
3. The passenger railway companies hold their special privileges subject to a proper exercise of this power by the city, which may regulate their franchises, provided it be not to a restriction or destruction of corporate rights, that the regulation be reasonable and necessary for common benefit, and not in restraint of trade, nor imposing a burden without an apparent benefit.
4. The ordinance of June 21st, 1873, requiring the removal of the Market street tracks is not within the act of April 3d, 1846, preventing the granting of injunctions restraining the erection of public works.
5. The removal of said tracks is not a necessity; the said ordinance is unauthorized, and the city should be enjoined from enforcing it.

Opinion by ALLISON, P. J. Delivered July 25th, 1873.

On the 21st day of June, 1873, the councils of the city of Philadelphia passed an ordinance, which orders the straightening of the tracks of the West Philadelphia and Union Passenger Railway Companies on Market street.

This ordinance directs the companies to remove their tracks to the central part of Market street, between Front and Broad streets, upon such lines and in such contiguity as the chief engineer and surveyor may direct. In default of a compliance with the requirements of the ordinance, the chief commissioner of highways is directed to cause the same to be done, and the city solicitor is empowered to collect the cost of change of track from said companies.

The execution of this ordinance is opposed by the plaintiffs, and an injunction is asked to restrain the officers of the city from carrying it into effect, on the ground of a want of power in the city of Philadelphia to take from them any of their existing lines or tracks of railway, or to substitute any other line or track for that which they now have, or to impose any charge or burden upon them. The plaintiffs further say they are advised that by no act of Assembly have they any right or franchise to lay new tracks in different locations from those long since adopted and laid down by them, and to accept, use or operate any such new line.

This general proposition is denied by the defendants, and the execution of the power which they claim is defended first, on the general corporate authority of the city, as expressed in the act of consolidation, and the charter of the city, which was supplied by the act of 1854; which latter act contained the express stipulation that in addition to the new powers granted to the city by the act of consolidation, should also be retained those which had theretofore been conferred on the municipality. These powers of regulation and control were most comprehensive in their scope and operation.

Over the streets and highways of the city ample authority is given. This includes the right to lay out and establish streets; determine lines and grades; pave and keep them in repair, and generally to see that the free and common right to an unobstructed passage over them is secured to the public. In the case of the Commonwealth v. the Central Passenger Railway Company, 2 P. F. S. 506, the Supreme Court have decided that, to a certain extent, the city is the owner of the highways within her boundaries. The power, therefore, of the city to regulate the use of the streets for the public welfare, is a near approach to an absolute power, and no authority short of the Legislature may abridge the dominion which the municipality possesses over highways, when that dominion is exercised inside of the grant of municipal corporate authority. That the Legislature may do this is beyond question; that which it has given to the local government it may take from it; it may entirely abrogate the power of the city over streets, or it may modify or change the same, according to its will or caprice. In the exercise of this right, grants are every year made to private corporations or to associations of individuals, of limited and restricted use of walks and streets, and to the extent of such grant, in any given case, is the general power of a municipality abridged. And yet these grants of special privileges must, in order to control or override the general powers of a public corporation, be clearly conferred. In the case of Commissioners v. Gas Company, 2 Jones, 320, the court say any ambiguity in the grant must be construed against them, and in favor of the public. The rule of construction is that in all such cases any ambiguity in the charter must operate against the corporation and in favor of the public. In the Trenton Water Company, 6 Pennsylvania Law Journal, 32, the rule is stated thus: Private corporations take their rights subject to the rights of individuals and communities; and the strong presumption of law is always against unconditional adverse privileges. This doctrine was recognized and acted on by this court, in the case of the North Pennsylvania Railroad v. Stone, 3 Phila. R. 421, where the city by several acts of Assembly was authorized to culvert Cohocksink creek.

The plaintiff was also by an act of Assembly empowered to construct a railroad upon certain streets of the city. We held that the city could temporarily remove the railway of the plaintiffs, the extent to which the same was necessary in the execution of its undoubted right to build the culvert, that the interests of the private corporation must for a time give way before the higher right of the public, whose convenience, comfort, and health were all to be conserved by the construction of the culvert.

To this may also be added the general principle, that where a private corporation accepts the grant of a franchise upon a highway over which a municipality possess general power of regulation and control for public purposes, it accepts its special privileges, upon the implied condition that it holds them, subject to the reasonable and necessary exercise of the general power of the municipality. "Until the Legislature overrides the local authorities their jurisdiction is not ousted." Philadelphia v. Lombard, etc., Railway, 3 Grant, 405.

We do not, therefore, agree with plaintiffs in the radical position on which they rest their application for an injunction, asserting that they are beyond all municipal control, in regard to a modification or change of the lines and track of their road, even when such modification is required by public necessity or convenience. We hold, on the contrary, that having accepted their charter with the knowledge that the city possessed the most ample power to legislate by ordinances as to her streets and highways, to make all needed regulations for the most convenient enjoyment of the same, by the citizens of the commonwealth, they are bound by an implied agreement to hold their special privileges subject to a proper exercise of this power by the councils of the city. This looks to a regulation only of the franchises of the corporation, not to a restriction or destruction of corporate rights, and this regulation must be reasonable and necessary for common benefit, not in restraint of trade or imposing a burden without an apparent benefit. Goddard's Case, 16 Pickering, 127. Upon this priciple the case in 2 Jones, 320, of Commissioners v. The Gas Company, was decided. An ordinance of the Northern Liberties, prohibiting the opening of streets for the purpose of laying gas mains between December and March, was held to be a reasonable regulation, which bound the private corporation; and an ordinance which prohibited the gas company from opening streets for the purpose of introducing gas into dwellings, was declared to be null and void, as an unreasonable exercise of authority. The vital question in every such case is, is the regulation or order of the municipal authority reasonable and necessary? If it is, it will be maintained; if it is not, it will be set aside.

This principle must not be confounded with that which was asserted in the case of the West Philadelphia Railway Company v. The Commissioners of Public Buildings. (*Legal Intelligencer*, March 28th, 1873.) It was asserted, upon the argument, that the ruling in that case was conclusive of the present motion in favor of the plaintiffs. We then said the act of August 5th, 1870, under which the defendants claimed a right to take possession of a portion of the track and roadway of the plaintiffs, whereby their property in this portion of the road, and all corporate frachises incident thereto, were utterly destroyed, was null and void; because it was in conflict with the constitution of the State, which declared that private property shall not be taken for public use without first making or securing compensation to the owner. We also said: It is true the defendants have proposed to give a new line or route of railway to the plaintiffs as a substitute for that which they intend to take from them. This route diverges from complainants' tracks at Merrick street, and is carried around the north and south sides of the proposed new buildings, etc. Our answer to this was: This would be satisfactory if it were not for two substantial objections. First, plaintiffs have not the power to accept the offer of the defendants; and second, the defendants possess no such rights as they propose to confer on the plaintiffs. The general remarks which follow this sentence, in the opinion of the court, as to the want of power in plaintiffs to lay new tracks on Market street, must be taken in connection with the point then under consideration, viz.: a change of route of the Market street road, and the power to change location of track on Market street at the will of plaintiffs, and of their own motion, which is an entirely different question from that which arises when the city becomes the actor, and from the highest considerations of public policy and necessity undertakes to regulate the use of the street by ordinance, prescribing a change in location of a track of a railway in a street. If this does not amount to a destruction of corporate franchises, or to a serious injury to them, and if common benefit makes it proper and necessary that it should be done, we think it is within the power of the municipality to direct such change, and to see that it is accomplished.

But the defendants further argue against the injuction, upon the ground that, by an express stipulation of their act of incorporation, the plaintiffs have agreed to the exercise of the power now sought to be enforced. The the 12th section of the act of May 19th, 1857, Appendix to P. L. 1858, page 587, provides that councils may from time to time, by ordinance, establish regulations, in regard to said railway, as may be required for the paving, repaving, grading, culverting, and laying water and gas pipes in and along said street, and *to prevent obstructions thereon.*

The preamble, if it may be regarded as explaining the true purpose and object of the ordinance of June 21st, 1873, recites that the tracks of the two companies are so laid as to occasion inconvenience to business men on Market street, and to others having occasion to use the same. This, in effect, declares the tracks as now laid to be an obstruction to the business of the street. But it is not that kind of obstructions contemplated by the 12th section of the charter of the company, which the city by this grant of express power is authorized to remove. The ordinances passed under this section could only prescribe regulations in relation to the road, in connection with paving, laying pipe, etc.; and to prevent obstructions thrown on the railway. This evidently has reference to the travel of wagons on the track, in such manner as to prevent obstructions of the cars; regulate stoppages at intersections of streets; the rate of speed of travel on the road, so that cars might not obstruct the travel or other persons on the street, or by being

themselves obstructed, constitute an obstruction thereon. This is wholly distinct from the track or roadway being in itself a hindrance or obstruction to the business of the street. We do not think this point is well taken.

The defendants also ground their resistance to the application of plaintiffs on the act of April 8th, 1846, which prevents the courts in Philadelphia granting or continuing injunctions against the erection or use of any public works of any kind, erected, or in progress of erection, under the authority of an act of the Legislature, until questions of title and damages shall be submitted, and finally decided by a common law court.

But we think it would be straining this law beyond its true meaning, to hold that a mere change in the location of railway tracks of two private corporations upon the street, can be construed to fall under the designation of "public works." Nor can it with truth be asserted that such works have been erected, or that they are in progress of erection; for removal and replacement of the tracks, so far from having been erected or completed, have not even been commenced. The public works contemplated and already begun is the repaving of the street; this is to be done for the benefit of the entire community, at public cost. But if the railway tracks are to be shifted to the centre of the street, they are, and will continue to be, the private property of private corporations. Nor is it intended that the city shall bear the burden of effecting the change, the ordinance providing that each corporation shall be compelled to reimburse the city in the outlay, is, in the first instance, required to be paid out of the treasury of the municipality. That the work may be done by the agents of the city, if done for individual corporations, does not make it public work, or public property; it remains the property of private owners. We do not agree with the plaintiffs, however, that because the work is not done under a special act of the Legislature that it is wanting in sufficient legislative authority. If there is in the act of incorporation of the city, or its supplements, to be found a grant of general power sufficient to authorize them to remove the plaintiffs' tracks of railway, it may in such case be properly said to be done under the authority of an act of the Legislature.

This brings us back to the question: Is the proposed interference by councils with the right of plaintiffs to continue to use their road as now constructed, justified by the law of necessity? Is the ordinance a reasonable and proper ordinance? Nor must it be forgotten, that all that is proposed to be done is to regulate the enjoyment of corporate franchises, not to destroy them, as was done by the action of the building commissioners, taking absolute possession of the road between Juniper and Merrick streets. The ordinance does not aver that the tracks of the railway of the plaintiff, as they have heretofore existed, or that their use by the company plaintiff have or do now, of themselves, occasion inconvenience to any of the public; but it is asserted that they do so, in connection with the tracks of the Union Passenger Railway. This is not such an averment of inconvenience or obstruction as we can consider as at all conclusive of the fact itself. If the hardship recited in the ordinance be not occasioned by, or is not properly chargeable upon the plaintiffs, but by something which another has done, it is much more reasonable and it is every way proper to first endeavor to cure the existing evil by removing its cause, and not inflict punishment upon those who have not offended. If the removal of both tracks of railway from their present location nearer to the centre of the street is a public necessity; if common benefit or general advantage demand it, let it be done as councils have ordained; but if the whole of the inconvenience arise from the fact that the Union Passenger Railway have, without a necessity to justify it, exercised their right to lay their tracks upon Market street in such a manner as to have occasioned all the mischief, then the evil ought to be abated by the removal of their tracks to another portion of the highway. A personal inspection of the street has satisfied us that this can be done, and if in this we are mistaken, we hold ourselves open to correction, and to such a modification of the order, which we propose to make, as may appear proper under the circumstances of the case. Between Eighth and Ninth streets, the north track of the Union road can be laid near the centre of the street, and south of the northernmost track of the plaintiffs, connecting with the Union track as now laid at the intersection of Eighth and Market. This will take away, as it appears to me, all cause of objection west of Eighth street. And on the south side of Market street the inconvenience can be removed by placing the southerly track of the Union road north of the southernmost track of the roadway of plaintiffs. There appears to be ample space in the centre of the street for this readjustment of tracks, except for a short distance west of Third street; but this difficulty can be obviated by straightening the track of plaintiffs on the south side of Market street, west of Third, so as to make the space between the tracks of the Market street road uniform from Third to Seventh street. The Union road can cross the track of plaintiffs at the intersection of Third and Market streets, to connect with their track now laid from Third street east.

It is possible that it may be necessary, if this plan is adopted, that the Union track must cross that of the plaintiffs west of Eighth street. If this is found to be the case, and if the connection cannot be made at the intersection of Eighth and Market, then I shall require the plaintiffs to agree to such a crossing of their track at this point, or if they do not concede to this, I will dissolve the injunction in so far as it applies to the street between Eighth and Ninth streets.

This arrangement, if practicable, renders unnecessary any disturbance of the plaintiffs in the enjoyment of their franchises which they have possessed since 1858, and which they are entitled to continue to enjoy until the public benefit or the general welfare of the community shall justify an interference with them, by way of regulation, by the corporate authorities of the city.

Until further order the injunction is continued.

Supreme Court of Minnesota.

SCHWARTZ v. GERMANIA LIFE INSURANCE COMPANY.

1. An insurance company in accepting an application for insurance may prescribe such conditions as it desires.
2. The sending of a life policy from the home office to the agent from whom the application was received with instructions not to deliver it unless the premium be prepaid, and the applicant in good health, is a conditional acceptance, and the company is not bound unless the condition be fulfilled.
3. The applicant's refusal or inability to comply with such condition, is a rejection of the proffered acceptance, and a rescission of the policy.
4. If the premium, upon being duly tendered, is refused, it is not necessary in an action on the policy to bring the money into court, for if there be a recovery the jury may give credit for the amount of the premium in making up their verdict.

Opinion by BERRY, J.

The principal controversy in this case relates to the law applicable to certain facts, with regard to which there is very little difference between the parties.

The defendant is a life insurance company, having its home office in the city of New York, and a local agency in St. Paul, in charge of one Ferdinand Willins.

On the first day of September, 1870, the plaintiff made a written application to defendant, through said Willins, for insurance upon the life of Fridolin Schwartz, her husband. The application among other things contained statements that "the present state of health" of the party whose life was to be assured was good; that he was not afflicted with any bodily defect, that the state of his health had been good theretofore, and that he had never been afflicted with any serious illness, defect, or personal injury. It also contained the following question and answer, viz.:

"Are you aware that this contract of assurance becomes valid only by the payment of the first premium?" Answer—"Yes." The application closed as follows, viz.: "It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that the above statements shall form the basis of the contract for insurance, and also that any untrue or fraudulent answers, any suppression of facts in regard to the party's health, or neglect to pay the premium on or before the day it becomes due, will render the policy null and void, and forfeit all payment made thereon, also that the policy of insurance hereby applied for, shall not be binding upon this company until the amount of premium as stated herein shall be received by said company or some authorized agent thereof, during the lifetime of the party therein insured."

On said 1st day of September, said Willins, by mail, transmitted to defendant's home office the application, enclosed in a letter of that date, the text of which is as follows: "Enclosed please find application of F. Schwartz, $1,000."

On September 9th, Willins received from the home office a letter signed by defendant's president, dated September 5th, acknowledging receipt of the application and letter from Willins, and enclosing a policy on the life of Fridolin Schwartz, bearing date on said September 5th. This policy is in general in the usual form of policies of endowment assurance. It provides for the payment of annual premiums of $62.88 each, the first to be paid in hand, the rest, respectively, to be paid on or before the 5th day of September, in every year, during the continuance of the policy.

The policy provides further, that it is accepted upon the express condition that it shall be of no effect, 1st, if the declaration, evidently referring to the application made by or for the assured, "forming part of the contract, and upon the faith of which this contract is made, shall be found in any respect untrue." 5th. "If the above premiums or any of them, shall not be paid on or before the several days hereinbefore mentioned for the payment thereof, respectively." Willins offered to deliver this policy to Schwartz upon payment of the premium. Schwartz declined to pay the same in cash, claiming that one Rosenfield, a solicitor in the employ of Willins, had agreed to take the premium in whole or in part in board, which, however, such solicitor had no authority to do.

The policy was not delivered, but at the request of Schwartz was returned on October 13th, to the home office, with the request that it be changed for another policy providing for semi-annual instead of annual payments. On October 25th Willins received a letter from the home office, acknowledging the receipt of the returned policy and of his letter requesting the above mentioned change to be made, and enclosing another policy like the first in all respects, save that it provided for the payment of semi-annual premiums, $32.07 in hand, and $32.07 "to be paid on or before the 5th day of March and September in every year during the continuance of the policy."

At the foot of each policy was a note as follows, viz.: "Agents holding an appointment from the company are authorized to receive premiums at or before the time when due, upon the receipt of the president or secretary of the company, but not to make, alter or discharge contracts or waive forfeitures."

On October 13th Fridolin Schwartz was attacked with a dangerous illness, of which he died on October 29th.

On October 25th, after the arrival of the second policy, plaintiff went to the office of Willins, inquired for the policy, and was informed that it had come. Upon asking if she could have it, she was told that she could not, because her "husband was taken sick."

Thereupon having requested that the premium money be taken, which was refused on the ground that her "husband was sick," she tendered the premium money, but defendant's agent refused to receive it on the sole ground that her "husband was sick." The second policy was never delivered nor offered to be delivered to plaintiff or her husband, and about the 1st of November was returned to defendant's home office at defendant's request. On the 18th of March, 1871, proofs of the death of Fridolin Schwartz, and of the plaintiff's claim under the policy were transmitted by Willins to the home office. There was testimony in the case not contradicted, and tending to show that defendant's general instructions to Willins were to deliver policies on payment of the premium, provided the person whose life

was to be insured was in health at the time of such delivery There is no evidence going to show that these instructions were known to the plaintiff.

Plaintiff's counsel takes the position that these facts make out an acceptance by defendant of a proposition by plaintiff. the effect being to conclude "a contract of insurance between the parties according to the terms proposed." What is said in Heiman v. The Phœnix M. L. Ins. Co., 17 Minn., would seem to be in point here. "The application for insurance is a mere proposal on the part of the applicant. When the insurer signifies his acceptance of it to the proposer, and not before, the minds of the parties meet and the contract is made. This acceptance must be signified by some act."

Plaintiff's application is properly characterized as a proposition to defendant.

And when Willins (defendant's agent) offered the first policy to Schwartz, who appears to be regarded by common consent as acting for the plaintiff as well as for himself in the whole business, upon payment of the first premium, defendant thereby signified its acceptance of plaintiff's proposition. In other words, defendant thereby offered to insure the life of Fridolin Schwartz by delivering to plaintiff its policy of insurance, upon prepayment of the first premium in hand. But this payment was refused. This was a refusal by plaintiff to comply with the terms of her own proposition.

It was a repudiation of the proposition, a rejection of the proffered acceptance. and in effect and in fact a refusal to receive the policy at all.

Plaintiff having thus repudiated her own proposition, and refused to comply with the conditions upon which defendant signified its acceptance of her proposition as the basis of a contract of insurance into which defendant offered to enter, by delivering policy, defendant, so far as any obligation or liability to plaintiff was concerned, stood precisely where it would have stood if it had never had accepted plaintiff's proposition, conditionally or otherwise.

Under these circumstances defendant certainly had the right to insist that it was not bound to the plaintiff by any contract of insurance, or by any agreement to enter into a contract of insurance.

After plaintiff had thus refused to receive the first policy, it was at plaintiff's instance returned to defendant's home office.

We are unable to conceive why under these circumstances it was not utterly inoperative as a foundation for any rights, whatever, upon plaintiff's part, whether such rights are sought to be placed upon the ground that defendant had insured, or upon the ground that it had agreed to insure the life of her husband.

If we are right, it follows that if there was any contract concluded between the parties to this action, this result must have been affected by the second policy, and what took place in reference thereto.

The facts already stated show that plaintiff's request that the policy should provide for semi-annual instead of annual premiums was acceded to, and that accordingly a second policy, providing for such semi-annual premium, was transmitted from defendant's home office to defendant's agent (Willins) at St. Paul.

Plaintiff's counsel claims that this second policy was not a "new contract;" that the original contract was not superseded or rescinded by it," but only modified in relation to the manner of payment; that it "was really an affirmation of the original contract;" "that it was intended to be but a redraft of the first as modified by mutual consent."

However ingenious these suggestions may be, it is evident that they possess little or no force, if the views which we have already expressed in regard to the first policy and its utter inoperativeness as a contract of any kind, or as evidencing a contract of any kind, are sound.

As we have no doubt of their soundness, we are forced to the opinion before expressed, that if there was any contract concluded between the parties, this result must have been brought about by the second policy, and the facts which transpired in reference to it. The second policy was never delivered nor offered to be delivered to plaintiff, or to any one for her. Yet independent of this policy, there is nothing in the case tending to show any binding acceptance of plaintiff's proposition, or any agreement to insure, or contract of insurance. If, then, defendant in any way signified its acceptance of plaintiff's proposition, so that a contract was concluded between the parties, it must have done it by transmitting the second policy to Willins, its agent, for the purpose of having the same delivered to plaintiff upon payment of the first premium in hand. And if Willins had no authority, discretion or duty in the premises, save only to deliver the policy upon payment of the first premium, then we can see no good reason why the transmission of the policy to him might not well be regarded as a signifying by defendant of its acceptance of plaintiff's proposition, nor any good reason why payment or tender of the first premium to such agent, even if delivery of the policy was withheld, would not have been completely effectual to entitle the plaintiff to the full benefit of the policy to the same extent as if it had been manually and unconditionally delivered. There is, however, nothing whatever in this case showing, or tending to show, that the defendant was under any legal obligation to accept plaintiff's proposition, or to enter into any contract of insurance thereupon by issuing or delivering a policy or otherwise. Plaintiff's application was a mere proposal, which defendant was at liberty to accept or decline at its own option. And as defendant was thus at liberty to accept or decline plaintiff's proposition at its own option, it is clear that upon the facts appearing in this case, defendant was at liberty to accept upon such terms and subject to such conditions as it saw fit to impose.

It was therefore competent for defendant to say to plaintiff, we will accept your application and deliver to you our policy upon payment of the first premium, provided your husband is now in good health, and it would be equally competent for defendant to transmit its policy to its legal agent, with instructions, general or special, to deliver the same to plaintiff upon payment of the first premium, provided her husband was in good health at the time of such delivery.

And in such case the transmission of the policy to the agent, would go no further than to signify the defendant's acceptance of plaintiff's proposition on condition that her husband was in good health. The agent's refusal to deliver the policy because of the fact that the husband was not in good health, would not be an attempt on his part to alter the contract, or impose terms other than those which had been agreed upon, as plaintiff's counsel contends. No contract could be made nor any terms agreed upon without some action upon the part of defendant.

There being no action upon defendant's part except the transmission of the policy to its own agent, to be delivered upon payment of the premium, upon the condition above mentioned, there would be no contract made nor any terms agreed upon, save such as embraced such condition.

Nor is this a case in which where an agent performs an act within the apparent scope of his authority, the act binds his principal, notwithstanding it was done in violation of private or secret instructions. The case at bar is not one in which the agent has performed any act in the name of his principal under an apparent authority to perform the same, so that the party with whom he has contracted has acquired rights which the principal will not be permitted to gainsay. But if the instructions under which Willins refused to deliver the policy were in fact given, the case is one in which the agent has refused to perform an act which would bind his principal, and by virtue of which, if performed, the plaintiff would acquire certain rights against such principal, and has refused to do this because instructed by his principal so to do.

Now if this plaintiff had acquired any right to the policy, or to a contract of insurance, except such as was subject to the condition of her husband's good health, as we have endeavored to show that she had not, if the instructions referred to were in fact given, then she might well contend that she was not to be deprived of that right by any private instructions given by defendant to its agent. Not having acquired any such right, that is to say, if the instructions referred to were in fact given, she is not in a position to insist that the policy shall be delivered to her in disregard of such instructions, or that she shall have the same rights and benefits as if it had been delivered to her. As the general charge of the court to the jury was entirely at variance with the views above expressed, there must be a new trial.

This disposes of what has seemed to us to be the principal and most difficult question presented by this appeal, but as there may be a new trial, it is expedient that we should consider some of the other questions raised and discussed by counsel.

The question whether the instructions as to delivering policies, provided the person whose life was to be insured was in good health, were given, being a question of fact, the plaintiff had the right to put in her testimony upon the basis that no such instructions were given. And in this view we perceive no reason why the two policies, notwithstanding the signatures were cancelled, together with the correspondence in reference thereto, between defendant and its agent, Willins, were not properly received in evidence as documentary history of the case, and of the transactions between the parties in reference to the subject of the action. We think the court was justified in receiving the evidence of what was said by Gustav Willins at the time when plaintiff went to the banking office occupied by him (Gustav) and his brother Ferdinand, since there was testimony tending to show that Ferdinand was present at the conversation, and also that Gustav was in the practice of assisting his brother in the insurance business, and of attending to the same in his brother's absence.

The tenth interrogatory addressed to Schroendler (defendant's vice president), inquired for the custom of the defendant as to delivering policies. The answer, which appears to be responsive to the interrogatory, states among other things a custom of the defendant not to deliver or send policies to agents for delivery, except upon the condition that the person whose life is to be insured is in good health.

We think the interrogatory and answer were properly excluded. Unless this custom was shown to be known to plaintiff, or to have been communicated to Willins as instructions, it is impossible to see its materiality in this case.

In regard to statements contained in the application, and mentioned in the early part of this opinion, as to the health, bodily defects, etc., of Fridolin Schwartz, we are of the opinion that they had reference to the state of facts existing or which had existed at the date of the application, not to any which might occur subsequently to such date.

The points made by defendant in reference to the court's refusal to instruct the jury as requested upon the question of tender, do not appear to be particularly insisted upon.

It is unnecessary to say more in regard to them, than that we think the tender sufficiently pleaded in the complaint, that it was not necessary for plaintiff to bring the amount tendered into court, the case being one in which, if she is entitled to recover at all, defendant may receive the premium money in the way of a deduction from the sum of her recovery, and that as the evidence tended to show an absolute refusal to receive the tender, the manner in which the testimony tended to show that it was made, was beyond doubt sufficient.

We need not consider the propriety of the questions which were excluded by the court as not proper cross-examination.

This objection to them can easily be obviated, if a new trial should be had.

Nor need we consider the point made as to the allowance of interest on the judgment.

An amendment allowable, as a matter of course, would prevent the recurrence of the question raised.

This in effect disposes, we think, of all the important matters presented by the case.

Order refusing a new trial reversed, and new trial granted.

U. S. Circuit Court, N. D. Illinois.

HEAD v. GREEN.

1. The measure of damages for breach of a guaranty of the amount due on a note, there being no guaranty of payment or collectability, is what the plaintiff has lost by that breach, which is, the *value* of a judgment if one had been obtained against the makers.
2. Where the makers were solvent but proved payment, the measure is the full amount due on the note at the time of bringing suit, as stated in the guaranty.—*Legal News.*

This was a motion for a new trial, the case having been tried by the court without a jury, and the issues found for plaintiffs.

The suit was brought on a guaranty by defendant, Harley Green, upon a note for $500, made by A. King & Co., to plaintiff, dated July 18th, 1867, payable on demand with interest at ten per cent., and on which there was an endorsement of $100. paid January 30th, 1869.

The guaranty is in the following words:

"I hereby guaranty that there is now due and unpaid on the within note, the original sum of five hundred dollars and interest, except the one hundred dollars endorsed. But it is expressly understood that the guaranty is without liability of any kind on the undersigned, except as above, as to amount due.

"Signed, HARLEY GREEN."

The defendant being the owner, on December 8th, 1870, of this note, together with four others for $500 each, made by Mary E. and A. C. King, and secured by mortgage, sold the whole to the plaintiff for the sum of $2,150, making at that time the guaranty sued on. The mortgage was collectable, and plaintiffs knew that the makers had nearly completed their arrangements to pay it, and neither party considered the A. King & Co.'s note of any great value.

After obtaining the guarantied note, plaintiffs brought suit on it against the makers, A. C. and Alpheus King, in Greene county, Iowa, to which the makers plead payment in full, to defendant, on the 30th of January, 1869. Defendant was duly notified of this defence, and requested to furnish proof to meet it. He directed plaintiffs to subpœna a son of A. C. King, and Mrs. Mary E. King as witnesses. Both were duly summoned; the son attended and testified that the note was paid; Mrs. King did not attend the trial by reason of sickness. Defendant did not attend the trial, nor furnish his deposition, although he was a competent witness, nor did plaintiffs take any steps to obtain his testimony. The case was tried, and resulted in a verdict against plaintiffs, on the ground that the note had been fully paid to defendant before he transferred the same to plaintiffs.

The record of the suit and judgment in Iowa, as well as other evidence of payment, was introduced on the trial, and the court found that the note had actually been paid at the time of the guaranty, and that the amount apparently due could have been collected if judgment had been obtained against the makers.

Opinion of the court by FLODGETT, J.

The only question now is as to what is the true measure of damages.

The well established rule in actions by endorsees against endorsers or guarantors of negotiable paper is, that the measure of damages is the amount paid by the assignee or endorser to the guarantor or endorser, with interest. But this rule has been only applied, so far as my examination has gone, to cases where there was either an express or implied guaranty of payment or collectability, and I have been unable to find from any research of my own, nor has the industry of counsel on either side furnished me with any adjudged case, or even the dictum of a court or text writer as to what is the true measure of damages on the breach of a guaranty like this. On a guaranty of payment or collectability, the holder knows that if he takes the necessary steps to fix the liability of the guarantor, he can recover back at least the amount paid for the note, with interest; but in a guaranty like this, he has no such redress. The holder of the guaranty takes all the chances of the collectability of the demand. There is no liability even by the guarantor in case the maker of the paper proves insolvent, but the holder must lose all he has paid unless he can collect from the maker. And it seems to me that the measure of his damages, in case of a breach of the contract as to the amount due, is what plaintiff has lost by that breach; which in this case should be the whole amount due on the note at the time suit is brought. And it appears to me that one weighty reason why this rule should be applied to a guaranty like this, is that the holder of notes or bills who attempts to negotiate them after due, must be presumed to know (and he alone) whether there are any legal or equitable defences to the paper he purposes to transfer to another. And as he assumes no risk in regard to the collectability of the debt, he should at least be held to make good his express undertaking that the paper represents an honest demand for what purports to be due thereon. Can it be supposed that any person would buy a note with such a guaranty unless he understood that the guarantor was holden to make good the pledge he gives? I do not say he is holden for the full amount due on the note, for the maker of the note may be insolvent, and a judgment obtained would be worthless, but the measure of his liability is the *value* of the judgment, if one had been obtained against the maker. And here it appears the judgment would have been worth the full amount, if it had been obtained.

Motion for a new trial overruled, and judgment for the plaintiff.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in August, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

June 28, Thomas C. Jones, Administrator of WILLIAM H. ENGARD, dec'd.
" 28, James McCann, Executor of JOHN GILMER, dec'd.
" 28, Annie T. Chadwick, Administratrix of SAMUEL T. CHADWICK, deceased.
" 30, Sarah F. Gregory, Administratrix of WILSON GREGORY, dec'd.
" 30, Samuel M. Clement et al., Administrators of WILLIAM McELROY, dec'd.
July 2, George Bennett et al., surviving Executors of ABEL BENNETT, dec'd.
" 3, Agnes Thayer, Administratrix of EDWARD N. THAYER, dec'd.
" 3, Isabella Bockius, Administratrix of JOHN BOCKIUS, dec'd.
" 5, William S. Helverson, surviving Executor of NICHOLAS HELVERSON, dec'd.
" 8, Israel W. Morris, Executor of JANE BOWMAN, dec'd.
" 9, Edward Comfort, Acting Executor of JEREMIAH COMFORT, deceased.
" 9, Jas. W. Paul, Administrator of PHILIP GEISSE, dec'd.
" 9, R. C. McMurtrie, Administrator of F. O. BOHLEN, dec'd.
" 9, John Campbell, Executor of JANE CAMPBELL, dec'd.
" 9, John Sherin et al., Executors of PATRICK McCANN, dec'd.
" 10, Robert E. Peterson et al., Executors of GEORGE PETERSON, dec'd.
" 11, Susan G. McFarland, Administratrix of JOSEPH McFARLAND, dec'd.
" 11, Caroline G. Galbraith, Administratrix of JOHN H. GALBRAITH, dec'd.
" 11, Samuel F. Smith, Administrator of CATHARINE FOLLAR, dec'd.
" 11, Peter Marseilles, Administrator of WILLIAM MARSEILLES, dec'd.
" 14, Wm. F. Steinmetz, Administrator of GEO. W. STEINMETZ, dec'd.
" 14, Joseph Harvey et al., Executors of WILLIAM DOUGHERTY, dec'd.
" 15, William Duty et al., Executors and Trustees of GEORGE W. McCLELLAND, dec'd.
" 16, Geo. T. Gabell, Jr., et al., Executors of GEO. T. GABELL, Sr., dec'd.
" 16, Bernard Rafferty et al., Executors of JAMES McFARLAND, dec'd.
" 16, W. T. A. Ridge, Trustee of FREDERICK HERSCHBERG, dec'd.
" 19, Wm. Rutherford, Executor and Trustee of JOHN GIVEN, dec'd.
" 21, Samuel Wetherill et al., Administrators c. t. a. of WILLIAM WETHERILL, dec'd.
" 22, Thos. P. McCadden, Administrator of MICHAEL McCADDEN, dec'd.
" 22, Robert Grist, Administrator of SYLVANUS WAINWRIGHT, dec'd.
" 22, William Warner, Jr., Administrator of ANDREW WARNER, dec'd.
" 22, James M. Eagleton, M. D., Trustee of SAMUEL POTTS, dec'd.
" 22, James M. Eagleton, Executor and Trustee of SAMUEL POTTS, deceased.
" 22, Janet M. Bullock, Administratrix of JONATHAN BULLOCK, dec'd.
" 22, H. C. Townsend, Trustee as well under Ann S. Sulger's will, as that of Jacob K. Sulger, dec'd, for ISAAC SULGER.
July 23, Alfred Fassitt, Surviving Executor of JAMES FASSITT, dec'd.
" 23, Alfred Fassitt, Executor of ROBERT F. FASSITT, dec'd.
" 23, Charles S. Close et al., Executors of HENRY MYERS, dec'd.
" 23, James Beatty, Sr., Executor of JAS. BEATTY, Jr., dec'd.
" 23, John B. Lever, Administrator of WM. LEVER, dec'd.
" 23, The Fidelity Ins. Co., &c., Executors of GEORGE W. IRWIN, dec'd.
" 23, Emily F. Ellis, Administratrix of ALFRED D. ELLIS, dec'd.
" 23, Elizabeth Castor, Administratrix of GEORGE J. CASTOR, dec'd.
" 24, Joseph F. Kerbaugh, Administrator of OPMAN KERBAUGH, dec'd.
" 24, Ellen E. Brown, Executrix of CAROLINE LEWIS, dec'd.
" 24, John H. Dingee, Executor of ELIZABETH FENNER, dec'd.
" 24, Edward Hayes, Executor of MARY DEEGAN, dec'd.
" 24, George Wiley, M. D., Administrator of MARY L. D. SMITH, dec'd.
" 24, Lewis M. Kensil, Administrator of LEWIS KENSIL, Sr., dec'd.
" 24, Hugh Hallowell, Guardian of ALONZO H. SHALKOP, minor.
" 24, William P. Stroud et al., Administrators of JOHN TOWERS, dec'd.
" 24, William Musser, Attorney in fact of MARY M. ROBINSON, Executrix of EDWARD W. ROBINSON, deceased.
" 24, Warren G. Griffith, Administrator of MARY ANN FLYNN, dec'd.
" 24, Herbert J. Lloyd, Executor and Trustee under the will of JOHN B. ACKLEY, dec'd.

WILLIAM M. BUNN.
aug 1-4t Register.

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE CHESTNUT HILL BANK, to be located at Philadelphia, with a capital of fifty thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE STATE OF PENNSYLVANIA BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to ten million dollars. jul 4-6m

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Supreme Court United States.

MILLER v. THE PEOPLE OF THE STATE OF NEW YORK.

1. Where by the constitution or general law of a State a power is reserved for the Legislature to repeal, alter or amend a charter, such reservation becomes a condition in every subsequent grant of corporate rights.
2. Such a reservation will not warrant the Legislature in changing the control of an institution from one religious sect to another, in diverting the fund of the donors to any new use inconsistent with the intent and propose of the charter, or in compelling subscribers to the stock, whose subscription is conditional, to waive any of the conditions.
3. The constitution and general laws of New York contain such a reservation. The Legislature of that State authorized the city of Rochester to subscribe to the stock of one of its corporations giving the city the right to choose four directors. The city owning the majority of stock, the Legislature enacted that the city should choose seven directors, which was a majority: *Held*, the act was constitutional.

Error to the Court of Appeals of New York. The opinion states the case.

Opinion by CLIFFORD, J.

Corporate franchises granted to private corporations, if duly accepted by the corporators, partake of the nature of legal estates, and the grant, under such circumstances, if it be absolute in its terms, and without any condition or reservation importing a different intent, becomes a contract within the protection of that clause of the Constitution which ordains that no State shall pass any law impairing the obligation of contracts.

Charters of private corporations are regarded as executed contracts between the State and the corporators, and the rule is well settled that the Legislature, if the charter does not contain any reservation or other provision modifying or limiting the nature of the contract, cannot repeal, impair, or alter such a charter against the consent or without the default of the corporation, judicially ascertained and declared. Subsequent legislation, altering or modifying such a charter, where there is no such reservation, is plainly unauthorized, if it is prejudicial to the rights of the corporators, and was passed without their assent. Where such a provision is incorporated in the charter, it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the Constitution. College Cases, 13 Wall. 213.

Such power also, that is, the power to alter, modify or repeal an act of incorporation, is frequently reserved to the State by a general law applicable to all acts of incorporation, or to certain classes of the same, as the case may be, in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition nor any allusion to such a reservation. Fletcher v. Peck, 6 Cranch, 136; Terrett v. Taylor, 9 id. 51.

Matters of fact, though not in dispute, must be first ascertained, in order that the questions involved in the case may be properly presented for decision. Briefly stated, the material facts are as follows, as appears by the finding of the court of original jurisdiction, and from the concessions of the parties:

That the railroad company is a corporation duly organized under the general railroad act of the State, passed on the 2d of April, 1850, and that the articles of association were, on the 10th of July, of the succeeding year, filed in the office of the secretary of State; that the articles of association provided for the construction of a railroad from Rochester to Portage, a distance of fifty miles, with a capital of $800,000, to be divided into eight thousand shares each for $100, as therein specified; that the stock subscribed for the corporation, paid and unpaid, amounted to nine thousand seven hundred and seventy-five shares, of which only five thousand five hundred and fifty-two shares were ever fully paid, and for which certificates have been issued. Authority was conferred upon the city of Rochester, by an act to amend the charter of the city, to subscribe for or purchase stock of that railroad company to the amount of $300,000, and the provision was that by virtue of that subscription or purchase, the city should acquire all the rights and privileges and be liable to the same responsibilities as other stockholders of said company, except in certain particulars not necessary to be mentioned. Sess. Acts, 1851, p. 768.

Pursuant to that authority the proper officers of the city subscribed for that amount of the stock of the railroad company, and it appears that the proper officers of the railroad company elected to receive the subscription, and that the full amount of the subscription was paid, and that the certificates of the shares were duly issued to the city, and that the city has ever since been the holder and owner of the whole number of said shares.

Power was also conferred upon the city in case the company "elected to receive their subscription," to nominate and appoint one director for every $75,000 of capital stock held by the municipality, at the time of each election of directors, but the further provision was that the city should have no voice in the election of the remaining directors, consequently the common council of the city, at the time of each annual election of directors, elected four, the number being limited by law to thirteen, and the other stockholders elected nine, without any interference from the city authorities.

Complaints arose from the fact that $452,300 of the stock subscribed by parties other than the city, had never been paid in, nor had certificates ever been issued for any part of that unpaid subscription. On the contrary, the same was not in existence as stock, having long before been extinguished and forfeited for non-payment, in consequence of which the railroad company had abandoned the construction of their road south of Avon, and assigned all their right of way, property and franchises beyond that point to another corporation, so that their railroad as constructed and operated terminates at Avon, and is only eighteen and three-fourths miles in length.

Control of the railroad, by a change of circumstances not contemplated when the plan was organized, being in the hands of stockholders owning a minority of the stock, the Legislature of the State, on the 9th of March, 1861, enacted that the common council of the city should "have the power to nominate and appoint one director of the company for every $42,855.71 3-7 of capital stock of the said railroad company held by the said city, at the time of each election of directors of said company." Session Acts, 1867, p. 92.

Thereafter the common council of the city, as the plaintiffs claim, became entitled at each annual election of directors to elect seven of the number allowed by law, and that the other stockholders were entitled to elect the remaining six only, as authorized by the apportionment prescribed by the amendatory act of the Legislature. Accordingly, the common council of the city, at the annual election held in June of the succeeding year, elected seven directors, but the other stockholders, denying the validity of the amendatory act, elected nine directors under the old law, and the persons so chosen immediately entered upon, used and exercised the said offices as directors of said corporation, and without any warrant or authority, as insisted by the plaintiffs.

Deprived of their rights as defined by the amendatory act the plaintiffs brought the present action, in the nature of a writ of quo warranto, in the Supreme Court of the State, alleging that the nine directors elected by the other stockholders have usurped the offices of directors of the railroad company. Service was made and the defendants appeared and filed an answer. Hearing was had and the Supreme Court rendered judgment for the plaintiffs, and the defendants transferred the cause to the Court of Appeals, where the judgment was affirmed, thereupon the losing party sued out a writ of error and removed the record into this court.

They seek to reverse the judgment of the State courts upon the ground that the act of the State Legislature, authorizing the common council of the city to elect seven of the thirteen directors in the railroad company, is unconstitutional and void as repugnant to their act of incorporation, and in support of that theory they submit the following propositions: 1. That the signers of the before-mentioned articles of association, when the articles were filed in the office of the secretary of State, became a corporation by the name specified in those articles, with all the powers and privileges granted by the general law of the State upon that subject. 3 Edm. Stats. 618, §§ 1–4. 2. That the powers and privileges thus conferred were granted by the State, and that the grant, as an act of incorporation, became and was an executed contract. 3. That the powers and privileges of the charter are prescribed and defined in the general railroad law of the State. 4. That the persons named as corporators in a charter cannot be compelled to accept the act of incorporation, nor any modification or extension of the powers and privileges granted, whether conferred or modified or extended, by a special act or by virtue of a general law. 5. That a contract created by an act of incorporation, when once complete, is unalterable by either party without the consent of the other.

Undoubtedly the powers and privileges of the railroad company in this case are the same as they would have been if the company had been incorporated by a special act, and it may also be conceded that the charter, when the articles of association were filed in the office of the secretary of State, became an executed contract, subject to the restrictions ordained by the constitution of the State, and to the reservations contained in the general law of the State relating to corporations, and also to the general railroad act, which it is admitted prescribes and defines the powers and privileges of the railroad company.

Section one of article eight of the constitution of the State ordains as follows: Corporations may be formed under general laws, but shall not be created by special act except in certain cases. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed. Const. 1846, art. 8, § 1.

Provision is also made by the eighth section of the act defining the powers, privileges and liabilities of corporations,

that the charter of every corporation that shall hereafter be granted by the Legislature shall be subject to alteration, suspension, and repeal in the discretion of the Legislature. 1 Rev. Stats. 600.

Articles of association for the incorporation of railroad companies cannot be filed and recorded in the office of the secretary of State until at least one thousand dollars of stock for every mile of railroad proposed to be made is subscribed thereto, nor without complying with the other conditions specified in the second section of the general railroad act, and the first section of the act provides that such corporation shall be subject to the provision (except those enacted in the seventh section) contained in title three of chapter eighteen of the first part of the Revised Statutes, which includes section eight, containing the reservation that the charter of every corporation that shall hereafter be granted shall be subject to alteration, suspension, and repeal in the discretion of the Legislature. Sess. Acts, 1850, 212, § 1.

Such a reservation, therefore, is not only ordained by the constitution of the State, but it has been twice enacted by the Legislature, and it is conceded that both of those statutes are in full force. Superadded to those reservations is the further one, contained in the forty-eighth section of the general railroad act, which provides that the Legislature may at any time annul or dissolve any corporation formed under this act, the effect of which, it is admitted by the defendants, is to incorporate into the grant a power of revocation which seems to supersede all necessity for any further remark upon the subject. Sess. Acts, 1850, p. 234.

Much consideration was given to the question under consideration in the case of Dartmouth College v. Woodward, 4 Wheat. 675, in which the right of the State was denied to amend the charter granted to the college by the crown before the revolution, and to modify and restrict the same without the consent of the trustees under the charter. Four propositions were decided by the court in that case, the opinion being given by the chief justice: 1. That the charter was a contract within the meaning of that clause of the Constitution which ordains that no State shall pass any law impairing the obligation of contracts. 2. That the charter was not dissolved by the revolution. 3. That the acts of the State Legislature altering the charter in a material respect, without the consent of the corporation, was an act impairing the obligation of the charter, and was unconstitutional and void. 4. That the college, under its charter, was a private and not a public corporation.

Concurring opinions were also given by two of the associate justices, and Judge Story, in enforcing his views, remarked that where a private corporation is thus created by the charter of the crown, it is subject to no other control on the part of the crown than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose, the crown cannot, in virtue of its prerogative, alter or amend the charter or divest the corporation of any of its franchises, or add to them, or augment or diminish the number of trustees, or remove any of the members, or change or control the administration of the funds, or compel the corporators to receive a new charter.

Prior to that adjudication the Supreme Court of Massachusetts had decided that rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the Legislature in the act of incorporation, and the learned judge having referred to that case remarked that the principles there laid down are so consonant with justice, sound policy, and legal reasoning, that it is difficult to resist the impression of their perfect correctness, showing very plainly that such legislation would be valid if the power for that purpose is reserved in the act incorporating the company. S. C., 4 Wheat. 708; Wales v. Stetson, 2 Mass. 146.

Conclusive evidence that such was the opinion of that learned judge is also derived from his subsequent remarks in that same case, in which he says that any act of the Legislature which takes away any powers or franchises vested by its charter in a private corporation or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons without its assent, is a violation of the obligations of the charter, adding: "If the Legislature mean to claim such an authority it must be reserved in the grant." S. C., 4 Wheat. 712; Cooley's Const. Lim. 279.

Where such a provision is incorporated in the charter, it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the constitution. College Cases, 13 Wall. 313.

Members of banking associations, it was enacted by the general banking law of New York, should not be individually liable for the debts of the association, unless it was so provided in the articles of organization, but this court held, in the case of Sherman v. Smith, 1 Black, 587, that a subsequent statute imposing such a liability upon the shareholders of the association, was a valid law, as the charter reserved to the Legislature the power to alter or repeal the act of incorporation. Such a conclusion was earnestly resisted at the bar, as the conditional exemption from such liability was embodied in the articles of association, but the court overruled the defence upon the ground that the reservation in the charter of the right to alter or repeal the act was paramount and controlling.

Decisions of the State courts, in repeated instances, both before and since that time, have been made to the same effect. When that case was before the Court of Appeals, before the record was removed here for revision, the Court of Appeals decided that the provision reserving to the Legislature the power to alter or repeal the general banking law became a part of the contract with every association formed under it, and that the State might modify it prospectively or retrospectively without infringing the article of the Federal Constitution, which ordains that no State shall pass any law impairing the obligation of contracts, and this court affirmed the judgment in that case. Oliver Lee's Bank, 21 N. Y. 16.

Laws could not be enacted under the constitution in force when the general banking law was passed, to create, alter, continue, or renew any body politic or corporate, without the assent of two-thirds of the members in each branch of the Legislature. Consequently it was contended that the members of such associations, subsequently created, could not be affected by the statute declaring that shareholders should be liable individually for the debts of the association, but the Court of Appeals re-affirmed the decision in the preceding case, and determined that the statute imposing that liability was a valid exercise of that power reserved in that act, and its effect was that the franchises and privileges granted were at all times subject to abrogation or change by the legislative power of the State; that the power reserved was one to be exercised at any time by the existing legislative authority, however constituted and in any mode conforming to the organic law of the State for the time being. The Reciprocity Bank, 22 N. Y. 14; White v. Railroad Co., 14 Barb. 362.

Exactly the same principle was adopted in the case of Railroad v. Dudley, 14 N. Y. 348, where it was held that an alteration of the charter of the company, made by the Legislature in pursuance of the power reserved to alter or repeal the act, by changing its name, increasing its capital, and extending its road, did not discharge a subscriber to the stock from liability for his subscription, whether such alteration was or was not beneficial to him, the alteration having been duly made and without fraud on the part of the company. See also, Plank Road v. Thatcher, 11 N. Y. 110.

Under such a reservation it is also held by the same court, that a member of the corporation holds his stock subject to such liability as may attach to him in consequence of an extension or renewal of the charter, made without his application or consent, and that the estate of an intestate succeeds to the individual liability imposed on the owner in his lifetime as a stockholder in a corporation whose charter would have expired if it had been renewed, but was extended after his death, and that his administrator was liable for debts of the corporation contracted after the death of the intestate. Bailey v. Hollister, 26 N. Y. 116; Clark v. City of Rochester, 28 Id. 631; People v. Hill, 35 Id. 449.

Even the defendants admit that the exact question presented for decision in this case was decided by the Supreme Court of the State in the case between these same parties, or some of them, and which was subsequently transferred to the Court of Appeals, and was there reversed upon an exception involving a question of local law. People v. Hill, 46 Barb. 344.

Nearly forty years earlier the same question substantially was decided in the same way by the chancellor of that State, in which he held that where a State Legislature reserves to itself, in the very charter it grants to a private corporation, the right of altering, amending or repealing the act of incorporation, a subsequent repeal of the charter is valid and constitutional; that such a reservation in the charter of a corporation, upon common law principles, is not repugnant to the grant, but a constitutional limitation of the powers granted. McLaren v. Pennington, 1 Paige's Ch. 102.

Few or none, it is presumed, will question the correctness of that rule, but the court here is of the opinion that the reservation is equally valid and effectual if it exists in the constitution of the State, or in a prior general law. College Cases, 13 Wall. 213; General Hospital v. Insurance Co., 4 Gray, 227; Roxbury v. Railroad, 6 Cush. 424; Suydam v. Moore, 8 Barb. 363; Angell & Ames on Corp. (9th ed.) § 767, p. 787.

So where the Legislature in granting a charter to an insurance company reserved the right to alter it, and they subsequently exercised that right by declaring that if the assets of such corporation should pass into the hands of a receiver he might make assessments upon the premium notes, it was held that this was a legitimate exercise of the reserved power, and that it fully authorized the receiver to make assessments whenever it became necessary to carry the intention of the Legislature into effect. Hyatt v. McMahon, 25 Barb. 467.

Power to legislate, founded upon such a reservation in a charter to a private corporation, is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which by a legitimate use of the powers granted have become vested in the corporation, but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs so as to protect the rights of the stockholders and of creditors, and for the proper disposition of the assets. Com. v. Essex Co., 13 Gray, 239; Miller v. Railroad Co., 21 Barb. 517.

Such a reservation, it is held, will not warrant the Legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the fund of the donors to any new use inconsistent with the intent and purpose of the charter, or to compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract. State v. Adams, 44 Mo. 570; Zabriskie v. Railroad Co., 3 C. E. Green, 180; Railroad Co. v. Veazie, 30 Me. 581; Sage v. Dillard, 15 B. Monr. 357.

Attempt is made in this case to show that the right to elect all of the directors, except four, had become vested in the stockholders owning a minority of the shares, and that the amendatory act giving to the city the power to elect seven impairs that vested right, but the court is entirely of a different opinion, as the Legislature, in conceding that right, made the concession subject to the reserved power to alter or repeal the charter, as ordained in the constitution of the State, and also in the several statutes mentioned, which clearly give to the Legislature the power to augment or diminish the number or to change the apportionment, as the ends of justice or the best interest of all concerned may require.

All parties supposed, when the charter was formed, and when the subscriptions to the stock were paid, that the capital stock would be $800,000, and that the right conceded to the city to elect four out of the thirteen directors would give the city a fair proportion of the whole number, but circumstances have changed in consequence of the failure of a large class of the subscribers to the stock to make good their subscriptions. Payments being refused the corporation found it necessary to reduce the capital stock, and to shorten the route, as before explained.

These changes from the original design made new legislation necessary to the ends of justice, and the amendatory act was passed to effect that object, and the court is of the opinion that the amendatory act is a valid law, and that the judgments hould be affirmed. Mr. Justice Bradley dissenting.

Recent Decisions.

PENNSYLVANIA.

[Our thanks are due to P. F. Smith, Esq., State Reporter, for advance sheets of Vol. 20 of his reports (Vol. 70 Pa. State Reports). We make the following selections from them.]

THE ALBANY CITY INSURANCE CO., for use, v. WHITNEY et al.

1. In a foreign attachment in the Common Pleas by an insurance company, bail was entered and the attachment dissolved. The declaration was in assumpsit, and averred that goods had been shipped by the defendants and the vessel had been wrecked on one of the "Great Lakes;" that the plaintiff came to the wreck with the necessary appliances to remove the cargo, tackle, furniture, &c., and that whilst at the wreck prepared to remove the cargo, &c., the defendants offered to receive the cargo and pay its proper proportion of the expenses incurred by the plaintiffs; and that the "proportion of the charges and expenses occasioned thereby and by the salvage of the rigging, furniture, &c., and of the cargo * * * which should be apportioned on the cargo was," &c., and that defendants received the cargo and agreed to pay such proportion," &c. The defendants pleaded in abatement that the cause of action occurred on the "Great Lakes and within the maritime jurisdiction of the United States, and being a claim for salvage," the jurisdiction was exclusive in a court of admiralty, and the Common Pleas had no jurisdiction. *Held*, that the action being on a *contract* to pay, it was within the saving of the 9th sect. of Federal Judiciary act of February 20th, 1789, and the common law court had jurisdiction.

2. The peculiar and exclusive jurisdiction is when the proceedings are *in rem*: remedies in *personam* are concurrent, when there is ground to maintain a common law action.

3. A benefit or service performed voluntarily is a consideration to support an express promise.

4. The saving in 9th sect. in act of Congress, February 20th, 1789 (Judiciary act), is of a common law remedy.

5. Common law courts and admiralty have concurrent jurisdiction on charter party, bill of lading, shipping articles and policy of marine insurance.

6. Foreign attachment is process to commence a personal action and compel an appearance: when dissolved by bail, the judgment is *in personam*.

7. On the *scire facias* against the garnishee, on the plea of "*nulla bona*," he may show that the property attached is not the defendant's but the garnishee's or some other person's.

8. The court should not proceed on a plea in abatement without replication or demurrer.

November — 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Erie county: No. 24, to October and November Term, 1871.

BENNETT et al. v. CADWELL'S EXECUTOR.

1. In a suit in Wisconsin on a partnership note, one of the partners was not served, and judgment was recovered against the others. This did not discharge the partner not served in a suit against him in Pennsylvania.

2. Prima facie, the law of the forum is the same with the law of the place of the contract.

3. Partners dissolved; Cadwell, one of them, received all the assets and covenanted to pay all the debts and indemnify his fellows. In a suit on a note against the firm, one of whom, Bennett, was not served, a judgment was recovered against the others, Cadwell being one of them. A judgment was recovered in Pennsylvania in a suit against Bennett for the same note for want of an affidavit of defence. This judgment was prima facie evidence of Bennett's right to maintain an action against Cadwell on his covenant.

4. In the action against Cadwell, the validity of the judgment could not be inquired into collaterally.

5. Accepting a bond from one partner for a firm's simple contract debt is a satisfaction of the firm's indebtedness.

6. The recovery of the judgment in Wisconsin extinguished the firm's indebtedness as to the partners served.

7. Act of April 6th, 1830 (judgments against part of joint contractors), applied.

8. Campbell v. Steele, 1 Jones, 394, recognized.

November — 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Erie county: No. 157, to October and November Term, 1871.

SQUIRE'S APPEAL.

1. Mrs. Squires by parol purchased from Cundy oil interests "with all debts due them:" $5,000 were due by Ridgway, who was her agent in the purchase; this was to be applied to the purchase money and the conveyance to be made to Ridgway in trust for her until the proceeds with his debt should pay the consideration; an absolute deed by his fraud was made to Ridgway; he denied the trust. *Held*, that he was a trustee for her *ex maleficio*.

2. Cundy not having objected to convey, Ridgway could not object on the ground that the sale was by parol.

3. By the contract, Ridgway's debt became hers, and by transfer of that debt she paid the purchase money.

4. This trust was within the exception of the 3d section of act of April 22d, 1856.

5. Seichrist's Appeal, 16 P. F. Smith, 237, adopted.

November — 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Appeal from the decree of the Court of Common Pleas of Venango county: In Equity: Of October and November Term, 1871, No. 196.

McCANDLESS' APPEAL.

1. Rhodes constructed a private railroad to his own mines through an alley on the line of an incorporated railroad company with their consent; he was enjoined from using it and ordered to remove the rails, &c. He procured the incorporation of himself and six others as a railroad, coal and oil company with a capital of $100,000; they were authorized to buy any railroad partly or wholly completed, and damages were to be ascertained, &c., according to the general railroad law. The company was organized before any stock was taken, and Rhodes sold to them his railroad, mines, &c., for $100,000, payable in the stock of the company, which had no other assets than the property sold by Rhodes. The company relaid the road and operated it with locomotives, &c. *Held*, that Rhodes was the owner after the organization and his sale to them, as he had been before.

2. The road sold by Rhodes having been built without authority of law, and being a nuisance, the act of incorporation did not authorize the company to purchase such road.

3. The railroad after the purchase was still a private road, and not covered by the act of incorporation.

4. The railroad was built from Rhodes' mines to private iron works. *Held*, that it did not come within the description of a partly built road.

5. The provisions of the general railroad law as to damages did not apply to such road, and there was therefore no provision for ascertaining damages.

November — 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Appeal from the decree of the Court of Common Pleas of Lawrence county: In Equity: No. 155, to October and November Term, 1871.

SEDGWICK v. LEWIS.

1. Pollock, a partner in a grocery, forwarding and commission firm, bought lumber on his own account, and gave a note signed in the firm name; the payees endorsed to Lewis, who received it without notice that it was not given in the business of the firm. *Held*, that Lewis could recover against the firm.

2. Signing the note by Pollock in the firm name was a fraud on the firm; had Lewis taken it with knowledge, it would have been a good defence for the firm.

3. Ihmsen v. Negley, 1 Casey, 297, recognized.

November — 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Greene county: No. 158, to October and November Term, 1871.

KAUFFMAN'S APPEAL.

1. Confession of judgment and præcipe for fi. fa. were handed by the plaintiff to the prothonotary on Sunday; on the next day the prothonotary entered the judgment and issued execution. *Held*, that the judgment and execution were valid, and had priority over other executions issued subsequently on the same day.

2. The prothonotary was not bound to receive the papers; his acceptance of them was not an official act; he received them as agent of the plaintiff.

3. An auditor was appointed to distribute a fund raised by execution, the money not having been paid into court; a creditor who had no notice of the application for the appointment and did not assent to it, appeared before the auditor; but excepted to the report on this ground. The court confirmed the report. *Held* to be error.

4. On filing the exception, the court should have ordered the money into court before distributing it.

5. The fund not being within the grasp of the court, there was no authority to distribute it without the assent of the parties.

November — 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Appeal of the decree of the Court of Common Pleas of Clarion county: No. 179, to October and November Term, 1871. In the distribution of the proceeds of the sheriff's sale of the personal property of John P. Cook.

WALTER'S APPEAL.

1. The provisions of the act of March 13th, 1815, § 5, limiting dissolution of incestuous marriages to the life of the party, are not confined to divorces, but apply to all courts and proceedings.

2. These provisions are not repealed by the 39th section of act of March 31st, 1860 (Crimes) which declares such marriages void.

3. Walter married the widow of his son, and died, leaving her to survive him: *Held*, in the distribution of his estate, that the validity of the marriage could not be questioned.

4. Repeals by implication are not favored.

January 19th, 1872. Before THOMPSON, C. J., AGNEW and SHARSWOOD, JJ. WILLIAMS, J., at Nisi Prius.

Appeal from the decree of the Orphans' Court of Chester county: No. 178, to January Term, 1872.

THE PHILADELPHIA AND BALTIMORE CENTRAL RAILROAD COMPANY'S APPEAL.

1. The act of April 7th, 1870, authorizing executions against corporations, supplies the 72d and 73d sections of the act of June 16th, 1836, authorizing sequestration.

2. The franchises and property of a corporation may be seized and sold out and out under a *fi. fa.*

3. The act of April 7th, 1870, construed.

January 15th, 1872. Before THOMPSON, C. J., AGNEW and SHARSWOOD, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of Chester county: No. 281, to January Term, 1872.

LEGAL GAZETTE.

Friday, August 8, 1873.

JOHN H. CAMPBELL, EDITOR.

THEODORE F. JENKINS, ASSOCIATE EDITOR.

Supreme Court of Pennsylv'a.

HOUGH et al. v. NORTHERN CENTRAL RAILWAY COMPANY.

When the rates per ton per mile are not uniform for all distances for which freights may be carried, "average charges for toll and transportation" signify charges made at a mean rate, obtained by dividing the entire receipts for toll and transportation, by the whole quantity of tonnage carried, deduced to a common standard of tons moved one mile.

Error to the Common Pleas of Lancaster county.

Opinion by MERCUR, J. Delivered July 2d, 1873.

The most important question in this case arises under the second assignment of error. It alleges "the court erred in deciding that the average charges in this case were not more than four cents per mile per ton for toll and transportation for the plaintiffs' coal and merchandise."

Strictly speaking, this raises a question of fact only. Inasmuch, however, as the facts were found by the referees under an agreement of the parties, that they should "have the same effect as a special verdict," we will consider whether the court decided the law correctly upon the facts found by the referees. As much of the argument has been directed towards the consideration of the meaning of "average charges," a reference to the legislation bearing upon it becomes necessary. The "Danville and Pottsville Railroad Company" was incorporated by act of April 8th, 1826. Under this act the road was constructed from Sunbury eastwardly to Shamokin, a distance of about twenty miles. By the act of April 8th, 1834, the credit of the State was pledged for the payment of the interest upon the loan certificates of said company, to the amount of $300,000, which were duly issued. The company became insolvent. The several acts of 21st April, 1846, March 16th, 1847, and April 11th, 1848, were passed, making provision for the sale of the road and the franchises of the company upon terms therein. No sale having been made, the further supplement of April 2d, 1850, was passed. It recited that the "State had already paid the sum of $225,000, and that there was no reasonable prospect that the company would ever complete the said railroad, and relieve the State from the annual drain of $15,000 from her treasury."

Under these laws a sale was finally effected in 1850. By act of April 12th, 1851, the sale was confirmed, and the name of the corporation changed to the "Philadelphia and Sunbury Railroad Company." This company repaired the part of the road already built, and in 1855 constructed a branch road from Shamokin eastwardly to Mt. Carmel, a distance of about eight miles. In November, 1857, the road and franchises were sold at sheriff's sale upon a mortgage executed by said company, under an act of the Legislature. The sale was confirmed by act of 25th of March, 1858, and the purchasers duly incorporated under the name of the "Shamokin Valley and Pottsville Railroad Company." This last named company operated the road until 27th February, 1863, at which time they leased it to the defendants for a term of years.

The act of April 8th, 1826, fixed the charges for tolls and transportation at prices varying from one and a half to four cents per ton per mile. The third section of the aforesaid act of April 11th, 1848, P. L. 1848, p. 541, provided "that the rates for toll and transportation may be fixed and regulated in such manner as the company may deem most advisable. *Provided, however*, That the maximum charges for toll and transportation on the said road shall not exceed four cents per ton per mile for freight." The second section of the supplement, approved April 2d, 1850, P. L. 1850, p. 298, declares that the "proviso to the third section of said act be and the same is hereby amended so as to read 'average charges for toll and transportation' instead of the maximum charges."

It is thus shown that at the time of the passage of the several acts relating to the sale of the road, prior to the act of April 2d, 1850, the maximum charges which the company was authorized to make was four cents per mile per ton. No greater charge than four cents per ton for any mile could be imposed. Beyond that sum the company could not go. The law made that the barrier which could not be passed. Under that limitation and restriction no purchaser was procured. What then was the object of the act of 2d of April, 1850? Was it to give more or less favorable terms to the company and to the purchaser? The desire to facilitate a sale having been unmistakably expressed by the Legislature, the reasonable presumption is that it was to offer more inviting terms to a purchaser. It is contended on the part of the plaintiff, that this law only gave power to make average charges below the four cents per mile. We answer the company had that power before its passage, so we will not give to the statute such a construction as will wholly prevent its taking effect. The maximum charge was the only limitation imposed by the previous law. Below that sum the company could have made such average charges as it "deemed most advisable." The undoubted intention of the act, therefore, was to authorize the company by a wise and judicious discrimination to impose some charges higher than four cents per mile; but by putting others less, to so adjust the whole that the general average should not exceed that sum.

The referees have found that the average charges for toll and transportation upon this road during the time in question was only 3 734-1000 per mile per ton. Objection is made to this conclusion for two reasons: First, because the referees considered the whole tonnage carried and not the plaintiffs' alone; and secondly, because of the much higher rates charged for short distances than over the whole road. We do not think either of these objections is sound. There is nothing in the act requiring that this adjustment should be so made as to bear equally upon each individual.

The adjustment is to be made between the whole road and the entire public who use it. Full effect is therefore given to the spirit and intent of the statute, as well as to its letter, by fixing different charges per mile for different kinds of freight. Such is the custom of all railroads. Nor is there anything unjust in discriminating in favor of longer distances. The referees have found it usual for railroad companies to charge higher rates for transporting freight short than long distances, for the reason that the number of men employed, the time consumed, and the incidental expenses incurred are proportionately greater. Strong reasons exist in this case for the application of that rule. The freight of the plaintiff was passed over one and three-fourths miles only of the defendants' road, while the motive power of the company had to be moved up a heavy grade to reach that portion of the road. The plaintiffs cannot be permitted to entirely separate their freight from that of others in determining the gross average charges received by the defendants. We, therefore, agree with the finding, that when the rates per ton per mile are not uniform for all distances for which freights may be carried, "average charges for toll and transportation" are understood to mean and do mean charges made at a mean rate, obtained by dividing the entire receipts for toll and transportation, by the whole quantity of tonnage carried reduced to a common standard of tons moved one mile. It is true this must be applied to some given time, but the finding shows that whether each year be considered separately, or the whole time together during which the tonnage of the plaintiffs was passing over the road, the average charges of the defendants did not exceed four cents per ton per mile for the whole tonnage.

This view of the case shows the judgment was correctly entered in favor of the defendants. It is, therefore, unnecessary to discuss the other assignments of error, as none of them can change the result.

Judgment affirmed.

THE PENNSYLVANIA R. R. CO. v. BEALE.

1. The failure to stop immediately before crossing a railroad track, is negligence *per se*, and is a question for the court.
2. The court charged that the person injured by a railroad train at a crossing, should have stopped, "if you find from the evidence that the approach of the train might have been seen or heard from there," *Held*, to be error by reason of the qualification.

Error to the Court of Common Pleas of Juniata county.

Opinion by SHARSWOOD, J. Delivered July 2d, 1873.

The evidence of the plaintiffs below showed a clear case of contributory negligence in the deceased. The crossing at which he met with the injury which resulted in his death, was a dangerous one, and as he was well acquainted with it, there was the greater reason that he should exercise the utmost care and caution, by stopping at the railroad before undertaking to pass over. It is very clear that if he had done so but for a few minutes the accident would not have happened. "This evidence," said the learned judge in his charge "is uncontradicted, that there was a level piece of ground, about ten feet wide, between the hill or bluff and the first track or siding on the approach to the track from the valley upon which the deceased was travelling." It was his plain duty to have stopped at that place, and so the learned judge instructed the jury, but he qualified this instruction by adding, "if you find from the evidence that the approach of the train might have been seen or heard from there." This in fact left the question of negligence to the jury, upon a point not material. Indeed, the duty of stopping is more manifest when an approaching train cannot be seen or heard than where it can. If the view of a track is unobstructed, and no train is near or heard approaching, it might, perhaps, be asked, why stop? In such a case there is no danger of collision—none takes place—and the sooner the traveller is across the track the better. But the fact of collision shows the necessity there was of stopping; and therefore in every case of collision the rule must be an unbending one. If the traveller cannot see the track by looking out, whether from fog or other cause, he should get out, and if necessary lead his horse and wagon. A prudent and careful man would always do this at such a place. In the Hanover Railroad Co. v. Coyle, 5 P. F. Smith, 396, the plaintiff, a pedler, in the depth of winter, was driving inside of his covered wagon, with his head muffled up in a thick overcoat, and it appeared that a traveller passing in the direction he was going could not see up and down the track until within sixteen feet of it. Yet these circumstances were not allowed to form any excuse for his negligence in omitting to stop. There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track, is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the court. North Pennsylvania Railroad Co. v. Heilman, 13 Wright, 60. It was important not so much to railroad companies as to the travelling public. Collisions of this character have often resulted in the loss of hundreds of valuable lives, of passengers on trains, and they will do so again, if travellers crossing railroads are not taught their simple duty, not to themselves only but to others. The error of submitting the question to the jury whether if the deceased had stopped, he could have seen or heard the approaching train, runs through the entire charge and answers of the learned judge below. He should upon the uncontradicted evidence have directed a verdict for the defendants.

Judgment reversed.

TWENTY-FIRST JUDICIAL DIST.
Court of Common Pleas.

In re WEBER.

The act of 21st April, 1848, relating to public officers and their sureties, does not give the courts power to discharge solvent sureties upon their own application.

Opinion by PERSHING, J. Delivered July 21st, 1873.

Ernst F. Jungkurth and Adam Kull have presented their petition setting forth that John J. Weber was duly elected the recorder of deeds for the county of

Schuylkill, and entered on the discharge of his duties on the first Monday of December, 1872; that he gave two several bonds to the commonwealth in the sums respectively of £1,000, and $1,666.66, conditioned according to law, and in both of which the petitioners are his sureties; that since the execution and approval of these bonds, the said John J. Weber has become liable for neglect of duty in not conducting the duties of said office legally and properly, in neglecting to make the proper entry and record of instruments presented for record, and in giving false certificates of search to parties, thereby rendering the petitioners liable for the penalty of said bonds, by which they will suffer loss by reason of the misconduct of said officer.

Petitioners pray for a citation to issue to said John J. Weber, to answer said petition, and to show cause why he shall not give other and further security, and the petitioners be discharged. The petition is verified by affidavit. In his answer, John J. Weber specifically denies the allegations of the petitioners as to the neglect of duty in conducting said office. He further denies that his said sureties have incurred any liability to loss by reason of his misconduct or neglect as an officer. He alleges that he is, and has been, ready and willing to give other and further security to the petitioners, whenever it shall appear that any damage has been, or shall be suffered, or any liability for the penalty of said bonds has been incurred, or any loss sustained by the relator. Respondent admits that a certificate of search made for D. C. Henning, Esq., by one of the employees in the office, omitted a mortgage for the sum of $800, against one Lewis Harris, but alleges that the omission was caused by a defective index, made by one of his predecessors; that the error was corrected, and that no loss has occurred or can occur, or any liability accrue to his said sureties in consequence of this omission, and that he has properly entered and recorded all instruments left in the office for that purpose. The right of the sureties to institute this proceeding, and on proof of the facts alleged, have themselves discharged, depends upon the construction of the first section of the act of 21st of April, 1846, entitled "An act relating to certain public officers and their sureties." Purdon's Digest, 1101, pl. 23. In this section it is provided that "The Court of Common Pleas of the county in which any prothonotary, sheriff, brigade inspector, county treasurer, or other public officer may reside, from whom, by law, security is required for the performance of his official duties, shall have the power to examine into the manner of the performance of said official duties, and the ability and solvency of the sureties of any such officer, at any time during his tenure of office, and to require from him such other or such additional security for the performance of his official duties, as they shall deem expedient, and such jurisdiction shall be exercised in the following manner, to wit: Whenever any person or persons shall apply to said court by petition, verified by affidavit, and setting forth that the solvency of such public officer, or of any one or more of his official sureties, has become impaired or diminished since the execution and approval of their official bond, or that such officer has become liable for neglect of duty, or has become a drunkard, and that the (by) reason thereof, the said officer and his sureties are not worth the amount of penalty of his said bond, or that said sureties are likely to suffer loss on account of misconduct of such officer, it shall be lawful for said court, or any judge thereof, in vacation, to award a citation to such officer and his sureties directed, commanding them to appear at the next term of said court to answer the matters alleged in said petition, and show cause why the said officer shall not give other and further security, and on the return thereof, or such time as shall be fixed for the purpose, the said court shall hear the said parties and examine the facts of the case. And if said court shall be satisfied that the sureties of such officers are insufficient, or have become liable for neglect of duty of such officer, or likely to become so from his intemperance, said court shall order and direct that he shall, within such time as shall be fixed by said court, enter into a new official bond, with sureties to be approved by the court or two of the judges thereof, in lieu of the former bond; and further providing, that upon the approval of the new bond, the sureties in the original bond shall "be discharged from all responsibility." Of the several grounds mentioned in this section on which the action of the court may be invoked, the only one specified in the petition is that of neglect of duty on the part of the recorder of deeds, involving his sureties in consequent loss. It would require a very liberal construction of this section to make it sustain this application. In this case the sureties have a citation issued to their principal alone, the citations authorized by this section is to be directed to the officer and his sureties, commanding them to appear, &c. This plainly implies that the petitioning party or parties, must be other than the sureties. The act was intended for the protection of the public, as when the officer by official misconduct had involved himself and his sureties to the amount of his bond, or the sureties, or either of them, had become involved, so that from the time this state of things was reached, the bond already filed was no longer a protection to those whose interests might be affected.

This view is strengthened from the reading of the latter part of this section, where the circumstances under which the court is authorized to take action are distinctly stated. If the court shall be satisfied "that the sureties of such officer are insufficient, or have become liable for neglect of duty of such officer, or likely to become so from his intemperance," then the court shall order and direct that a new bond be filed, &c. The language here is adapted to a proceeding, where parties are pursuing a remedy against an officer and his sureties, but will not harmonize with an application made by the sureties to be discharged from the legal obligations they voluntarily took upon themselves.

When the Legislature intends to make provision for a surety, that intention is expressed in no doubtful phraseology. Thus, where any executor, administrator, or guardian is mismanaging the estate committed to his care, or is likely to prove insolvent, or has neglected his duty in other respects, the 28th section of the act of 29th March, 1832, Purdon's Digest, 454, pl. 240, provides that any surety, in such cases, may apply to the Orphans' Court, and thereupon the court may order such executor, guardian, or administrator to give counter securities to indemnify the surety making complaint against loss by reason of his suretyship.

The fifth section of the same act, of which the first section is made the foundation for the application in this case, seems conclusively to establish that the first section was not intended to provide a way by which sureties could issue a citation to their principal, and as a result relieve themselves from liability. The fifth section provides: "Whenever upon petition and due proof, if it shall be made to appear to the Court of Common Pleas of the proper county, that any justice of the peace or alderman of any city or county, is likely to become insolvent, or that any surety of any justice or alderman has removed from the State, or has become insolvent, or is likely to become insolvent and when upon the petition of any surety of any justice or alderman, and proof as aforesaid, it shall appear such justice or alderman has become, or is likely to become insolvent, such court (or judge thereof in vacation, by section nine of the act of May 8th, 1850) may require any such justice or alderman to give security, or additional security, or counter security, to indemnify the surety so petitioning against loss, by reason of his suretyship, as the case may be," &c. Now if the Legislature intended the first section to afford such a remedy for the sureties of a recorder of deeds, as they have provided in the fifth section for the sureties of a justice, it must be confessed they have very obscurely indicated in the first case, what is stated with great clearness in the second. Why not provide for the sureties petitioning the court in one case, as well as in the other, when both classes are embraced in the same statute, if it was intended to furnish by the first section such a remedy as that claimed in this proceeding?

As to the facts: It does not appear that the recorder has failed to account to the State for any moneys received by him belonging to the treasury of the commonwealth.

The State treasurer may, whenever the occasion demands it, require a new bond for the protection of the State. Act May 18th, 1857, section 81, Purdon's Digest, 1102, pl. 25. We think the evidence discloses some want of care in the conduct of the office, which may be attributable, as argued by counsel, to the fact that Mr. Weber was a new officer, and compelled at the start to depend upon others. The omission to certify one mortgage is admitted, and some evidence was offered to show that in another certificate a mortgage for a much larger amount, $50,000, was left out. The certificate itself was not produced, and no sufficient ground was laid to authorize secondary evidence of its contents. Advantage of any omission to certify can only be taken by the party to whom the erroneous certificate is issued. 6 Philadelphia Reports, 90. It appears that both of these omissions were discovered in time to prevent the parties who received the certificates from being mis'ed. We are not satisfied that the sureties of John J. Weber are insufficient, or that they have become liable for neglect of duty on his part, or are likely to become so from his intemperance, and until one or all of these things can be established, we cannot take action, even if it is conceded that the law will cover the case of an application made by sureties of an officer, and the issuing of a citation to him alone.

As having some bearing upon the question of construction, we may refer to Smith's Forms of Procedure, page 542, *et seq.* The citation is dismissed.

For the petitioners, *Jno. W. Bickel, Esq.*, and *Hon. F. W. Hughes.*

For the respondent, *C. N. Brumm, F. W. Bechtel*, and *J. W. Ryon, Esqs.*

Supreme Court of N. H.

[We are indebted to John M. Shirley, Esq., for advanced sheets of 52 New Hampshire Reports, from which we select the following.]

BRYANT v. OSGOOD.

1. An officer, having a writ of attachment against A., went to the barn where some hay was stored, and there posted a paper written thus: "I have attached all the hay in this barn, in which (A.) has any interest." A. knew at the time, and the plaintiff soon after, and prior to his subsequent purchase of the hay of A., of the posting of this notice and its contents. The officer made return upon the writ, to the effect that he had "attached all the * * * hay * * * in the town of W., in which the said A. has any right, title, interest or estate; and on the same day left at the office of the town clerk of said town, a true and attested copy of this writ and of this my return endorsed thereon." *Held*, that these proceedings did not constitute a valid lien upon the property, as against the plaintiff.
2. The statute which provides that an attachment of bulky and ponderous articles shall not be defeated or dissolved by any neglect of the officer to retain actual possession thereof, provided he leave an attested copy of the writ, and of his return of such attachment thereon, as in the attachment of real estate—Gen. Stats., ch. 205, sec. 16—requires that the return should be so certain and explicit in its description of the property and its situation, as to give subsequent attaching creditors or purchasers substantially the same notice they would derive from knowledge of the actual retention of possession of the property by the officer.

Opinion by FOSTER, J.

At common law, the doings of an officer in respect to personal property cannot amount to a valid attachment, unless the articles are taken into his actual custody, or are placed under his exclusive control. Odiorne v. Colley, 2 N. H. 68. The articles must be within the power of the officer. He must continue to retain this power over them by remaining present himself; by appointing an agent in his absence; by taking a receiptor for the property; by inventorying and marking them; or by a seasonable removal of them. Huntinton v. Blaisdell, 2 N. H. 317; Runlett v. Bell, 5 N. H. 433; Chadbourne v. Sumner, 16 N. H. 129; Young v. Walker, 12 N. H. 506; Weston v. Dorr, 25 Me. 176. The officer must take possession of the goods. It is not necessary that they should be removed, but they must in all cases be put out of the control of the debtor. Dunklee v. Fales, 5 N. H. 527; Drake on Attach., sec. 256.

There was no valid attachment of this hay by proceedings at common law, for the property was not taken into the actual custody of the officer, nor was any agent

or receiptor appointed to hold the property in the absence of the officer, nor was it put out of the control of the debtor.

But the statute has provided for dispensing with all these requirements in the case of bulky and ponderous articles, such as unthreshed grain, hay, potatoes, lumber, wood, machinery, &c., by authorizing the officer attaching such property to "leave an attested copy of the writ, and of his return of such attachment thereon, as in the attachment of real estate; and in such case the attachment shall not be dissolved or defeated by any neglect of the officer to retain actual possession of the property." Gen. Stats.; ch. 205, sec. 16.

If the sheriff in this case fulfilled the requisition of the statute, his attachment was and remained valid—that is, the lien acquired by the caption of the property was retained by the officer, and the plaintiff, as a subsequent purchaser of the hay, could acquire no title; but if the terms of the statute were not fulfilled, the lien of the officer was lost, and the attachment dissolved.

By the statute, a public record of the return of the property attached is made a substitute for the retention of possession by the officer or his agent, and its purposes would not be subserved nor its spirit maintained by any such effort at compliance with the terms of the statute, or by any such construction of its provisions as should fail to furnish a subsequent attaching creditor, or a purchaser of the property from the debtor, substantially and practically the same information as would be derived from knowledge of the officer's retention of possession at common law.

The defendant's return, a copy of which was left with the town clerk here, gave information that he had attached all the hay in the town of Warren, in which Smith had any interest; but with regard to quantity, or any particular location, and whether the hay was in one or more different lots or localities, there was no specification in the return; and if, ten days after the filing of this return, a purchaser, or a subsequent attaching creditor, should find a quantity of hay, either upon or not upon the premises occupied by Smith, he could have no knowledge or information, derived from inspection of the town clerk's records, as to whether such lot of hay had been attached or not; and a dispute would instantly arise between the purchaser, or subsequent attaching creditor, and the officer, as to the identity of the property; and infinite confusion would result, contrary to the demands of public policy.

We are clearly of the opinion, that the return in this case was insufficient for the preservation of the officer's lien upon the hay; and that, by reason of this insufficiency, the attachment was dissolved prior to the purchase of the property by the plaintiff on the 2d day of October. "The return," says Mr. Drake, "should state specifically what the officer has done." Drake on Attach., sec. 205. And again: "By the general principles of law, independent of any statutory regulation, the officer is bound to give, as nearly as it can reasonably be done, in his return, or in a schedule or inventory annexed thereto, a specific description of the articles attached, their quantity, size and number; and any other circumstances proper to ascertain their identity. * * * It does not seem, however, that any more precision should be exhibited in the return than is necessary for the identification of the property. Hence, where a sheriff returned an attachment of four horses (describing their color), it was held sufficient. So, where an officer returned all the 'stock of every kind,' in a woollen factory, particularly described, specifying the stock as a lot of 'dye-wood and dye-stuffs,' 'lot of clean wool,' 'sixteen pieces of black Oxford mixed cassimere,' twenty-five pieces doeskins and tweeds,' 'fifty-one pieces of unfinished cloth,' "lot of cotton wool,' 'cotton wool, oils,' &c., 'in said woollen factory,' the return was held sufficient"—citing Ela v. Shepard, 32 N. H. 277.

But concerning this return, it was remarked by the court, Fowler, J., that, although sufficient, "it was, perhaps, more general than desirable."

In Baxter v. Rice, 21 Pick. 199, Shaw, C. J., says: "It is highly important, upon grounds of public policy, that a good degree of exactness and particularity should be observed in returns on mesne process, to show their identity, and thereby more definitely to fix the rights and responsibilities of all parties in relation to them." And see Pierce v. Strickland, 2 Story, 292; Toulmin v. Lesesne, 2 Ala. (N. S.) 359.

In Haynes v. Small, 22 Me. 14, it was held, that "if an officer returns on a writ that he has 'attached one hundred and seventy-five yards of broadcloth, the property of the within named defendant,' it is not competent for him, in an action for not producing the property to be taken on the execution, to show that but thirty yards were in fact attached by him, he not having measured but only estimated the quantity of cloth, Whitman, C. J., remarking: "Officers ought to know what they attach, and to be holden to exactness and precision in making their returns. Neither the debtor nor the creditor would be safe if it were otherwise. And it will be well that the law should be so promulgated and understood. An officer, in such cases, is intrusted with great power. He may seize another man's property without the presence of witnesses, whether it be goods in a store or elsewhere; and safety only lies in holding him to a strict, minute and particular account. To hold that he may indifferently make return of his doings at random, and afterwards be permitted to show that what he actually did was entirely different, would be opening a door to infinite laxity and fraud, and mischiefs incalculable. Suppose the deputy had returned that he had attached one hundred and seventy-five sheep; he might as well be permitted to show, that by mistake, there were but thirty of them. It was the duty of the officer to have measured the cloth attached, or in some other way to have ascertained precisely what he had attached. Such a mistake as is here pretended could have arisen only from the grossest negligence, to which it would be a disgrace to the law to afford its countenance."

But it may be said that since the statute provides that the officer attaching hay, &c., "may leave an attested copy of the writ, and of his return of such attachment thereon, as in the attachment of real estate," the return in this case must be regarded as sufficient, because it is commonly understood, that a return of an attachment of all the defendant's real estate in town, without any other description, is sufficiently explicit.

It is to be observed, however, that the provision is not that the attachment may be made, as in case of real estate *by* leaving a copy. Indeed, no attempt is made to change the mode of making the attachment, but a new and easier method of preserving it is provided. Before the statute there was not so much difficulty in making as in preserving attachments of the various articles enumerated in section 16 of chapter 205 of the General Statutes. See Scott v. Print Works, 44 N. H. 508

Probably an attachment of real estate, by leaving a copy of a return expressed in such general terms, would be held sufficient, if the point were distinctly raised, on the ground that since the law provides for the registration of land titles, a reference to the county records would disclose the precise property referred to in the officer's return, and *id certum est*, &c.

But that argument will not avail this defendant, there being no analogy between the case of real and personal estate in that particular, and no registration being required of a man's acquisitions of personal property, to which an inquirer may have access, in order to ascertain what is included by a general designation of property in an officer's return; and the expression used in the 16th section simply means that, as real estate may be attached by leaving a copy, &c., "at the dwelling house of the town clerk," so an attachment of personal property may be preserved, by leaving a copy of a sufficient and proper return at the dwelling house of the town clerk, "as in the attachment of real estate."

A reasonable degree of certainty is required, even in attachments of real estate. Thus in Whitaker v. Sumner, 9 Pick. 308, a return of "all the right, &c., to a piece of land, with the buildings thereon, situate in Columbia street," was held sufficient, because it was said "Huntington had only one house in the street, so that the property attached could be readily ascertained, and *id certum est*."

So in the present case, if the return had been of all the hay in the barn occupied by the defendant, although inexcusably loose and irregular, so much so that the officer could not have resorted to parol evidence to explain, for his own protection, the quantity of hay included in the attachment, yet, as against third persons, the return, perhaps, might have been regarded as sufficiently explicit, as in Reed v. Howard, 2 Met. 36, where the officer attached "all the wood and coal of the defendant lying on a lot of land belonging to B. H., situate in B.;" and Dewey, J., said, we "do not perceive any objection to the validity of the attachment, arising from the generality of the description of the property in the officer's return, taking into consideration the nature of the property attached and the entire recital found in the return."

It is said in Taylor v. Mixter, 11 Pick. 347, "any description which would be sufficient to pass the land by a deed, will answer for an attachment." To the same effect is Howard v. Daniels, 2 N. H. 137, in which Woodbury, J., says the object of an attachment is "merely to caution the public and the debtor that the land attached is intended to be considered by the creditor as eventual security for his debt. A description of it, therefore, as 'the farm the defendant now lives on, with his tannery, &c., thereon,' could not fail to apprise the defendant, and all others in interest, what premises were intended. Our statute concerning attachments does not, like that concerning extents, require the 'metes and bounds' of the land to be set out; and in deeds, where the title itself passes, the same certainty contained in this return suffices; for there the rule always is, *id certum est, quod certum reddi potest.*

In Hathaway v. Larrabee, 27 Me. 449, the officer, upon a writ against three defendants, returned that he had attached all the right, &c., "the defendant has in and to any real estate in the county of Penobscot." It was held that the language was too vague and uncertain to create a lien by attachment on the estate of either one of the defendants." Shepley, J., remarked: "No person should be deprived of his right to sell or to purchase an estate as free from incumbrance, when he cannot ascertain, by an inspection of the officer's return, that it has been attached."

But the defendant contends that the posting of a notice in the barn was sufficient proclamation to all the world, and to Bryant in particular, who knew of the posting of the notice and its contents, that this particular hay had been attached.

There is no doubt about that. The attachment was well enough. The question is, was it preserved, or dissolved? It was not preserved by any retention of possession by the sheriff or an agent of the sheriff, by the exclusion of the debtor from the custody and control of it, by removal of the property, or by taking a receipt for it. And we have seen that it was not preserved by such a return as the law required for a substitute for the common law requisitions.

The simple question then is, whether the plaintiff, a subsequent *bona fide* purchaser, is to be excluded from acquiring title to the property, by reason of notice of an abortive attempt of an attaching creditor, through the agency of an incompetent or careless officer, to make and preserve a valid attachment.

Preliminary to the answering of this question, it may be remarked, that as between an attaching creditor and a *bona fide* purchaser, there can be no superiority or preference upon any equitable considerations.

Bryant had notice of the attachment, and was bound by it; but the attaching creditor was equally bound to fulfil the requirements of the statute if he would *preserve* the lien which, as against Bryant, he had obtained.

The most that can be said, then, is that Bryant had notice of an attachment, which the attaching creditor virtually abandoned.

Bearing in mind that the statute was not intended to change the mode of making

the attachment, but only to provide a new and easier method of preserving it when made. Scott v. The Print Works, before recited. That the leaving of a copy of the return with the town clerk is merely a substitution for the retention of actual possession or other legal equivalent by the officer, the pertinency and conclusiveness of the cases of Young v. Walker, 12 N. H. 502, and Chadbourne v. Sumner, 16 N. H. 129, as authorities upon this branch of the subject, will be apparent. These are to the effect that "where a sheriff merely knows that property has been attached by another officer, if no possession be retained, he may make a valid attachment." Why? Not because no regular and valid attachment has been made by the first officer, but because the lien created thereby has not been preserved by the retention of possession requisite for that purpose; and full knowledge of all particulars, by a subsequent attaching creditor, will not reinstate the prior creditor in the rights which he has lost through the negligence or ignorance of the officer employed by him to acquire and retain those rights.

In Chadbourne v. Sumner, the defendant, a subsequent attaching creditor, had a very similar notice of an attachment of hay to that which the plaintiff in the present case had—a written notice posted on the barn, and a notice in red chalk thereon; but since the defendant, the first attaching officer, did not employ any agent to take charge of the hay (this was before the present statute), it was held that the first attachment was dissolved, and that the defendant might lawfully attach the property notwithstanding his notice.

So in Bagley v. White, 4 Pick. 398, where goods attached were put into the debtor's store, but the sheriff did not keep the key, and had no control over the store, nor any possession by any one, as his servant, for thirty or forty days after the goods were put there, the attachment was held to be lost as against another officer who knew these facts.

In Young v. Walker, it was said by the court, Gilchrist, J.: "Where the officer finds property in the possession of the debtor, the mere knowledge on his part that the property had been attached, will not prevent him from making a valid attachment of it. But if he knew that there is a subsisting attachment and an unrescinded contract of bailment, although the debtor might at the time have the possession of the property, he cannot acquire a lien by attaching it. And these principles are not unreasonable. If the officer find property in the possession of the debtor, and know only that it has once been attached, he might well presume that it was there because the suit had been compromised and the attachment dissolved. But if he knew that the attachment and the bailment still subsist, and that the property is in the hands of the debtor merely for his temporary convenience, he will not be misled, and can make no such presumption." And see Carpenter v. Cummings, 40 N. H. 158.

It will be said that there is a distinction between these cases and the present in this, that in the cases cited, the subsequent attaching officer may have had good reason to suppose that the suit had been compromised, and the property purposely released; whereas, in the present case, the plaintiff must have known that there had been no intentional abandonment of the security—and this is undoubtedly true; but the admission only brings us back to the proposition that a subsequent attaching creditor, or purchaser in good faith and for value, is not to be prejudiced by mere knowledge of a failure by his adversary to comply with the statute requisitions, positively essential to the preservation of his security.

The statute which provides that upon the filing of a copy of a sufficient return with the town clerk, "the attachment shall not be dissolved," by necessary implication provides that if such return be not filed, it *shall* be dissolved.

If it be said that this result is a hardship upon the attaching creditor, the answer is furnished by Gilchrist, J., in Young v. Walker: "The care of his rights was entrusted to (the defendant) his agent; and if that agent have so conducted as to sacrifice any of those rights, the creditor has his remedy against him. It does not follow, because this suit (can) be maintained, that the benefit of the attachment must be lost."

There must be judgment for the plaintiff, according to the finding of the court below.

EASTERN DISTRICT.

U. S. Circuit Court, Missouri.

UNITED STATES v. HORTON'S SURETIES.

1. A United States commissioner can take bail only in such cases as State magistrates may.
2. By a statute of Missouri, a magistrate might take bail upon an adjournment not exceeding ten days. A United States commissioner of that State adjourned a case for nineteen days, and took a bond with sureties for the appearance of the accused at that time: *Held*, the bond was void.

Opinion by DILLON, C. J.

One Horton was arrested for a violation of the internal revenue laws, and taken before Chamberlain, a commissioner of the United States for this district, for examination, on the 30th day of May, 1872. The accused asked for a postponement, and the commissioner adjourned the proceedings until the 19th of June following, and required the defendant to enter into a recognizance with sureties for his appearance before the commissioner at the adjourned time, and it was under this order that the recognizance in suit was executed. Horton failed to appear, and his default was duly entered. This suit is on the recognizance. The sureties defend. The District Court held the recognizance to be valid, and judgment was rendered against the sureties, who bring the same and the bill of exceptions, by writ of error, to this court.

The constitution of this State provides that *all* persons shall be bailable, except for capital offences.

The statute of the State provides that "a magistrate may *adjourn* an examination of a prisoner pending before himself, from time to time, as occasion requires, *not exceeding ten days at one time*, . . . and for the purpose of enabling the prisoner to procure the attendance of witnesses, or for other good and sufficient cause shown by the prisoner, said magistrate shall allow such an adjournment on the motion of the prisoner." 2 Wagner, 1,075, sec. 88.

The act of Congress of 24th of September, 1789, section 33, provides, that "for any crime or offence against the United States, the offender may by . . . . . any justice of the peace of any of the United States, where he may be found, *agreeably to the usual mode of process against offenders in such State* . . . . . be arrested, and imprisoned or *bailed*, as the case may be, for trial before such court of the United States as by this act has cognizance of the offence." By the act of 1842, 23d of August, section 1, it is provided that United States commissioners "shall and may exercise all the powers that any justice of the peace . . . . of any of the United States may now exercise in respect to offenders, by arresting, imprisoning, or bailing the same under the act of 1789."

The record shows that the principal cognizor was charged with an offence against the laws of the United States, and was arrested and taken before a commissioner for this district, who upon his application continued the time for the examination and hearing of the charge for the period of *nineteen* days, and thereupon ordered him to find bail in the sum of $500, to appear before the commissioner at his office on the day to which the adjournment was thus made.

The recognizance in suit was given in pursuance of this order. The principal failed to appear at the time and place to which the hearing was adjourned, and his default was entered by the commissioner.

The substantial question presented for determination is, whether the recognizance taken under these circumstances is binding upon the cognizors. It is settled that bonds of this character are valid only when taken in pursuance of law and the order of a competent court or officer. United States v. Goldstein's Securities, Dillon's C. C. R. 413; United States v. Rundlett, 2 Curtis C. C. R. 41–45. Whatever authority the commissioner has in respect to the arresting, imprisoning, or bailing of criminal offenders, is conferred by statute, and must be exercised by him pursuant to its requirements. Congress has not seen fit to prescribe a uniform mode of its own in respect to preliminary proceedings against persons accused of a violation of its criminal enactments, but in the 33d section of the judiciary act, it provided that the procedure in such cases should be "agreeably to the usual mode of process against offenders in such State;" that is, in the State in which the offender may be arrested and the proceedings had. To this section we must resort to ascertain the powers of commissioners in respect to the arrest, imprisonment and bail of offenders against the laws of the United States. The meaning of this section was very carefully considered by Mr. Justice Curtis in the United States v. Rundlett, *supra*. This learned judge there says: "My opinion is that it was the intention of Congress by these words, 'agreeably to the usual mode of process against offenders in such State,' to assimilate all proceedings for holding accused persons to answer before a court of the United States to proceedings had for similar purposes by the laws of the State where the proceedings should take place; and, as a necessary consequence, that the commissioners have power to order a recognizance to be given to appear before them in those States where justices of the peace, or other examining magistrates, acting under the laws of the State, have such power. The prisoner is not only to be arrested and imprisoned, but bailed, agreeably to the usual mode of process in the State.

As the legislation now stands, a commissioner, as respects taking bail, has the same power as State magistrates and no greater. On this principle it has been recently held by Judge Woodruff that in New York, where State magistrates have no power to take recognizances to appear before them at a subsequent day, United States commissioners have no such authority, and a bond conditioned for the appearance of the accused before the commissioner on a future day to which the proceeding was adjourned, was void. United States v. Case, 8 Blatchf. 250, 1871, affirming the judgment of the District Court. On the other hand, in those States where magistrates have by statute the power of adjournment, there a United States commissioner may let to bail pending the proceedings against the accused. United States v. Rundlett, *supra*.

By the statute of Missouri, "a magistrate may adjourn an examination of a prisoner pending before him, from time to time, as occasion requires, not exceeding ten days at one time." Wagner's Statutes, p. 1,075, sec. 88.

In this case the commissioner adjourned the examination for nineteen days, and ordered the accused to find bail to appear before him at that time. This was an order not only without authority of law, but directly contrary to law. He could not lawfully require the accused to find bail in pursuance of it; and a bond executed to avoid being imprisoned for the nineteen days, when the statute limits the period to ten days, is without any binding obligation. It is immaterial that in this instance the accused asked for the continuance. His consent could not confer jurisdiction or power to make the order; nor does it estop him or his sureties to set up the invalidity of the recognizance executed to comply with it.

Reversed.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in August, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

June 28, Thomas C. Jones, Administrator of WILLIAM H. ENGARD, dec'd.
" 28, James McCann, Executor of JOHN GILMER, dec'd.
" 28, Annie T. Chadwick, Administratrix of SAMUEL T. CHADWICK, deceased.
" 30, Sarah F. Gregory, Administratrix of WILSON GREGORY, dec'd.
" 30, Samuel M. Clement et al., Administrators of WILLIAM McELROY, dec'd.
July 2, George Bennett et al., surviving Executors of ABEL BENNETT, dec'd.
" 3, Agnes Thayer, Administratrix of EDWARD N. THAYER, dec'd.
" 3, Isabella Bockius, Administratrix of JOHN BOCKIUS, dec'd.
" 5, William S. Helverson, surviving Executor of NICHOLAS HELVERSON, dec'd.
" 8, Israel W. Morris, Executor of JANE BOWMAN, dec'd.
" 9, Edward Comfort, Acting Executor of JEREMIAH COMFORT, deceased.
" 9, Jas. W. Paul, Administrator of PHILIP GEISSE, dec'd.
" 9, R. C. McMurtrie, Administrator of F. O. BOHLEN, dec'd.
" 9, John Campbell, Executor of JANE CAMPBELL, dec'd.
" 9, John Sherin et al., Executors of PATRICK McCANN, dec'd.
" 10, Robert E. Peterson et al., Executors of GEORGE PETERSON, dec'd.
" 11, Susan G. McFarland, Administratrix of JOSEPH McFARLAND, dec'd.
" 11, Caroline G. Galbraith, Administratrix of JOHN H. GALBRAITH, dec'd.
" 11, Samuel F. Smith, Administrator of CATHARINE FOLLAR, dec'd.
" 11, Peter Marseilles, Administrator of WILLIAM MARSEILLES, dec'd.
" 14, Wm. F. Steinmetz, Administrator of GEO. W. STEINMETZ, dec'd.
" 14, Joseph Harvey et al., Executors of WILLIAM DOUGHERTY, dec'd.
" 15, William Dulty et al., Executors and Trustees of GEORGE W. McCLELLAND, dec'd.
" 16, Geo. T. Gabell, Jr., et al., Executors of GEO. T. GABELL, Sr., dec'd.
" 16, Bernard Rafferty et al., Executors of JAMES McFARLAND, dec'd.
" 16, W. T. A. Ridge, Trustee of FREDERICK HERSCHBERG, dec'd.
" 19, Wm. Rutherford, Executor and Trustee of JOHN GIVEN, dec'd.
" 21, Samuel Wetherill et al., Administrators c. t. a. of WILLIAM WETHERILL, dec'd.
" 22, Thos. P. McCadden, Administrator of MICHAEL McCADDEN, dec'd.
" 22, Robert Grist, Administrator of SYLVANUS WAINWRIGHT, dec'd.
" 22, William Warner, Jr., Administrator of ANDREW WARNER, dec'd.
" 22, James M. Eagleton, M. D., Trustee of SAMUEL POTTS, dec'd.
" 22, James M. Eagleton, Executor and Trustee of SAMUEL POTTS, deceased.
" 22, Janet M. Bullock, Administratrix of JONATHAN BULLOCK, dec'd.
" 22, H. C. Townsend, Trustee as well under Ann S. Sulger's will, as that of Jacob K. Sulger, dec'd, for ISAAC SULGER.
July 23, Alfred Fassitt, Surviving Executor of JAMES FASSITT, dec'd.
" 23, Alfred Fassitt, Executor of ROBERT F. FASSITT, dec'd.
" 23, Charles S. Close et al., Executors of HENRY MYERS, dec'd.
" 23, James Beatty, Sr., Executor of JAS. BEATTY, Jr., dec'd.
" 23, John B. Lever, Administrator of WM. LEVER, dec'd.
" 23, The Fidelity Ins. Co., &c., Executors of GEORGE W. IRWIN, dec'd.
" 23, Emily F. Ellis, Administratrix of ALFRED D. ELLIS, dec'd.
" 23, Elizabeth Castor, Administratrix of GEORGE J. CASTOR, dec'd.
" 24, Joseph F. Kerbaugh, Administrator of OPMAN KERBAUGH, dec'd.
" 24, Ellen E. Brown, Executrix of CAROLINE LEWIS, dec'd.
" 24, John H. Dingee, Executor of ELIZABETH FENNER, dec'd.
" 24, Edward Hayes, Executor of MARY DEEGAN, dec'd.
" 24, George Wiley, M. D., Administrator of MARY L. D. SMITH, dec'd.
" 24, Lewis M. Kensil, Administrator of LEWIS KENSIL, Sr., dec'd.
" 24, Hugh Hallowell, Guardian of ALONZO H. SHALKOP, minor.
" 24, William P. Stroud et al., Administrators of JOHN TOWERS, dec'd.
" 24, William Musser, Attorney in fact of MARY M. ROBINSON, Executrix of EDWARD W. ROBINSON, deceased.
" 24, Warren G. Griffith, Administrator of MARY ANN FLYNN, dec'd.
" 24, Herbert J. Lloyd, Executor and Trustee under the will of JOHN B. ACKLEY, dec'd.

WILLIAM M. BUNN.
aug 1-4t Register.

SHERIFF'S SALES.

The following are the prices obtained for the properties sold at Sheriff's sale on Monday last.

Henry Glenn and Westley Hartley. $50
Abraham Shetzline. 650
Wm. Wright and wife. 1,000
Thos. Clark. No. 1, $50. No. 2, 50. No. 3, 50. No. 4, 250
Henry M. Boyd No. 1, $4,000. No. 2, 4,250
Edward Hughes. No. 1, $2,400. No. 2, 2,150. No. 3, 2,500. No. 4, 2,250
Jos. M. Thomas. 1.425
Patrick Cassidy. 1,800
Jos. G. Wills. No. 1, $1,200. No 2, 1,150. No. 3, 1,150
Jacob Leonard. 125
John E. Young. 18,000
C. M. S. Leslie. No 1, $1,000. No. 2, 500
Wm. C. Lobb. 2,800
Alexander Smith. No. 1, $500. No. 2, 4,650
Wm. H. Gesner. 3,100
C. M. S. Leslie. No. 1, $25. No. 2, 25. No. 3, 25. No. 4, 25
Grace A. Town. 100
Jas. M. Keenan. No. 1, $550. No. 2, 650. No. 3, 550. No. 4, 500. No. 5, 550. No. 6, 550. No. 9, 550. No. 11, 550. No. 12, 550. No. 13, 550
James Boal. No. 1, $350. No. 2, 1,050.
Frederick Flurer and wife. 1,500
Charles Bierman. 500
Chas. B. Roberts. No. 1, $150. No. 2, 140
C. M. S. Leslie. No. 1, $825. No. 2, 975. No. 3, 975. No. 4, 1,900
Geo. E. Henderson. No. 1, $700. No. 2, 650. No. 3, 650. No. 4, 650. No. 5, 650. No. 6, 550. No. 7, 650. No. 8, 550
Michael Darcey. 500
Jeremiah Rhodes. 100
Alex. Smith. Nos. 1, 2 & 3, $500
Harrisson Grambo. 27,000
Samuel Minner. 1,875
Jos. V. Peterman. No. 1, $15. No. 2, 15. No 3, 20. No. 4, 20. No. 5, 30. No. 6, $30
Wm. Evans. 50
Barnard Mullen. 150
C. M. S. Leslie. No. 1, $50. No. 2, 100. Nos. 3 & 4, 125. No. 5, 50. No. 6, 50
Alex. Smith. No. 1, $1,975. No. 2, 2,000
Barnard Mullen. No. 1, $150. No. 2, 25
James Mooney. 4,000
James J. Mullin. No. 1, $250. No. 2, 200. No. 3, 100
Geo. M. McKeever. No. 1, $700. No. 2, 300
Edw. H. Hunt, dec'd, 6,000
McKenna & Larkin, 20
Harriet M. Shoemaker. 199
August C. Miller. No. 1, $50. No. 2, 50. No. 3, 50
Edw. Hughes. 2,150
Wm. J. Bell. 1,200
Wm T. James. 100
John Buchanan. No. 1, 1,800. No. 2, 1,775
Wm. Idell, Jr. 30
Wm. B. Hazzard. 50
Wm. S. McIlhenney. 30
Gottleib Elsasser. 10
Theodore Bomeisler. 10
Joseph Green. 2,500
Levi R. King. No. 1, $250. No. 2, 200. No. 3; 200. No. 4, 200. No. 5, 200. No. 6, 200. No. 7, 200. No. 8, 200. No. 9, 200. No. 10, 200
John Lamplue. No. 1, $225. No. 2, 200. No. 3, 200. No. 4, 200. No. 5, 200. No. 6, 200. No. 7. 200. No. 8, 200. No. 9, 200. No. 10. 200. No. 11, 200. No. 12, 200
C. M. S. Leslie. No. 1, $1,000. No. 2, 1,000. No. 3, 1,000. No. 4, 1,000. No. 5, 1,000. No. 10, 1,000
Jos. Green. 1,150
Cyrus C. Phelps. No. 1, $50. No. 2, 50. No. 3, 50. No. 4, 50

Legal Gazette.

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ONE COPY FOR ONE YEAR, THREE DOLLARS.

Supreme Court of Pennsylv'a.

ESHLEMAN'S APPEAL.

1. An advancement is an irrevocable gift by a parent to a child, of the whole or a part of what it is supposed the child would be entitled to upon the death of the parent, intestate.
2. Where an intestate's descendants are in different degrees of consanguinity, the more remote take by representation, and advancements either to them or their ancestors, are to be deducted in computing their shares of the intestate's estate.
3. An intestate died leaving as descendants a child and a grandchild, the son of a deceased child. The intestate had made advancements to the deceased child and to the grandchild. In the distribution of the estate: *Held*, the grandchild took by representation, and the advancements made to him and his parent were to be deducted from his share.

Appeal from the Orphans' Court of Lancaster county.

Opinion by MERCUR, J. Delivered July 2d, 1873.

John Gyger died intestate, leaving a daughter, Elizabeth G. Eshleman, and a grandson, Abijah D. Gyger, the only child of his son, Jesse Gyger, who died during the life of his father. John was appointed guardian of Abijah. From time to time after Abijah became of full age, John furnished him with money and other property.

Upon the distribution of the estate of John between Elizabeth and Abijah, the question arises, whether the latter sustains such a relation to John as to be charged with the property given to him as an advancement. The precise question does not appear to have been hitherto considered by this court. If both the claimants were grandchildren of the intestate, so that they would take *per capita*, the doctrine of advancements made to them might not apply. Here, however, Abijah takes by representation. Purdon's Digest, 807, pl. 14 (C).

Section sixteenth of the act of April 8th, 1833, Pur. Dig. 810, pl. 35, provides, that if any child of an intestate shall have any estate by settlement of such intestate, or shall have been advanced by him in his lifetime, either in real or personal estate, to an amount or value equal to the share which shall be allotted to each of the other children of such intestate, such child shall have no share of the real or personal estate of such intestate; and if such settlement or advancement be to an amount or value less than the share to which he would otherwise be entitled, if no such advancement had been made, then so much only of the real and personal estate of such intestate shall be allotted to such child as shall make the estate of all the said children to be equal, as near as can be estimated.

The manifest design of the law is to equalize the intestate's property among all his children. It is equally clear that it was not the design of the law makers to put a grandchild upon higher ground than a child would occupy if living. It is true, the letter of the statute says, "if any child" shall have been advanced. In many cases, however, both in England and in America, it has been held that the word child may apply to, and include grandchild. The English statute of 22 and 23 Car. II., ch. 10, from which our act of April 8th, 1833, supra, as well as all of our former acts, relating to distribution, are derived, provides, that "if a child" shall be advanced; yet it is there held to extend to a grandchild, the father being dead. 1 Eq. Ab. 381, B., pl. 6; 382, B., pl. 8, 9, 10, 11. Grandchildren and great grandchildren are all children, and come within that to certain purposes. Wyth v. Blackman, 1 Vez., Sr. 196. It is allowed by all, that if no children are in being, grandchildren would come in under the word children, and may be thereby described. 2 Vern. 106; S. C. Ambler, 555. So grandchildren may take under the description of "children" in a will. Royle v. Hamilton, 4 Vez., Jr. 437. In a trust for children, it was held that grandchildren were entitled to participate. In re Crawel's Trust, 8 De G. McN. & Gord. 480.

In 4 Kent's Com. 419, in discussing the question of advancement to a child, it is said: In New Jersey the statute uses the word issue, which is a word of more extensive import than the word child; though children, as well as issue, may stand in a collective sense for grandchildren, when the justice or reason of the case requires it. It would have been better, however, if the statutes on this subject had been explicit, and not have imposed upon courts the necessity of extending by construction and equity the meaning of the word child, so as to exclude a grandchild who should come unreasonably to claim his distributive share, when he had been sufficiently settled by advancement.

In construing a statute, the real intention when accurately ascertained, will always prevail over the literal sense of terms. I Kent's Comm. 462. When the expression in a statute is special or particular, but the reason is general, the expression should be deemed general. Idem; People v. Utica Ins. Co., 15 Johns. 380; Whitney v. Whitney, 14 Mass. 92.

Under the act of 1764, relating to the partition and valuation of the real estate of an intestate, providing that the eldest son or heir at law should have his election of taking the land at the valuation, yet it was held, where the eldest son had died before the intestate, that the eldest son of the deceased eldest son, had the same priority of election of taking the real estate of his intestate grandfather, that his father, if living, would have had. Walton v. Willis, 1 Dall. 351. So under the 22d section of the act of 19th April, 1794, where one died intestate, leaving sons and daughters, and also grandchildren, the children of the eldest son of the intestate, who had died in the lifetime of his father, it was held, where the words of the statute gave the priority of choice to the "eldest son," and was silent in regard to grandchildren, yet that they were within the equity of the act which intended to put them in the place of their father, if he had survived the intestate; and therefore they were permitted to take the real estate of the intestate in preference to the eldest son then living. Hersha v. Brenneman, 6 S. & R. 2.

The general doctrine unquestionably is, that an advancement is an irrevocable gift by a parent to a child, of the whole or a apart of what it is supposed the child will be entitled to upon the death of the parent, who afterwards dies intestate. The question, however, recurs, who is a child within the meaning and spirit of the statute relating to advancements? In Hughes' Appeal, 7 P. F. Smith, 179, and in other cases there cited, it is held, that in the distribution of the grandfather's estate, the grandchildren take subject to advancements made to their father, and to such debts due by him to the intestate, as were recoverable when the estate descended. The reason given is, that they take not paramount to their father, but through him by representation. This, however, must be understood as applying to the facts in those cases. That is where the intestate shall leave descendants in different degrees of consanguinity to him, the more remote of them being the issue of a deceased child, grandchild, or other descendant, and not where he leaves granchildren only. In the latter case they would take *per capita*.

The clear intent and design of the statutes are to equalize the property of the intestate among his children. Where one of his several children has died during his life, leaving an only child, who the intestate has advanced after the death of his father, it seems to us the whole reason of the statute compels us to hold it an advancement. To do otherwise would work injustice to the surviving children, and defeat that equal distribution which the statute was designed to secure. We believe the true exposition of the statute to be, as against a surviving child of the intestate, that Abijah takes, not only subject to advancements made to his father, and to such debts due by him to the intestate as were recoverable when the estate descended, but also subject to advances made to himself after the death of his father, and to such debts due by him to his grandfather as were recoverable when the estate descended.

For purposes of distribution, the intestate should be held, after the death of his son, as standing *in loco parentis* towards Abijah, and all the principles flowing therefrom should be applied.

We think, therefore, the learned judge erred in confirming the second report of the auditor, and the case must go back to have distribution made upon the principles we have declared.

And now, to wit, July 2d, 1873, decree reversed, and the court is directed to send the case back to an auditor to restate the account.

Hon. Thos. E. Franklin, and *D. G. & B. F. Eshleman, Esqs.*, for appellant.

Jesse Landis and *Saml. H. Price, Esqs.*, for appellee.

PERSON'S APPEAL.

1. Where the immediate descendants of an intestate are his grandchildren, they take *per capita*.
2. In computing their shares of the decedent's estate, advancements to their parents are not to be considered.

Appeal from the Orphans' Court of Lebanon county.

Opinion by MERCUR, J. Delivered July 2d, 1873.

John Person died intestate leaving a widow and five grandchildren. His three children, Sarah, Amanda and David, all died prior to his death. Sarah and Amanda each left one child, and David left three children. These five grandchildren are the only living lineal descendants of the intestate, and are equally removed from him. The question presented is, whether, in the distribution of the estate of the intestate, the children of David are chargeable with advancements made to their father in his lifetime. If the intestate had left surviving him a child or children, against whom these grandchildren were claiming, it is clear they are so chargeable. In that case they would take by representation such share only as their father would have taken, if he had been living at the death of the intestate. How do they take in this case? The second section of act of 8th of April, 1833, Pur. Digest, 807, pl. 9, 11, provides "if such intestate shall leave grandchildren, but no child or other descendant, being the issue of a deceased grandchild, the estate shall descend to and be distributed among such grandchildren."

The facts in this case are precisely those indicated by the statute quoted. The intestate left grandchildren, but he left no children, and no descendants which were the issue of a deceased grandchild. Then the estate shall be distributed among his grandchildren. How shall it be distributed? Shall it be by representation *per stirpes*, or shall it be *per capita?*

Under the statute of distributions, 22 and 23 Car. ii., which is very similar to our own, it is held that they take *per capita*, that is, equal shares in their own right. 2 Black. Comm. 517; 2 Will. on Executors, 1349. So under our act of 19th April, 1794, it was held, where the intestate's children are all dead, all of them having left children, the parties take *per capita*, or each an equal share in his own right. Earnest et al. v. Earnest et al., 5 Rawle, 213. The act of 8th April, 1833, has received the same construction; that is, when all the heirs are in equal degree of consanguinity to the intestate, they take *per capita*. Miller's Appeal, 4 Wr. 387; Krout's Appeal, 10 P. F. Smith, 380. It is true the second section of the act of 27th of April, 1855, Pur. Dig. 808, pl. 26, changes the rule of descent, and of distribution, among collaterals; but does not change it as to grandchildren of the intestate. Krout's Appeal, *supra*. Then David's children do not take by representation through him. They, as well as the other two grandchildren, take in their own right. Unless expressly so declared by statute, it is contrary to reason to hold them liable for advances made to one who is a stranger to their title. Neither the letter nor the spirit of the statute will make a grandchild liable for advances made to one under or through whom he does not claim. The several cases of Earnest v. Earnest, *supra;* Levering v. Rittenhouse, 4 Whar. 130; Christy's Appeal, 1 Grant, 369; McConkey v. McConkey, 9 Watts, 352; and Hughes' Appeal, 7 P. F. Smith, 179, have been cited as establishing a contrary doctrine. We do not controvert the correctness of construction given to the statute in each of those cases. In each of them the facts were entirely different from the present case. In each of them the intestate left surviving children and grandchildren. His heirs were standing in different degrees of consanguinity to him. Hence the rule established for the benefit of their surviving children applied. It follows that where there is no surviving children of the intestate to invoke the aid of the statute relating to advancements, the children of a deceased child do not take subject to advancements made to their father. Skinner v. Wayne, 2 Jones' (N. C.) Equity Reports, 42. The learned judge, therefore, erred in confirming the report of the auditor; and the first three assignments of error are sustained. This renders it unnecessary to consider the fourth assignment.

Decree reversed so far as it relates to the distribution among the several grandchildren of the intestate, and the record is remitted for the Orphans' Court to proceed in conformity to the above reversion, and it is ordered that the appellees pay the costs of this appeal.

Hon. Josiah Funck, for appellant.

A. R. Boughter, Esq., for appellee.

Quarter Sessions of Tioga County, Pennsylvania.

[We are indebted to M. F. Elliott Esq., of the Tioga county bar for the report of the following opinion.]

COMMONWEALTH v. BURGIN.

An indictment omitted in the caption the words "of the peace" from the style of the court. Defendant's counsel moved to quash, and the district attorney to amend. The amendment was allowed and the motion to quash dismissed.

Opinion by H. W. WILLIAMS, P. J.

Upon the return of the bill of indictment in this case by the grand jury, defendant's counsel moved to quash the indictment. The reason assigned is the omission from the style of the court in the caption of the words "of the peace." The district attorney has also moved for leave to amend by inserting the omitted words, and both motions are now for consideration.

Defendant's counsel relies upon the case of the Commonwealth v. M. J. Mackin, in Quarter Sessions of Philadelphia, reported in No. 11 of the Legal Intelligencer, for 1872, page 85. In that case an indictment having precisely the same defect in the caption was demurred to, and the court sustained the demurrer, holding the omission of the words "of the peace" to be fatal. We are of opinion, however, that it is not necessarily so. The caption is no necessary part of an indictment. W. A. C. L., ed. 1855, p. 150. It is merely "the style of the court prefixed by way of preamble when the record is made up, or when it is returned on certiorari." W. Law Dic., 370; Com. Dig., vol. 4, p. 672, note h; Chitty's Cr. L. 326. It is amendable in the same manner in which it is made up, viz.: from the records of the court where found. 4 P. L. J. Rep. 414. "The precept for holding the court, the sheriff's return, the minutes of the clerk of the sessions, and proceedings of the court, and the venire for the grand jury," are all to be taken into view, and what the whole shows with reasonable certainty, a court of review could examine if the record was before them on certiorari. Commonwealth v. Bell, 1 Addison, 156. The record in this case sufficiently shows that this indictment was found in the "Quarter Sessions of the Peace" in and for the county of Tioga, and any omissions or other defect in the caption, may be amended by the record. 4 P. L. J. Rep. 414; Commonwealth v. Bell, *supra*.

If this admitted of a doubt at the common law, it certainly does not since the act of 31st March, 1860, relating to criminal procedure. By section 11 of that act, it is made the duty of the court "before whom any objection shall be taken for any formal defect, if it be thought necessary, to cause such indictment to be forthwith amended," &c. We therefore hold, 1st. That the caption is no necessary part of an indictment, but a formal preamble thereto, made up from the records of the court. 2d. That its absence or a defect therein, can only be taken advantage of by motion to quash, or by demurrer. 3d. That the objection when so taken, may and should be removed by amending the caption so as to make it conform to the records. The motion to quash is therefore annulled, and the amendment allowed.

Supreme Court of California.

OAKLAND COTTON MANUFACTURING CO. v. JENNINGS.

1. If a vessel be chartered in the usual manner, either for a particular voyage or for a period of time, the charterer having the authority to appoint the master, and undertaking to victual, man and navigate her at his own expense, he will be deemed the owner *pro hac vice*, and the general owner will not be personally liable for supplies or under contracts for affreightment.
2. But where the owner appoints a master, he thereby authorizes him to do those things which the law attaches to that office, and a secret understanding between them cannot, as against third persons, change the liability of the owner.

Appeal from the District Court of the Third Judicial District of Alameda county.

Opinion by CROCKETT, J. Delivered July 15th, 1873.

The defendant being the owner of the American schooner Greenfield, caused her to be duly enrolled at the port of San Francisco with one Enos as master. Subsequently he appointed Horton as master in place of Enos; but whether the change of masters was reported at the custom house and noted or recorded, does not appear. Some time after Horton took command of the schooner, the defendant entered into an agreement with him to the effect that Horton was to have the entire control and management of her; was to make whatever contracts of affreightment he saw fit; to employ her in any business he desired, within the inland waters of the State; to victual, man and navigate her at his own expense, and to collect all her earnings; and to pay to the defendant one-third of her gross earnings, at the end of each month, or as often as a settlement was had between them—the defendant to keep the schooner seaworthy and in repair. Subsequently Horton entered into an agreement with one Finney, to the effect that the schooner was to be run for their joint benefit, under the contract with the defendant, and thereafter she was controlled and manned by the two jointly.

The plaintiff contracted with Finney, acting on behalf of himself and Horton, to transport certain machinery, on the schooner, from San Francisco to Clinton, on the opposite side of the bay. But owing to negligent stowage, the schooner capsized during the voyage, and the machinery was partially lost and the remainder damaged. The action is to recover damages for a breach of the contract of affreightment. On these facts, the defendant insists that he is not liable, for the reason that the schooner was not under his control or management, or navigated by his servants or agents; but by Horton & Finney, under the contract, they having the exclusive control and possession of her, with a right to make such contracts of affreightments as they saw proper; that Horton was in no sense the agent of the owner, with authority to bind him in maritime contracts, without his consent. On the other hand, the plaintiff claims, that by the maritime law, the master appointed by the owner is his agent to make contracts of affreightment, and that no secret agreement between master and owner, of which the shipper had no notice, can exempt the owner from liability.

It appears to be well settled, that if a vessel be chartered in the usual manner, either for a particular voyage or for a period of time, the charterer having the authority to appoint the master, and undertaking to victual, man and navigate her at his own expense, *he* will be deemed the owner *pro hac vice*, and the general owner will not be personally liable for supplies or under contracts for affreightment. This proceeds upon the ground, that as the charterer appoints the master and has the exclusive control of the vessel, the master is *his* agent, and not the agent of the general owner, who does not, therefore, hold himself out to the world as the principal for whom the master is authorized to act. In respect to a contract of affreightment, the general owner in such a case would not be liable, for the further reason, that inasmuch as the vessel was not navigated by him, or at his expense, or by his agents or servants, or for his benefit, he was not a common carrier, and was therefore not amenable as such. I do not understand the counsel for the plaintiff to controvert these propositions; but, at all events, they are abundantly supported by authority in this country and in England. It is equally clear, that if the owner let out to charter the hold of the vessel, appointing his own master, and sailing her at his expense, he will be responsible on all contracts of affreightment made by the master with the shippers, having no notice of the charter party. Sandemann v. Scurer, 2 Law Reports, 86; In re St. Cloud, Browning and Lushington R. 15. In the first of these cases, Cockburn, C. J., bases his conclusion on the ground "that the plaintiffs having delivered their goods to be carried, in ignorance of the vessel being chartered, and having dealt with the master as clothed with the ordinary authority of a master, to receive goods and give bills of lading on behalf of his owners, are entitled to look to the owners as responsible for the safe carrying of the goods. We think that so long as the relation of owner and master continues, the latter as regards parties who ship goods in ignorance of any arrangement whereby the authority ordinarily incidental to that relation is affected, must be taken to have authority to bind his owner by giving bills of lading. We proceed on the well-known principle that where a party allows another to appear before the world as his agent in any given capacity, he must be liable to any party who contracts with such apparent agent in a matter within the scope of such agency. The master of a vessel has, by law, authority to sign bills of lading on behalf of his owners. A person shipping goods on board of a vessel, unaware that the vessel has been chartered to another, is warranted in assuming that the master is acting by virtue of his ordinary authority, and therefore acting for his owner in signing bills of lading. It may be that as between the owner, the master and the charterer, the authority of the master is to sign bills of lading on behalf of the charterer only, and not of the owner. But in our judgment this altered state of the master's authority will not affect the liability of the owner, whose servant the master still remains, clothed with a character to which the authority to bind his owners by signing bills of lading attaches by virtue of his office. We think that until the fact that the master's authority

has been put an end to is brought to the knowledge of a shipper of goods, the latter has a right to look to the owner as the principal with whom his contract has been made."

This reasoning commends itself strongly to our judgment, and appears to us to be unanswerable. In the case at bar, the master was appointed by the defendant, who was the registered owner; and whatever may have been the secret understanding between them, in respect to the management, employment and sailing of the vessel, or the appropriations of the earnings, persons dealing with the master in ignorance of this understanding, were warranted, in the language of Chief Justice Cockburn, "in assuming that the master was acting by virtue of his ordinary authority, and therefore acting for his owners in signing bills of lading." When Horton was appointed and entered upon his duties as master, the law conferred upon him authority to bind the owner in contracts of affreightment. By the act of appointing him, the defendant notified the public that Horton was his agent for this purpose. After thus openly proclaiming the agency, he is not at liberty secretly to revoke it whilst it ostensibly continues, in so far as persons are affected by it who dealt with the master within the scope of the agency in ignorance of the revocation. It is a familiar principle governing all agencies, that so long as the principal permits the agency ostensibly to continue, even though it has been secretly revoked, the principal is bound by the acts of his apparent agent within the scope of the agency, in respect to persons dealing with the agent without notice of the revocation. In Story's Agency, section 470, it is said that "the revocation, as between the principal and agent, takes effect from the time *when* the revocation is made known to the agent, and as to third parties, when it is made known to them and not before. Until, therefore, the revocation is so made known it is imperative. If known to the agent, as against his principal, his rights are gone, but as to third persons who are ignorant of the revocation, his acts bind both himself and his principal." It must be conceded, I think, on all sides, that by appointing the master, the owner, by a notorious act, constitutes him his agent to enter into contracts of affreightment, and if he can secretly revoke the agency, so as to effect third persons who are ignorant of the revocation, without revoking the appointment of the master, it must be because agencies of this description stand upon a different footing from other agencies, and are excepted from the operations of the general rule. But there is no sound reason for the exception. On the contrary, considerations of public policy and fair dealing appear to me to require a strict application of the rule to this class of agencies. Otherwise the general owner who appoints the master and permits him, under the appointment, to continue in command of the vessel, thereby inviting the public to deal with him as the agent of the owner, may wholly escape responsibility for the acts of his ostensible and accredited agent, by entering into a secret agreement with the master, of the terms of which the public are not informed. If he could thus escape responsibility, it would impose upon shippers the necessity of inquiring, at their peril, not only who was the owner and by whom the master was appointed, but also what secret understanding or agreement existed between them in respect to the management and sailing of the vessel. In my opinion the interests of commerce demand that this onerous duty should not be imposed upon shippers, and that the owners of vessels navigated by masters appointed by them, should be subject to the responsibilities which usually pertain to the relation of owner and master in dealing with those who are ignorant that those relations are different from what they *prima facie* are. I am aware that there is apparently a considerable conflict in the authorities on this point, but, in my opinion, those which hold the views above stated, are supported by the better reasoning.

Recent Decisions.

PENNSYLVANIA.

[Our thanks are due to P. F. Smith, Esq., State Reporter, for advance sheets of Vol. 20 of his reports (Vol. 70 Pa. State Reports). We make the following selections from them.]

WHELEN'S APPEAL.—NEVIN'S ESTATE.

1. The principle that for a mistake in law, equity will not relieve against a deed, &c., will not bar relief, if the party has acted upon a want of proper knowledge, which he could not obtain, though vigilant in his search; nor where necessary information has been refused and withheld; nor where unconscionable advantage of circumstances, whereby his will was coerced, and by undue pressure, he had done what otherwise he would not.

2. Relief against mistake in law will be given where there is actual or legal fraud, by one who thus seeks to obtain the execution of an agreement to benefit himself or those for whom he acts.

3. A daughter against whom charges were made in a statement exhibited to her by the executors of her father's estate, for the settlement of her share, was entitled to the freest access to her father's books by herself, or her agent, or attorney.

4. When a party has acted in misconception or ignorance of his title, and executed an agreement, &c., to his prejudice, he will be relieved in equity.

5. A bill of review is not allowed to stand on strict law and against equity.

6. The act of October 13th, 1840 (review in Orphans' Court), has no application to a case in which the distribution and payment were voluntary by the accountant, and made before the account filed.

7. A will contained this clause: "And whereas, during my lifetime, I have made or may hereafter make advances in money, stock or otherwise, to my said son, or to the husband of either of my said daughters, and it is my express intention that the shares of all my said children shall be equalized, I hereby direct that such advances respectively shall be deducted from the share to be paid to the trustees of my said son, or to either of my said daughters whose husband may be so indebted to me." *Held*, that "advances" did not mean debts of the husbands, but gifts to the husbands as advancements on account of the shares of the daughters, and they were not chargeable with interest.

8. Commissions to executors on an estate of $168,000 under the circumstances fixed at 3 per cent.

9. In this case an account after a distribution of the bulk of the estate, upon a statement showing advancements and deducting them; a subsequent account of the executors with the report of auditor confirmed, payment of the balance found due, &c., under the circumstances opened and corrected.

January 12th and 29th, 1872. Before THOMPSON, C. J., AGNEW and SHARSWOOD, JJ. WILLIAMS, J., at Nisi Prius.

Appeal from the decree of the Orphans' Court of Philadelphia: No. 212, to July Term, 1871. In the estate of James Nevins, deceased.

THROPP'S APPEAL.

1. Thropp leased to Gagg who erected a frame building, a removable fixture; a constable levied on the building during the term on executions against Gagg; afterwards Gagg in consideration of a release of rent due, &c., surrendered the term to Thropp, who had no knowledge of the levy, and he took possession; the constable sold the building under the execution. *Held*, that the purchaser could not remove the fixtures.

2. By the arrangement Thropp gave up his right to his rent out of the execution and Gagg's personal responsibility, which were a consideration for the surrender.

3. If the constable had given the landlord notice of the levy, the arrangement between Thropp and Gagg would not have been effectual against the levy.

4. Such building being *prima facie* part of the realty, is such notice as to put a creditor of the tenant upon his inquiry as to its character.

5. Notice of the levy to the landlord was necessary to enable him to protect his rights.

January 19th, 1872. Before THOMPSON, C. J., AGNEW and SHARSWOOD, JJ. WILLIAMS, J., at Nisi Prius.

Appeal from the decree of the Court of Common Pleas of Chester county: In Equity: Of January Term, 1872.

PATTERSON v. DELAWARE CO.

1. Patterson's property was returned by the assessor as "square of ground, factory and machinery," the whole assessed as real estate, and a tax levied on the valuation for county purposes. *Held*, that under the act of April 29th, 1844, § 32, the machinery was properly taxed as real estate.

2. Act of April 29th, 1844, § 32, construed per Butler, P. J.

January 18th, 1872. Before THOMPSON, C. J., AGNEW and SHARSWOOD, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of Delaware county: Of July Term, 1871, No. 101.

HEWES v. TAYLOR.

1. Hewes by letter of 10th, proposed to Taylor to give him goods if he would guaranty payment for goods to be sold to another, and asked where the goods to Taylor should be shipped. Taylor by letter dated 9th wrote: "I received yours yesterday," and told him where to ship the goods. *Held*, in a suit against Taylor on a guaranty, that Hewes might prove that the letter dated 9th, was in answer to his of 10th.

2. Under the act of 26th of April, 1855 (Frauds), the date of a writing, whether omitted or inaccurately inserted, may be proved by parol.

January 19th, 1872. Before THOMPSON, C. J., AGNEW and SHARSWOOD, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of Chester county: No. 249, to January Term, 1872.

WATTERS et al. v. BREDIN.

1. A deed was. "I, John Watters, * * * have sold and assigned the within-named farm to the said Lasher, * * * authorizing her in my name, or otherwise, but at her own expense, to carry on and possess the same according to the tenor of herein written * * * The condition of this assignment is such that said Watters is to have a good living out of the aforesaid farm his natural lifetime, and all other necessary expenses, and the residue to remain in the hands of the said Lasher or her heirs; that is to say, if the above conditions are complied with, * * * otherwise to become null and void and of none effect." *Held*, to be a deed upon condition.

2. The clause containing the condition is part of the *habendum*; it explains the premises that an absolute estate was not intended to be granted, and controls the generality of the words in the premises.

3. By the provisions of the deed, the grantee was required to furnish a living to the grantor, or in default to be subject to lose the estate by re-entry for condition broken.

4. The maxims, *Animus ad se omne ducit* and *Mala grammatica non vitiat chartam*, applied.

5. An inartificial and obscure deed construed.

November — 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

SCOTT v. SCOTT.

1. A writing in form a deed, but in fact a will, contained a covenant of warranty of land designed to be passed by it. *Held*, that the clause, being in a will was not a covenant of warranty.

2. An express warranty must be created by deed; a will is not a deed.

3. The instrument granted real estate to the grantee after the death of the grantor; the grantor afterwards devised to others. *Held*, not a breach of the covenant.

4. If there had been such covenant, its breach could not occur in the life of the grantor so as to subject him or his executors after his death to an action.

5. To sustain an action on a covenant of warranty, there must be an actual or constructive eviction by title paramount.

6. Turner v. Scott, 1 P. F. Smith, 126, recognized.

November — 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Erie county: No. 130, to October and November Term, 1871.

LEGAL GAZETTE.

Friday, August 15, 1873.

JOHN H. CAMPBELL,
EDITOR.

THEODORE F. JENKINS,
ASSOCIATE EDITOR.

NEW PUBLICATIONS.

Opinion and decision of the Supreme Court of Ohio in the case of JOHN D. MINOR et al. v. THE BOARD OF EDUCATION OF THE CITY OF CINCINNATI et al. Published by ROBERT CLARK & Co., 65 West Fourth street, Cincinnati, Ohio. Price 25 cents.

The Board of Education of the City of Cincinnati passed two resolutions prohibiting religious instruction, and the reading of religious books, including the Holy Bible, in the common schools of Cincinnati. Several taxpayers filed a petition in the Superior Court of Cincinnati, praying for an injunction to restrain the enforcement of the resolutions, which was granted. On an appeal to the Supreme Court of Ohio, the decree was reversed, and the petition dismissed, upon the ground that the board of education had the exclusive control of the mangement of the schools, and the courts had no right to interfere. The argument of counsel, however, extended over a large field, and Judge Welch in delivering the unanimous opinion of the court, meets and overthrows the arguments of the complainants.

To show the advanced liberal tone of the opinion, we make the following extracts: "True Christianity asks no aid from the sword of civil authority; True Christianity never shields itself behind majorities. Nero and the other persecuting Roman Emperors were amply supported by majorities; and yet the pure and peaceable religion of Christ in the end triumphed over them all; and it was only when it attempted itself to enforce religion by the arm of authority, that it began to wane. A form of religion that cannot live under equal and impartial laws, ought to die, and sooner or later, must die. Legal Christianity is a solecism . . . Its essential interests lie beyond the reach and range of human governments. United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism. . . . The State can have no religious opinions; and if it undertakes to enforce the teaching of such opinions, they must be the opinions of some natural person or class of persons. . . Whose opinion shall it adopt? If it adopts the opinions of more than one man, or one class of men, to what extent may it group together conflicting opinions? or may it group together the opinions of all? And where this conflict exists, how thorough will the teaching be? . . . . It is only when we come to teach what lies 'beyond the scope of sense and reason,' what from its very nature can only be the object of *faith*, that we encounter these difficulties. Especially is this so, when our pupils are children, to whom we are compelled to assume a dogmatic method and manner, and whose faith at last is more a faith in us than in anything else. If it be true that our law enjoins the teaching of the Christian religion in the schools, surely then, all its teachers should be Christians. Were I such a teacher, while I should instruct the pupils that the Christian religion was true, and all others false, I should tell them that the law itself was an *unchristian* law. I could not look the verriest infidel or heathen in the face, and say that such a law was just. 'Whatsoever ye would that men should do to you, do you even so to them.' . . . . . Does not the best government require the best religion? Certainly, but the real question is, not what is the best religion, but how shall it be secured? . . . Let religious doctrines have a fair field and a *free, intellectual, moral, and spiritual conflict*, the weakest will go to the wall, and the best will triumph. . . . . The State will impartially aid all parties in their struggles after religious truths, by providing means for the increase of general knowledge. . . If you desire people to fall in love with your religion, make it lovely. If you wish to put down a false religion, put it down by kindness, thus heaping coals of fire on its head. You can't put it down by force; that has been tried. . . . . Moral and spiritual conflicts cannot be profitably waged with carnal weapons; the enemy of truth and right is too apt to conquer. . . . . Three men, say a Christian, an infidel, and a Jew, ought to be able to carry on a government for their common benefit, and yet leave the religious doctrines and worship of each unaffected thereby, otherwise than by fairly and impartially protecting each, and aiding each in his searches after truth. If they are sensible and fair men, they will so carry on their government, and carry it on successfully, and for the benefit of all. If they are not sensible and fair men, they will be apt to quarrel about religion, and in the end have a bad government and bad religion, if they do not destroy both. . . . . The great bulk of human affairs and interests is left by any free government to individual enterprise and action. Religion is eminently one of those interests, lying outside of the true and legitimate province of government. . . . . Madison, who had more to do with framing the Constitution of the United States than any other man, and whose purity of life, and orthodoxy of religious belief no one questions, says, 'Religion is essentially distinct from human government, and exempt from its cognizance. A connection between them is injurious to both. There are causes in the human breasts which insure the perpetuity of religion without the aid of law.'"

The doctrines on the relation of Church and State, set forth in the opinion, are most accordant to an enlightened understanding of the subject.

The majority of the framers of the Constitution of the United States certainly held them. They appear in the first of the twelve amendments to that instrument, and they are the foundation of like provisions in most of the State constitutions.

There is a natural code which is separate and distinct from religious teachings. It is founded upon reason and enforced by the instructions of history. It has been well understood by the intelligent of all ages. It forms the basis of all laws made by enlightened minds, and is sufficient for the necessities of civil government.

From the nature of the American people, and by reason of the diffusion of general knowledge, there is little to apprehend from an attempt to establish a national religion in this country. Still, it cannot be denied, that there are many, who firmly convinced of the truth of their religious belief, look with disfavor on that of others, and what would be the consequence of even the slightest recognition of a direct connection between religion and the government, either national or State, it may be difficult to foretell, but not hard to imagine.

The opinion of Judge Welch, published as it is, together with a history of the case, and the arguments of counsel, in a cheap form, is within the easy reach of all. It is not to be understood only by lawyers, or the learned generally, but the truths therein are expressed so clearly, that every one may understand them, whilst the doctrines contained will receive the acquiescence of all save that enemy to true religion, the bigot.

Supreme Court of N. H.

[We are indebted to John M. Shirley, Esq., for advanced sheets of 52 New Hampshire Reports, from which we select the following.]

PUTNAM v. OSGOOD.

1. Declarations of one in the possession of personal property that it is owned by another are competent evidence in favor of the person declared to be the owner, against an officer who has attached it as the property of the declarant.
2. Where one of two sureties is secured by a mortgage of chattels which are subsequently attached, and the mortgagee upon a demand renders an account, stating his liability at the full amount due without referring to his co-surety, evidence of the responsibility of the other surety for his share does not tend to prove the falsity of the account.
3. In an action between a mortgagee of chattels and an attaching officer, the officer offered his return "as evidence of what he did with the property," and the presiding judge excluded it:—*Held*, that the court, it not appearing that what was done with the property was material, could not say this was erroneous.
4. An agreement or understanding between a mortgagor and mortgagee of chattels, though made after the execution of the mortgage, that the mortgagor may sell the mortgaged property, or a part of it, on his own account, renders the mortgage void as to creditors, and such agreement or understanding will be proved by evidence that the mortgagor did so sell with the knowledge of the mortgagee, and without objection on his part.

Opinion of the court by BELLOWS, C. J.

The first question is as to the admissibility of the statements of Parker M. Child, as testified to by J. D. Child.

When Parker M. Child made these statements he was in the possession of the wool of which he spoke, and what he said was in disparagement of his own title, and went to show that the wool was purchased by him for the plaintiff, and belonged to him. The possession of the wool was *prima facie* evidence of title in Child, and his declarations that he held it in subordination to the plaintiff was against his interest; and upon that ground such declarations have been held to be admissible. It has been distinctly so held in this State in the case of Rand v. Dodge, 17 N. H. 358. In that case the title of real estate was in question, and the only evidence of possession in the plaintiff were the declarations and entries of a person in the actual possession, tending to show that he was in under the plaintiff's ancestor, and for that purpose his verbal declarations and various entries on his books of debit and credit, tending to show that he was managing the land as agent, were received. The same doctrine was recognized in Peaceable v. Watson, 4 Taunt. 16, and is also laid down as the law in 1 Greenl. Ev., sec. 109, and cases cited. Holloway v. Rakes is cited by Buller, J., in Davis v. Pierce, 2 T. R. 55, as deciding that the declarations of a tenant in possession, that he held under the devisor of the plaintiff, were admissible to show possession in the devisor. A similar doctrine is held in Carne v. Nicoll, 1 Bingh. N. C. 430. The doctrine, in fact, is well settled in our own State. It is recognized and acted upon in Spence v. Smith, 18 N. H. 587. It is applied also in the case of personal property, as in the case of real estate. Woods v. Blodgett, 18 N. H. 249; Walcott v. Keith, 22 N. H. 212; Bradley v. Spofford, 23 N. H. 444, and cases cited. So the declarations of the person in possession are admissible, although he himself is alive and in condition to testify. Woods v. Blodgett, 18 N. H. 249. We are of the opinion, then, that there was no error in admitting the testimony of J. D. Child.

The next question is as to proof of the responsibility of Dwight P. Child, the plaintiff's co-surety on Parker M. Child's note of $2,000, the mortgage in question being made to secure the plaintiff against his liability on that note.

I am unable to see how this inquiry was material. It is true, as suggested by the defendant's counsel, that Dwight P. Child was equally liable with the plaintiff, and might be made to contribute, if able to do so; but the plaintiff's right to take security against his liability could not be in the least degree affected by the responsibility or want of it of his co-surety. It is urged by the defendant's counsel that the inquiry was proper because the account rendered ought to have stated the fact, if the co-surety was able to contribute his share. It does not appear by the case whether he did fully describe that note or not, nor is any point made of it. Besides, the statute only requires an account of the amount due and liabilities secured, and does not require a description of other securities held by the mortgagee for the same debts and liabilities; and in view of the highly penal character of these provisions, we should not feel at liberty to enlarge by construction the obligation of the mortgagee beyond the plain requirements of the statute. Besides, this mortgage having been taken before the plaintiff was damnified, his co-surety is entitled to share in the security. Brown v. Ray, 18 N. H. 102; Low v. Smart, 5 N. H. 353; Currier v. Fellows, 27 N. H. 366. The case of Hall v. Cushman, 16 N. H. 463, holds a somewhat different doctrine, especially where the sureties have paid the debt and adjusted their shares between them, before a mortgage to one is taken; but this case, so far as respects mortgages taken before

the sureties have been damnified, is overruled by the subsequent case of Brown v. Ray, 18 N. H. 103, both opinions having been given by Judge Parker. It will be perceived, also, that no authorities were cited for the opinion in Hall v. Cushman, and it is not certain that it was not intended to be limited to cases where the sureties had paid the debt and divided the amount between them, and afterwards one had taken security for the repayment of the amount paid by himself. Such a limitation might well be inferred from the decision in Brown v. Ray, which was made by the same judge about eighteen months later. The general doctrine, that securities taken by one surety enure equally to the benefit of his co-sureties, is well established. 1 Story Eq., sec. 499, note 2; 4 Kent's Com., 9th ed., note 6, and cases cited; Bachelder v. Fiske's Exrs., 17 Mass. 470; Fuller v. Hapgood, 39 Vt. 617. The right to contribution is not understood to spring from contract, but is a doctrine of equity, founded upon the equality of burthen, from which is deduced the obligation to hold securities received by one for the benefit of all the sureties. With this view of the law, it is obviously immaterial whether the plaintiff's co-surety was responsible or not.

In respect to the officer's return, to show what he did with the goods attached, enough is not stated to show whether it was material or not. If offered to prove the attachment, it would have been competent, clearly; but that cannot have been the purpose, for that appears otherwise in the case very distinctly. Until it is made to appear that what was done with the property was material, and that the return was evidence of it, we cannot say that there was error in the ruling on that point.

The great question in the case arises upon the instructions of the court. It appears that the mortgage to the plaintiff was made February 8th, 1867, and the defendant's attachment was on the twenty-second of the same month. The case finds that from the time of the mortgage down to the time of the attachment, the mortgagor, Child, had continued to sell these goods, on his own account, just as he had been doing before the mortgage —selling, in that time, some $600 worth of goods; and that this was done with the full knowledge of Putnam, and without any objection from him. The court held, and instructed the jury, that this would not be sufficient to invalidate the mortgage, unless such understanding existed at the time when the mortgage was made; and the jury have found that there was then no such understanding, and that the mortgage was made in good faith, and to secure an honest debt. This is precisely the question that was left undecided in the former opinion in this case, and its solution is not free from difficulty. Upon a careful consideration of the adjudged cases in this State and elsewhere, we are brought to the conclusion that the instruction on this point, without some qualification, was erroneous. As held in the former case, the selling of the goods by the mortgagor for his own benefit, was totally inconsistent with the avowed purpose of the mortgage, and if done in pursuance of an understanding between the parties when the mortgage was made, would invalidate it in respect to creditors. The jury having found that there was no such understanding at the time the mortgage was made, the question is whether such sales, with the knowledge and without the objection of the mortgagee, will have the same effect as if it had been agreed, when the mortgage was made, that a mortgagor might sell. The knowledge on the part of the mortgagee that these sales were being made, and no objection interposed, is equivalent to an assent to them; and it will be observed that the case finds that the mortgagor continued to sell the goods from the time of making the mortgage down to the time of making the attachment, so that the mortgage was no interruption to the sales; and in that state of things, the mortgagee, with a full knowledge of it, acquiesced.

The principles upon which this question is to be decided may be detected by considering the rules which govern the retention of the possession by the vendor on the absolute sale of goods. There the retention of the possession by the vendor is always *prima facie*, and, if unexplained, conclusive evidence of a secret trust. This is the doctrine of Coburn v. Pickering, 3 N. H. 415–425, which has since been followed, and must be regarded as the settled law of this State—see Coolidge v. Melvin, 42 N. H. 510, and cases cited; and it is equally well settled that, the trust being established, the sale is to be regarded as fraudulent and void as against creditors. Whether there was a trust, is a question of fact; but the trust being established, it is a conclusion of law that the sale is fraudulent and void as to creditors. Ordinarily, in the case of an absolute sale of goods, a trust will be presumed, with us, from the mere retention of possession by the vendor. In some States, as in Vermont and many others, the presumption is conclusive; in others, it is *prima facie* only, and may be rebutted by showing the sale to be *bona fide*, as in Massachusetts and some other States. The decisions, indeed, in this country are very conflicting and unstable on this subject. In New Hampshire, however, since the decision in Coburn v. Pickering, the rule has been steadily adhered to, that the retention of the possession by the vendor is always *prima facie*, and, if unexplained, conclusive evidence of a secret trust. By this it is not meant that the possession may be explained by showing that the sale was really in good faith; but a satisfactory reason must be shown for allowing the vendor to retain the possession of the goods, else it will be presumed that it was intended that he should have the use of them. What would be a sufficient explanation of the possession, as a general principle, has not been determined in this State. It has been decided, however, that it is not a sufficient explanation that the sale was at first without any trust, but that soon after, and before the goods were removed, it was agreed that the vendor might retain and use them, and pay rent therefor. Coburn v. Pickering, before cited. Nor that it was agreed that the vendor should store the property for a time for the vendee, and then transport and deliver it at another place. Page v. Carpenter, 10 N. H. 77. Nor that the vendor should retain and break the colt, which was the subject of the sale, and he retained it for seven months, and until it was attached. Shaw v. Thompson, 43 N. H. 130. But it was held to be a sufficient explanation, that the property was left until the vendor could procure the necessary means to remove it. Morse v. Powers, 17 N. H. 296. So, doubtless, it would be a sufficient explanation that the goods were at sea or at a distance, and possession taken as soon as they could be reached. Without some explanation of this kind, a trust will be conclusively presumed; and, as in all other cases of trusts, the sale will be held fraudulent and void as to creditors, without stopping to inquire what were the real motives and intentions of the parties; for it is well settled in New Hampshire that if the trust be established, the fraud is a conclusion of law—as in the case of a sale absolute on its face, but with an agreement to reconvey on the payment of a sum of money, or with an agreement for the future support of the vendor.

In these cases, however clearly it may be shown that there was no intent to defraud creditors, the sales will be held void. Coolidge v. Melvin, 42 N. H. 510.

These decisions go upon the ground that such trusts are inconsistent with good faith and fair dealing, and directly calculated to hinder and defeat creditors, and therefore should be held to be fraudulent *per se*, whatever may have been the motives of the parties in the particular case. In the case before us, the mortgagor was permitted to continue to sell the goods as before, immediately upon the execution of the mortgage, and to continue to do so at the rate of fifty dollars' worth daily until the attachment.

The sales made were of the goods mortgaged, and to a substantial amount, and were wholly inconsistent with the avowed object of the mortgage, which was to secure a debt, while it was used simply to protect the mortgagor in the enjoyment and use of the goods, and to shield him from the claims of his creditors. It makes no difference whatever that the mortgagee may not have intended to hinder and delay the other creditors. It is enough that his acts would naturally produce that effect, and he must, in law, stand charged with it.

The instructions were, that these sales would not be sufficient to invalidate the mortgage, unless the understanding existed when the mortgage was made. We think, however, that no such distinction exists, or is applicable here. The case as it stands before us is, that the mortgagor proceeded to sell as before, from the time of making the mortgage, with the plaintiff's knowledge and without objection; and it may well be urged that this conclusively shows that such was the agreement. In Coburn v. Pickering, the agreement that the goods should remain in the vendor's possession was, as the case finds, made after the sale, but before the goods were removed, and they were accordingly retained and used by the vendor. There was evidence tending to prove that the sale was made to pay a debt to the vendee. The court directed a verdict for the attaching officer, assuming that the sale and subsequent agreement for the use of the goods must be considered as one contract.

The ruling and direction of the court were fully sustained, the court, per Richardson, C. J., holding that this was purely a question of law for the court, and that the fact of the agreement, in respect to the possession being made after the sale, afforded no sufficient explanation. He says the principle contended for by the plaintiff's counsel, that the original contract is to form the criterion by which the honesty of the sale is to be determined, stands in direct opposition to the rules which have long been applied to the subject; that "it stands wholly unsupported by authority, and seems to have made its appearance for the first time in this case. To give it any countenance in our courts would, in our judgment, take from creditors some of the most efficient means of detecting fraud, which human ingenuity has been able to invent." Indeed, we think it quite clear that the presumption arising from the retention of the possession, has never been understood to depend upon its having been agreed at the time of the sale that the seller should keep possession.

In Twyne's Case, 3 Co. 81, a, it is laid down as one of the badges of fraud, that the "donor continued in possession, and used the goods as his own; and by reason thereof, he traded and trafficked with others, and defrauded and deceived them." In fact, the selling of the goods, as in this case, is intimately associated with retaining the possession of them—only, the permission to sell goods on the vendor's own account has much more decidedly the character of a trust reserved.

The case of Robbins v. Parker, 3 Met. 117, is much in point. That was a mortgage of "all the hay, grain and produce standing" on the mortgagor's farm; and it appeared that the mortgagor used the hay and other produce on the farm, with the mortgagee's knowledge, and without any objection from him. The court held the transaction to be fraudulent and collusive, the court saying that the mortgagor used and consumed the property in the same manner as if no mortgage had been made and without objection. In Kendall v. Fitts, 22 N. H. 7, Eastman, J., lays it down as the result of our decisions, that "all agreements or bargains, express or implied, which entered into the contract of sale, whereby the vendor should retain possession of the property for the advantage of either party, and not for the accommodation of the vendee, and all agreements and contracts to retain possession, made directly after the sale, either without changing the possession, or immediately after changing it, should be regarded as conclusive evidence of fraud." In Edward's v. Harben, 2 T. R. 595, it is laid down that unless possession accompanies and follows an absolute conveyance of goods, it is fraudulent and void. So is Coburn v. Pickering, and cases cited. So in French v. Hall, 9 N. H. 145, it is laid down by Parker, C. J., that, by the law of this State, to constitute a valid sale as against creditors, there must be a change of possessions. So is Clarke v. Morse, 10 N. H. 239; and Hamilton v. Russell, 1

Cranch, 318, confirms the case of Edwards v. Harben.

In none of these cases is there the least countenance given to the position that there must have been an agreement at the time of the sale that the possession should remain in the mortgagor, in order to produce the effect suggested; on the contrary, the language in which the rule is announced excludes such an idea. In Jennings v. Carter, 2 Wend. 449, it is held that a voluntary sale of chattels, with an agreement, in or out of the deed, that the vendor may keep possession, is—except in special cases and for special reasons, to be shown to and approved by the court—fraudulent and void as against creditors; and that where the possession is continued in the vendor without any agreement to that effect, the presumption of fraud is equally strong. These authorities show very clearly that the retention and use of the goods sold by the vendor have the same effect to avoid the sale, whether it was so agreed when the sale was made or not; and we think the same principle should be applied to the case before us. This being a recorded mortgage, the retention of the possession is not objectionable; but the selling of the goods mortgaged, with the assent of the mortgagee, occupies the same position in respect to the mortgage that the mere retention and use of the goods does in respect to an absolute sale. In the one case the vendor is in possession of the goods and using them, and in the other he has possession and sells them; and both are equally inconsistent with the avowed object of the respective conveyances.

The case of Robbins v. Parker, 3 Met. 117, is a direct authority to the point that the assent of the mortgagee, subsequent to the mortgage, to the consumption by the mortgagor of the property mortgaged, would render the transaction collusive and fraudulent. It is very obvious, indeed, that the substantial character of the transaction is the same, whether the agreement that the mortgagor may sell the goods be made at the time of the mortgage, or immediately after; and, as a means of sheltering the property of a dishonest debtor from the claims of his creditors, the latter method would be equally effective as the other. The policy of the law is equally against both, and there is much reason to apprehend serious mischief from giving the least countenance to an agreement that a mortgagor might sell the goods on his own account, because the agreement was made subsequent to the mortgage. I am satisfied that such a distinction is not sustained by principle or authority.

It is urged that the law which imposes a penalty upon a mortgagor for selling the goods without the written consent of the mortgagee, assumes that with such consent he may sell. It is true, he may so sell without being subjected to a penalty, but there is nothing in the act designed to change the law in respect to the validity of mortgages as against attaching creditors. That stands as it did before. It is urged, also, that it must appear that the sale was made with intent to defraud or hinder creditors, and that is so; but the trust being shown, the fraudulent intent is conclusively presumed. Again: the jury were told that the continuing to sell the goods with the plaintiff's knowledge and without objection would not invalidate the mortgage, unless such understanding existed at the time the mortgage was made. Now the fact of such selling was very strong evidence of an understanding when the mortgage was made that the sales might be continued, and, under ordinary circumstances, the jury ought so to have found, and therefore, without some qualification of that instruction, there was danger that the jury might be misled, and induced to give to this evidence less weight than it deserved, even if, as matter of law, the selling as the mortgagor did would not have invalidated the mortgage; and, upon the whole, I think this instruction, as here stated, was calculated materially to diminish the weight of that important testimony, unless there was some qualification not stated in the case, which is quite probable.

The instructions to the jury that, if the mortgage was made in good faith to secure an honest indebtedness, it would not be rendered invalid by including, by inadvertence and mistake, a greater sum than was really due, were correct. No authority has been cited, and we find none, to the effect that an innocent mistake as to the amount due, shall avoid a mortgage. Such a doctrine would be very severe upon mortgagees, and finds no countenance from analogous cases. In the former opinion in this case, it was held that an account rendered by the mortgagee of the amount due on the mortgage debt, in perfect good faith, and with all reasonable efforts to make it correct, would not be a false account within the statute, because by accident or mistake it was made too large. If the mortgage is made to secure a greater sum than is due, this would be a matter of proper observation to the jury on the question of the good faith of the transaction, but we cannot say that, as matter of law, it renders the mortgage void.

The instructions in respect to the rendition of the account were in accordance with the former decision in this cause, and we think were correct; nor do we think the verdict should be disturbed as against evidence, from anything now before us.

On the point of the instructions as to the trust, we think there must be a new trial.

SOUTHERN DISTRICT OF N. Y.

United States Circuit Court.

BARNEY v. STEAMBOAT D. R. MARTIN.

1. No passenger, as such, has a right to carry on any business occupation upon the vehicles of a common carrier, and if he attempt so to do, after being requested to desist, he may be ejected.
2. A carrier may grant the right to transact a business upon its vehicles, but the right will be limited to the grantee.

Opinion of the court by HUNT, J.

On the trial before the district judge, the libellant recovered the sum of $1,000 as his damages, for ejecting him from the boat on the morning of October 23d, 1871. On an application subsequently made to him, the district judge reduced the recovery to the sum of $500. A careful perusal of all the testimony satisfies me that the libellant was pursuing his business as an express agent on board the boat; that he persisted in it against the remonstrance of the claimants, and that it was to prevent the transaction of that business by him on board the boat, that he was ejected therefrom by the claimants.

The steamboat company owning this vessel were common carriers between Huntingdon and New York. They were bound to transport every passenger presenting himself for transportation, who was in a fit condition to travel by such conveyance. They were bound, also, to carry all freight presented to them in a reasonable time before their hours of starting. The capacity of their accommodation is the only limit to their obligation. A public conveyance of this character is not, however, intended as a place for the transaction of the business of the passengers. The suitable carriage of persons or property is the only duty of the common carrier. A steamboat company or a railroad company is not bound to furnish travelling conveniences for those who wish to engage on their vehicles in the business of selling books, papers, or articles of food, or in the business of receiving and distributing parcels or baggage, nor to permit the transaction of this business in their vehicles when it interferes with their own interests. If a profit may arise from such business, the benefit of it belongs to the company, and they are entitled to the exclusive use of their cars for such purposes. This seems to be clear both upon principle and authority. Story on Bailments, § 591, a; Jenckes v. Coleman, 2 Sumn. 221; Burgess v. Clements, 4 Maule & S. 306; Fell v. Knight, 8 Mees. & W. 269; Commonwealth v. Powers, 1 Am. Railway Cases, 389.

These cases show that the principles thus laid down are true as a general rule.

The case of the N. J. Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S.) 356, shows that it is especially applicable to those seeking to do an express business on such conveyances. It is there held, in substance, that the carrier is liable to the owner for all the goods shipped on a public conveyance by an express company, without regard to any contract to the contrary between the carrier and the express company. Although they may have no custody or control of the goods, they are liable to the owner in case of loss, if they allow them to be brought on board. It is the simplest justice that they should be permitted to protect themselves by preventing their being brought on board by those having them in charge. This rule would not exclude the transmission as freight of any goods or property which the owners or agents should choose to place under the care and control of the carrier.

That persons other than the libellant carried a carpet bag without charge, or that such bag occasionally contained articles forwarded by a neighbor or procured for a friend, does not affect the carrier's right. The cases where this was proved to have been done were rare and exceptional, and do not appear to have been known to the carrier, nor does it appear that any compensation was paid to the agent. They were neighborly and friendly services, such as people in the country are accustomed to render for each other.

But if the services and the business had been precisely like that of the libellant, the rule would have been the same. The rights of the carrier in respect to A. are not gone or impaired for the reason that he waives his rights in respect to B., especially if A. be notified that the rights are insisted upon as to him. If Mr. Prime were permitted to carry a bag without charge on the defendants' boat, or to do a limited express business thereon, this gives the libellant no right to do such business, when notified by the carrier that he must refrain from it. A carrier, like all others, may bestow favors where he chooses. Rights, not favors, are the subject of demand by all parties indiscriminately.

The incidental benefit arising from the transaction of such business as may be done on board a boat or a car belong to the carrier, and he can allow the privilege to one and exclude it from another at his pleasure. A steamboat company or a railroad company may well allow an individual to open a restaurant or a bar on their conveyance, or to do the business of boot blacking, or of peddling books and papers. This individual is under their control, subject to their regulations, and the business interferes in no respect with the orderly management of the vehicle. But if every one that thinks fit can enter upon the performance of these duties, the control of the vehicle and the good management would soon be at end.

The cars or boats are those of the carrier, and I think exclusively so for this purpose. The sale or leasing of these rights to individuals and the exclusion of others therefrom, come under the head of reasonable regulations, which the courts are bound to enforce. The right of transportation, which belongs to all who desire it, does not carry with it a right of traffic or business.

It is insisted that the libellant could not legally be ejected from the boat for any offence or violation of rules committed on a former occasion. It is insisted, also, that having purchased a ticket from the agent of the company, his right to a passage was perfect. Neither of these propositions is correct. In Commonwealth v. Powers, 7 Metc. 596, the passenger had actually purchased his ticket, and the chief justice says:

"If he, Hall, gave no notice of his intention to enter the car as a passenger and of his right to do so, and if Powers believed that his intention was to violate a reasonable subsisting regulation, then he and his associates were justified in removing him from the depot."

In Pearson v. Duane, 4 Wall. 605, Mr. Justice Davis, in giving the opinion of the court, held the expulsion of Duane to have been illegal, because it was delayed until the vessel had sailed, "But this refusal," he says, "should have preceded the sailing of the ship. After the ship had got to sea it was too late to take exception to the character of a passenger as to his peculiar position, provided he violated no inflexible rule of the boat in getting on board.'

The libellant in this case refused to give any intimation that he would abandon his trade on board the vessel. The steamboat company, it is evident, were

quite willing to carry him and his baggage, and objected only to his persistent attempts to continue his traffic on their boat. He insisted that he had the right to pursue it, and the company resorted to the only means in their power to compel its abandonment, to wit: his removal from the boat. This was done with no unnecessary force, and accompanied by no indignity.

In my opinion the removal was justified, and the decree must be reversed.

DISTRICT OF OREGON.

United States District Court.

In re THOMAS RYAN.

1. An innkeeper and retail dealer in liquors is a trader, and when he is unable to pay his debts as they become due, *in money*, he is insolvent, although his property may exceed in value the amount of his debts.
2. An insolvent debtor who prefers one or more of his creditors, necessarily thereby commits an act of bankruptcy.
3. Where it appears that a debtor gave a mortgage upon a large portion of his property, which mortgage purported to be given as security for a debt that in fact never existed, the reasonable conclusion is that such mortgage was made to hinder and delay, if not to defraud the creditors of such debtor, and is, therefore, an act of bankruptcy.
4. Where a debtor has committed an act of bankruptcy by giving an unlawful preference, or making a transfer of his property, with intent to hinder, delay and defraud his creditors, he cannot discharge himself from his legal liability for such act by a subsequent rescission or undoing thereof.—*Pacific Law Reporter.*

Opinion by DEADY, J. Delivered April 29th, 1873.

Petition by F. Opitz and others to have respondent adjudged a bankrupt. The cause was heard by the court without a jury, on April 22d and 23d, and submitted.

At the filing of the petition, April 1st, 1873, and since 1864, the respondent was engaged in keeping a tavern and bar in this city, called the Russ House.

The petition alleges that the respondent being a trader and insolvent, committed acts of bankruptcy as follows: 1. That on January 29th, 1873, he made a conveyance and transfer of the chattels in said Russ House to one Catharine Crinnion, with intent to thereby hinder, delay and defraud his creditors, and with the intent to give a preference to said Crinnion, and also with the intent to defeat and delay the operation of the bankrupt act. 2. That on February 12th, 1873, he made a payment to Henry Wilmer, and on March 1st, thereafter, a payment to —— Hunsaker, with intent thereby to give each of them a preference.

The answer of respondent admits the making of the conveyance and payments, but denies the insolvency, and that either such conveyance or payments were made with the intents alleged.

The evidence proves that at the dates of the alleged acts of bankruptcy, the respondent owed not less than $1,700, and that his assets consisted of the furniture and fixtures of the Russ House, worth in cash probably $1,200, a piece of land on the McAdam road, worth not to exceed $150, and book accounts for board against forty-six different persons, scattered over the coast, for sums ranging from $239 to $5; amounting in all to $2,954. Some of these accounts are twelve months overdue; one-fourth of them are at least six months due, and only $200 or $300 were charged within two months before the commencement of this proceeding. The opinion of the respondent's barkeeper is that $1,500 of these accounts are *good;* that is, the persons who owe them will pay them when they get money, and he thinks they will have money sooner or later, and some of them before long. This, of course, amounts to nothing; there is really no evidence that a single dollar can be made on these accounts by law, and the strong probability is that they are not worth a cent. For the past nine months the respondent has been falling behind with his creditors, and the probabilities are that *good* accounts against boarders by the week would have been collected by him as they fell due.

It also appears that for at least six months prior to the filing of the petition, the respondent was unable, and so stated to divers of his creditors, to pay the debts incurred in his business as they became due, *in money;* and that during that term, for that reason, he procured an extension on $700 or $800 of said debts.

As to whether the respondent's property was sufficient to pay his debts at the date of these transactions, the burden of proof is upon him. Section 41, Bank Act; In re Randal, 1 Deady, 559; In re Silverman, 1 Sawyer, 418. The evidence furnished by the respondent upon this point is not satisfactory, and is altogether insufficient to establish the fact that this property could have been disposed of for cash at $1,700. It must also be borne in mind that the only portion of this property which appears to have had any market value was the furniture, and to have sold this, or any considerable portion of it, would have broken up respondent's business at once. Besides, at least $300 worth of it was probably exempt from execution, the respondent being a householder.

But it is immaterial whether his property was sufficient to pay his debts or not. The respondent was an innkeeper and a retail dealer in liquors, and therefore a trader, and being confessedly unable to pay his debts *in money* as they became due, in the ordinary course of business, he was insolvent. In Toof v. Martin, 13 Wal. 47, the Supreme Court affirmed the ruling of the court below, which was that "if the bankrupts" (who were traders) "could not pay their debts in the ordinary course of business, that is, *in money*, as they fell due, they were insolvent;" and to the same effect has been the decisions of the District Courts. Indeed, it would be intolerable, if a person in the situation of respondent, who refuses to pay the current bills of his baker, butcher and grocer, as they become due, because he has no money to do so with, and at the same time pays and secures other creditors, could prevent the former from having him adjudged a bankrupt upon the doubtful ground that his property was equal in value to his debts, and therefore he was not insolvent.

The payments to Wilmer and Hunsaker are admitted, and the fact being that the respondent was then insolvent, the necessary effect of such payments was to give these creditors a preference, which was an act of bankruptcy. The necessary consequence of his acts the respondent is conclusively presumed to have intended, and therefore the denial in the answer of an intent to give a preference to these parties is of no effect. In re Sutherland, 1 Deady, 348; In re Silverman, 1 Sawyer, 418.

The conveyance to Crinnion is a mortgage which purports to have been given by respondent to secure the payment of a note of even date therewith, for $3,000 in coin, payable in one year, with interest at the rate of one per centum per month. The property included in it was probably three-fourths in value of all the respondent possessed, subject to execution, and consisted of the furniture of the parlor and the sixty-one bed rooms in the Russ House. The instrument gave Crinnion power to take possession in case the note was not paid at maturity, or at any time, in case she should "deem herself unsafe," and sell the property at public or *private* sale for the payment of the debt. The mortgage was filed on January 30th, 1873, and on March 19th, thereafter, purports to have been assigned by Crinnion, for "a valuable consideration," to one Annie English.

On the trial Ryan testified that this note and mortgage was a scheme to raise money to pay his debts, but that no money was received upon it except $800 *in currency*, which was returned to English, when she gave up the note, and the transaction was rescinded, because the whole amount of the $3,000 could not be raised. The note was not produced on the trial, and the mortgage still remains on file in the clerk's office unsatisfied and uncancelled. Ryan stated that the note had been lying on the washstand in his bed room from the time it was returned to him until the day of trial, when it suddenly disappeared, and has not been found, and that the $800 received on the note was paid to and returned by his wife. Under the act (section 41) and upon general principles, the burden of proof is upon the respondent to show this mortgage to have been actually made upon the consideration and for the purposes expressed therein. The facts are peculiarly within his knowledge.

Neither Crinnion nor English are called as witnesses by him, or their absence attempted to be accounted for; while upon the evidence, their very existence is even doubtful. As the case appears in court, there is no other conclusion reasonable but that this mortgage was a mere sham and pretence from first to last. In point of fact it was not true, as therein represented, that respondent owed Crinnion the sum of $3,000 in coin, but only $800 in currency, and it is doubtful whether even that sum was received until after the making of the mortgage, if at all. The assignment to English purports to have been made as late as March 19th, and for "a valuable consideration," and although attested by counsel for respondent, no one was called to speak as to the amount or nature of such consideration, or the true character of the transaction. The strong probability is that this transfer is also a sham, and was put upon the instrument with the idea of giving color of good faith to the original transaction. The mortgage was left on file as an unsatisfied one, after, it is now claimed, the transaction was rescinded, apparently for the purpose for which it appears to have been originally made and placed there, to keep off and deceive his creditors; and to this effect was respondent's declaration to the witness Rohr, one of his creditors, as late as February 1st. The power to enter and sell at "private sale" whenever the mortgagee might "deem herself unsafe," is a significant and suspicious circumstance, and might at any moment be used by the parties to this contrivance to put the barrier of another apparently innocent ownership between this property and the respondent's creditors.

The intent with which the transfer was made is a question of fact, but if the note and mortgage were fictitious, as it appears they were, then the only reasonable inference from the premises is that it was done with intent to hinder and delay creditors, if not to defraud them. In re Drummond, 1 B. R. 10; Ecfort v. Greeley, 4 C. L. N. 209.

It is not an element of this act of bankruptcy that the respondent at the time of committing it should have been insolvent. A sale or transfer of property with intent to hinder, delay or defraud creditors, is an act of bankruptcy, without reference to the solvency of the persons making it. In re Randal, 1 Deady, 565.

On the argument counsel for the respondent seemed to assume that the inquiry as to his solvency was to be directed to the time of filing the petition. Insolvency alone is never an act of bankruptcy. In this case, respondent being insolvent on February 12th and March 1st, 1873, when he made payments to Wilmer and Hunsaker, he thereby committed an act of bankruptcy. But his even becoming solvent afterwards, much less getting further time to pay his debts, would not condone or discharge this act of bankruptcy, or prevent him from being adjudged a bankrupt therefor. And so with this mortgage; the question is, did the respondent at any time within six months before the filing of the petition, make it with the intent alleged, and not did he afterwards, and before the filing of the petition, recant, and procure the same to be cancelled or rescinded? When an act of bankruptcy has been once committed, the debtor cannot be relieved from the legal consequences thereof, except by lapse of time or an arrangement with the creditors, who have the right to sue on account of it.

I find that the respondent has committed the acts of bankruptcy alleged in the petition, and adjudge him a bankrupt accordingly.

J. W. Whalley, for petitioners.

R. Williams and *O. P. Mason*, for respondent.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in August, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

June 28, Thomas C. Jones, Administrator of WILLIAM H. ENGARD, dec'd.
" 28, James McCann, Executor of JOHN GILMER, dec'd.
" 28, Annie T. Chadwick, Administratrix of SAMUEL T. CHADWICK, deceased.
" 30, Sarah F. Gregory, Administratrix of WILSON GREGORY, dec'd.
" 30, Samuel M. Clement et al., Administrators of WILLIAM McELROY, dec'd.
July 2, George Bennett et al., surviving Executors of ABEL BENNETT, dec'd.
" 3, Agnes Thayer, Administratrix of EDWARD N. THAYER, dec'd.
" 3, Isabella Bockius, Administratrix of JOHN BOCKIUS, dec'd.
" 5, William S. Helverson, surviving Executor of NICHOLAS HELVERSON, dec'd.
" 8, Israel W. Morris, Executor of JANE BOWMAN, dec'd.
" 9, Edward Comfort, Acting Executor of JEREMIAH COMFORT, deceased.
" 9, Jas. W. Paul, Administrator of PHILIP GEISSE, dec'd.
" 9, R. C. McMurtrie, Administrator of F. O. BOHLEN, dec'd.
" 9, John Campbell, Executor of JANE CAMPBELL, dec'd.
" 9, John Sherin et al., Executors of PATRICK McCANN, dec'd.
" 10, Robert E. Peterson et al., Executors of GEORGE PETERSON, dec'd.
" 11, Susan G. McFarland, Administratrix of JOSEPH McFARLAND, dec'd.
" 11, Caroline G. Galbraith, Administratrix of JOHN H. GALBRAITH, dec'd.
" 11, Samuel F. Smith, Administrator of CATHARINE FOLLAR, dec'd.
" 11, Peter Marseilles, Administrator of WILLIAM MARSEILLES, dec'd.
" 14, Wm. F. Steinmetz, Administrator of GEO. W. STEINMETZ, dec'd.
" 14, Joseph Harvey et al., Executors of WILLIAM DOUGHERTY, dec'd.
" 15, William Culty et al., Executors and Trustees of GEORGE W. McCLELLAND, dec'd.
" 16, Geo. T. Gabell, Jr., et al., Executors of GEO. T. GABELL, Sr., dec'd.
" 16, Bernard Rafferty et al., Executors of JAMES McFARLAND, dec'd.
" 16, W. T. A. Ridge, Trustee of FREDERICK HERSCHBERG, dec'd.
" 19, Wm. Rutherford, Executor and Trustee of JOHN GIVEN, dec'd.
" 21, Samuel Wetherill et al., Administrators c. t. a. of WILLIAM WETHERILL, dec'd.
" 22, Thos. P. McCadden, Administrator of MICHAEL McCADDEN, dec'd.
" 22, Robert Grist, Administrator of SYLVANUS WAINWRIGHT, dec'd.
" 22, William Warner, Jr., Administrator of ANDREW WARNER, dec'd.
" 22, James M. Eagleton, M. D., Trustee of SAMUEL POTTS, dec'd.
" 22, James M. Eagleton, Executor and Trustee of SAMUEL POTTS, deceased.
" 22, Janet M. Bullock, Administratrix of JONATHAN BULLOCK, dec'd.
" 22, H. C. Townsend, Trustee as well under Ann S. Sulger's will, as that of Jacob F. Sulger, dec'd, for ISAAC SULGER.
July 23, Alfred Fassitt, Surviving Executor of JAMES FASSITT, dec'd.
" 23, Alfred Fassitt, Executor of ROBERT F FASSITT, dec'd.
" 23, Charles S. Close et al., Executors of HENRY MYERS, dec'd.
" 23, James Beatty, Sr., Executor of JAS. BEATTY, Jr., dec'd.
" 23, John B. Lever, Administrator of WM. LEVER, dec'd.
" 23, The Fidelity Ins. Co., &c., Executors of GEORGE W. IRWIN, dec'd.
" 23, Emily F Ellis, Administratrix of ALFRED D. ELLIS, dec'd.
" 23, Elizabeth Castor, Administratrix of GEORGE J. CASTOR, dec'd.
" 24, Joseph F. Kerbaugh, Administrator of OPMAN KERBAUGH, dec'd.
" 24, Ellen E. Brown, Executrix of CAROLINE LEWIS, dec'd.
" 24, John H. Dingee, Executor of ELIZABETH FENNER, dec'd.
" 24, Edward Hayes, Executor of MARY DEEGAN, dec'd.
" 24, George Wiley, M. D., Administrator of MARY L. D. SMITH, dec'd.
" 24, Lewis M. Kensil, Administrator of LEWIS KENSIL, Sr., dec'd.
" 24, Hugh Hallowell, Guardian of ALONZO H. SHALKOP, minor.
" 24, William P. Stroud et al., Administrators of JOHN TOWERS, dec'd.
" 24, William Musser, Attorney in fact of MARY M. ROBINSON, Executrix of EDWARD W. ROBINSON, deceased.
" 24, Warren G. Griffith, Administrator of MARY ANN FLYNN, dec'd.
" 24, Herbert J. Lloyd, Executor and Trustee under the will of JOHN B. ACKLEY, dec'd.

WILLIAM M. BUNN.
aug 1-4t Register.

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Supreme Court of Pennsylv'a.

STECKMAN v. ERNST et al.

A promissory note payable twelve months after date, contained the further limitation, "or before, if made out of the sale of W. S. Coffman's Improved Broadcast Seeding Machine." In a suit on the note, it was held:

1. To constitute a negotiable promissory note, the time or the event for its ultimate payment must be fixed and certain; yet it may be made subject to contingencies, upon the happening of which, prior to the time of its absolute payment, it shall become due.
2. The contingency may depend upon some act to be done or omitted by the maker or upon the occurrence of some event indicated in the note, but not upon any act of the payee or holder, whereby the note may become due at an earlier day.
3. The note in suit was negotiable.

Error to the Common Pleas of Lancaster county.

Opinion by MERCUR, J.

This case hinges upon whether the instrument is a negotiable promissory note. It contains language sufficient to make it one. That language is a promise to pay, twelve months after date, to the payee named, or bearer, a specific sum of money, for value received. It is contended, however, that it contains too much. That the addition of "or before, if made out of the sale of W. S. Coffman's Improved Broad-cast Seeding Machine" changes its character and destroys its negotiability. The addition of some words beyond what are necessary to constitute a negotiable promissory note, do not destroy its character as such. Thus it was held in Zimmerman v. Anderson, 17 P. F. Smith, 421, that the addition of "waiving the right of appeal a valuation, appraisement, stay and exemption laws," did not destroy its negotiability.

It is claimed that the character of this instrument is changed by the fact, that in the contingency of the same being sooner realized from the sale of the machinery, it might become payable within the year.

The general rule to be extracted from the authorities undoubtedly, requires that, to constitute a valid promissory note, it must be for the payment of money at some fixed period of time, or upon some event which must inevitably happen. That it is not such a note if it purports to make the payment depend upon a contingency or uncertainty. Nor is it sufficient that the contingency does in fact happen afterwards, upon which the payment is to become absolute. Its character as a promissory note cannot depend upon future events, but solely upon its character when created. Story on Prom. Notes, § 22. Yet it is an equally well written rule of commercial law that it may be made payable at sight, or at a fixed period after notice, or on request, or on demand, without destroying its negotiable character. The reason for this, said Lord Tenterden in Clayton v. Gosling, 5 Barn. & Cressw. 360, is that "it was made payable at a time which we must suppose would arrive."

In Jordan v. Tate, 19 Ohio, it was ruled that the negotiable character of a promissory note is not affected by the fact that it was made payable by its terms, on or before a future day therein named Though the maker has the right to pay such note at any time after its date, yet for all purposes of negotiation it is to be regarded as a note payably solely on the day therein named.

No case has been cited in which the court has distinctly ruled upon such a form of note, yet we think this decision is in accord with the general sentiment of the legal mind of our State.

In Cota v. Buck, 7 Metc. 588, in addition to language sufficient to give it negotiability, the note proceeded "it being for property I purchased of him in value at this date, as being payable as soon as can be realized of the above amount for the said property I have this day purchased of said Peco (the payee), which is to be paid in the course of the season now coming." The instrument was held to be a negotiable note. In giving the opinion of the court Shaw, C. J., said, "We think the meaning was this, that the signer, for value received, in the purchase of property, promised to pay Peco or bearer the sum named as soon as the termination of the coming season, and sooner, if the amount could be sooner realized out of the funds. Such refer ence to the sale of the property was not to fix the fund from which it was to be paid, but the time of payment. The undertaking to pay was absolute and did not depend on the fund. So as to the time. Whatever time may be understood as the "coming season," whether harvest time, or the end of the year, it must come by mere lapse of time, and that must be the ultimate limit of the time of payment."

Carlon v. Kensaly, 12 Mees. & Wels. Exch. 139, was an action brought by an endorsee against the maker. The note was payable by instalments, subject to a condition that on default being made in payment of the first instalment, the whole amount should become immediately payable. The declaration averred that the payee endorsed the note to plaintiff, that the defendant made default in payment of the first instalment, and that he had not paid the amount of the note. Upon special demurrer on the ground that the note was not made according to the custom of merchants, and consequently that the right of action thereon could not pass by endorsement, and that on joinder in demurrer the court held the instrument to be a negotiable promissory note, and on default being made by the maker in payment of the first instalment, the endorser was liable for the whole amount. Lord Abinger, C. B., said, "I think there is no ground for saying the defendant is not liable." Peake, B., said, "Now, to hold that action could not be maintained upon such notes as this would be to impugn all the established practice. Almost every note payably by instalments, has such a condition. It is not a contingency. It depends on the act of the maker himself, and on his default it becomes a promissory note for the whole amount."

To these authorities is interposed the doctrine of Lord Campbell, C. J., in Alexander v. Thomas, 71 E. C. L. Rep. 333. The language of the note, however, in that case failed to declare clearly that the contingency must necessarily precede the ninety days named for the payment

It was "payable ninety days after sight, or when realized." So it was at last open to question whether "when realized" might not make the doing of an act beyond the ninety days. If so, it was made such a contingency as to its absolute payment as to clearly destroy the negotiable character of the instrument.

The principle to be deducted from the authorities is this, to constitute a negotiable promissory note, the time or the event for its ultimate payment must be fixed and certain; yet it may be made subject to contingencies, upon the happening of which, prior to the time of its absolute payment, it shall become due. The contingency depends upon some act done or omitted to be done by the maker, or upon the occurrence of some event indicated in the note, and not upon any act of the payee or holder whereby the note may become due at an earlier day. Hence it is not in conflict with the decision of this court, which declared that if the instrument contained a power under which the payee might enter judgment upon it. its negotiable character was entirely destroyed. We think the learned judge was correct in holding this note to be negotiable. None of the other errors assigned were urged.

Judgment affirmed.

Messrs *Ellmaker, North* and *Nauman*, for plaintiff in error.

Mr. *Reynolds*, for defendants in error.

Common Pleas, Luzerne Co

GRIFFIN v. FELLOWS et al.

1. Under the confirming acts of Assembly of 1826, 1831, and 1835, the relation of landlord and tenant, in case of a lease by the public committee of the township of Providence, in Luzerne county, made in 1796, claiming the Connecticut title, exists with the same effect as in leases held under title derived from a Pennsylvania claimant.
2. In the premises of a lease for the term of nine hundred and ninety-nine years, the lessor granted, demised, set and to farm let the land described. The *habendum* clause was as follows: "To have and to hold the above granted and demised premises, with every privilege, right, member and appurtenances whatsoever, to the same premises belonging, or in anywise appertaining, whether ways, waters, water courses, mines and minerals, of whatever description," &c.: *Held*, that although there was no opened mines at the time of the demise, the lessee had the right to dig for minerals, and to mine and take them away.
3. When a lease permits the opening of mines, it is not a cause of forfeiture for the tenant to work them even to exhaustion.
4. The term "minerals" embraces everything not of the mere surface, which is used for agricultural purposes. Granite, as well as fossils, are comprehended within it.
5. An ancient grant is to be construed by evidence of the manner in which the thing granted has always been possessed and used, for so the parties must be supposed to have intended.
6. A tenant for years does not incur a forfeiture of his term by entering into articles of agreement for the sale of the demised premises in fee, nor by absolute conveyance of the fee by deed. By such agreement or deed the estate of the reversioner is not divested. No other effect is given to such instruments than that of passing such interest only as the lessee might lawfully part with.—*Lus. Leg. Reg.*

Opinion by ELWELL, P. J.

The plaintiff seeks to recover, in this action, the possession of fifty acres of land, situate in that part of the city of Scranton which was formerly the borough of Hyde Park, in the certified township of Providence. His title was not much questioned upon the argument For the purpose of this case, under the view which I take of the rights of the defendants as lessees under the legal title, it may be conceded that the title rested in the public committee of the township of Providence, by the certificate dated in 1807, granted by the commissioners appointed under the act offering compensation to Pennsylvania, claimants of certain lands within the seventeen townships of Luzerne county, passed on the 4th April, 1799, and its supplement, together with the patent from the commonwealth dated in 1812, became vested in the plaintiff by the deed from the majority of the trustees of said township, on the 13th day of March, 1865.

Both parties in this controversy trace their rights back to what is called the "Connecticut title." The certificate granted to the public committee is of itself conclusive evidence that they, or those from whom they derived the title, were actual settlers prior to the decree of Trenton, in 1782.

On the 8th of September, 1796, the then public committee of the township of Providence executed and delivered to Joseph Fellows a lease of the land in question.

for the term of nine hundred and ninety-nine years, for the yearly rent of four pounds and four shillings and the taxes. The plaintiff now contends that this lease was, at the time of making it, absolutely void, and conferred no estate upon the lessee. And we are cited to the act of the 11th of April, 1795, which forbids the taking of possession of any lands in Luzerne county under color of title not derived from the commonwealth or the late proprietor. But neither this act nor that of 6th April, 1802, applied to lands within the seventeen townships.

It is unnecessary to refer particularly to the several acts of Assembly in reference to this subject. In 1814 (see 6 Laws Penn. 122,) the Legislature repealed the whole list of intrusion laws, acts to protect territorial limits, &c., and in 1813 so far recognized some rights of Connecticut claimants as to respect the law which suspended the act of limitation where lands were claimed under Connecticut. Prior to this time it was decided by the Supreme Court in Carkhuff v. Anderson, 3 Binn. 4, that the interest of a Connecticut settler in land within the seventeen townships, who was entitled by the act of 1799 to obtain a patent, was subject to the lien of a judgment. This case, in effect, decides what was expressly held by Judge Scott in Barney v. Sutton, 2 Watts, 3, to wit, that after acquired title of a Connecticut settler by a certificate under the act, enured to the advantage of a purchaser, where the vendor had conveyed or executed a contract before acquiring the legal title.

On the 8th day of April, 1826, a law was passed enacting "that the relation of landlord and tenant shall exist, and be held as fully and effectually between Connecticut settlers, and between Connecticut settlers and Pennsylvania claimants, as between other citizens of the commonwealth on the trial of any cause now pending or hereafter to be brought within the commonwealth, any law or usage to the contrary notwithstanding." This act was held in Setterlee v. Matthewson, 16 S. & R. 169, to be constitutional, and upon a writ of error to the Supreme Court of the United States the decision was affirmed.

But still more to the purpose, and directly in the line of the plaintiff's title, and without which he must have failed for want of authority in the committee or trustees to make a conveyance, is the act of 2d April, 1831, Pamphlet L., 367, and the supplement thereto, passed April 14th, 1835, by which all leases before made by the committee of the proprietors of Providence township, were confirmed and declared valid.

The objection to the lease on this ground is an ungracious one, coming, as it does, from a landlord who holds under or by virtue of the same act of Assembly which confirmed the tenant's title, and who is presumed to have knowledge of the fact, that for seventy years prior to his purchase the rent reserved had been to, and received by his predecessors in the title. If there were no confirming act of Assembly, there would arise, after this lapse of time, a presumption of confirmation by the lessor by the acceptance of rent and the written receipt therefor.

It is contended, secondly, by the counsel for the plaintiff, that the tenant has forfeited his term, by having conveyed a greater estate in the land than he possessed.

The facts as stated do not show any conveyance by the tenant. He entered into articles of agreement for the sale of a number of lots in August, 1865, and covenanted with the purchaser, that on the full payment of the purchase money (the last instalment of which sould fall due in 1875) he would execute and deliver to him a good and sufficient deed of the land, sold in fee simple, with covenant of warranty.

The law of England upon the subject of forfeiture, the common law, does not go the length of declaring that even a conveyance by a tenant will in all cases work a forfeiture. In order to have this effect, it must be such as displaces or divests the estate of the reversioner; if it have not that effect, the law will not adjudge it a forfeiture. It must, therefore, be by feoffment and livery, for this only operates upon the possession, and effects a disseisin. It cannot be by a grant or any other conveyance in the nature of a grant, such as lease and release, or bargain and sale—conveyances of this kind operating only on the grantor's interest, and passing only what he may lawfully part with. 5 Bac. Abr. 668, Title Lease and Form for Years; Co. Litt. 251, 6; 1 Blk. Com. 274, n; 1 Chitty's Genl. Prac. 243, 4, 287; 1 Bouvier's Law Dict. 602, and cases cited; 2 Blk. Com. 120, n.

The reason for the distinction as to the effect of the different modes of conveyance is this: "A feoffment may be a tortious conveyance creating a fee, even though made by the owner of a particular estate, and therefore incurring a forfeiture; but a lease and release form, but an innocent conveyance, which transfers only such an interest as the party conveying has, and therefore may be used without forfeiting his estate." 1 Chitty Gen. Prac. 327.

In McKee v. Pfouts, 3 Dall. 486, it was held by the Supreme Court of this State, and recognized as the law in numerous cases, that a conveyance by bargain and sale, acknowledged and recorded, of an estate in fee simple by tenant by the courtsey, was not a forfeiture of his estate, the reason being that a deed of bargain and sale operates by way of use, and conveys no greater estate than the bargain and sale may lawfully convey; therefore it never was considered as inducing a forfeiture on common law principles. Dunwoodie v. Reed, 3 S. & R. 445–454; 4 Kent Com. 85, 454. If a deed, the ordinary mode of conveyance, cannot work a forfeiture, surely a mere agreement to convey, which may or may nor be carried out, will not have that effect.

It is contended lastly by the counsel for the plaintiff, that the term is forfeited by reason of waste committed by the tenant upon the demised premises by opening mines thereon, by mining and selling annually large quantities of coal, and by opening and working, for the purpose of sale, stone quarries for a number of years before the commencement of this suit.

It is an important fact in the case that there were no opened mines or quarries on the premises at the date of the lease; that mining of coal was first commenced by the tenant in 1810, and quarrying stone in 1855 or 1856.

These acts were to the prejudice of the reversioner, and were undoubtedly waste, operating as a forfeiture of the term, and entitling the lessor to recover the premises by ejectment, unless they were authorized by the lease, or the forfeiture was by some act of his. This brings us to the consideration of the most important and difficult part of the case, involving the proper construction of the lease, and a determination of the rights of the parties under it.

In the first or granting part of the indenture, the lessors say that they "have, and a majority of them hath granted, demised, set and to farm let, and by these presents do grant, demise, lease, set and to farm let, unto the said Joseph Fellows, his executors, administrators and assigns, all that certain tract of land" (describing these several lots or tracts). Then follows this clause, "to have and to hold the above granted and demised premises with every privilege, right, member and appurtenances whatsoever to the same premises belonging, or in anywise appertaining, whether ways, waters, water courses, mines and minerals, of whatever description, to the said Joseph Fellows, his executors, administrators or assigns, for and during and until the full end and term of nine hundred and ninety-nine years, fully to be completed and ended."

It is the office of the *habendum* clause in a deed to determine what estate or interest is granted. It may lessen, enlarge, explain or qualify the estate granted in the premises. 2 Blk. Com. 298. Unless totally repugnant to the estate granted, the words of the *habendum* are to receive the same construction as if contained in the first part of the instrument. In Wager v. Wager, 1 S. & R. 375, it was said by Tilghman, C. J., that "one of the most important rules in the construction of deeds is so to construe them that no part shall be rejected. The object of all construction is to ascertain the intent of the parties, and it must have been their intent to have some meaning in every part." This rule applied to the lease relieves the mind from all doubt as to the meaning of the parties. When the lessors said that the lessee should have every privilege of mines and minerals, it was clearly their intention that he should reap some benefit and advantage from the exercise and enjoyment of that privilege. It never could have been contemplated that the tenant should forfeit all rights if he made those expressly granted to him available. The right to the minerals being granted to him, he might dig for them. It is a well settled rule that when anything is granted, all the means to obtain it, and all the fruits and effects of it, are granted also, and all shall pass inclusive together with the thing by the grant of the thing itself. Noyes' Maxims, 198.

If there be a lease of land with the mines in it, and there be no open mines, the lessee may dig for mines, otherwise the grant as to the mines will not take effect. Sanders' Case, 5 Rep. 12, a, b; 1 Inst. 54, b; Liford's Case, 11 Rep. 52; Co. Litt. 59 b, 1 W. Saund. 323, n, c; 10 Bac. Abr. 427; 1 Wash. Real Prop. 412.

The case of Whitfield v. Bewit, 2 Pecre Wms., 240, is not in conflict with Sanders' Case, nor with the general doctrine as stated above. There the grantor conveyed to trustees the fee simple of the lands, with all mines, &c., to his own use for life, remainder to A. for life, remainder to his first son in tail with other remainders stated, remainder to the grantor in fee. It was held, that being a tenant for life, A. could not commit waste by opening mines, and that the words mines, trees, &c., were introduced that all should pass to the trustees, but as they were part of the inheritance, no one should have power over them, but such as had an estate of inheritance limited to them.

The words used in conveying the fee to the trustee were the mere usual and formal words to convey a fee, and there was nothing to indicate that the tenant for life was to hold the property dispunishable of waste. It is very evident it was not the design of the lord chancellor to overrule Sanders' Case, but to distinguish the case under consideration from that. The one was a conveyance of the fee to trustees to support remainders for life and in fee, while the other was a lease of a present interest to the lessee, in which the words used could have no operation or effect unless the tenant was permitted to open and work the mines.

In a lease designed merely for agricultural purposes there is no occasion to say anything in regard to the mines or minerals where there are no open mines, unless it is intended to grant some interest therein. When they are mentioned it must be considered that there was a purpose in doing so, and when that purpose is plainly and expressly declared to be a privilege, a benefit to be enjoyed by the lessee, the case of Whitfield v. Bewit is not authority against the exercise of the privilege granted.

The term "mineral, embraces everything not of the mere surface, which is used for agricultural purposes; the granite of the mountains, as well as metallic ores and fossils, are comprehended within it. Earl of Ross v. Wainman, 14 M. & W. 859; Bainbridge on Mines, 1, note 1.

Having considered the case thus far upon the effect of the words of the lease, let us for a moment examine it in the light of the conduct of the parties.

It was said, per Lord Hardwicke, in Attorney General v. Parker, 3 Atk. 576, "that there is no better way of construing ancient grants and deeds than by usage." And the uniform course of modern authorities fully establishes the rule that an ancient grant is to be construed by evidence of the manner in which the thing granted has always been possessed and used; for so the parties thereto must be supposed to have intended. Weld v. Hornby, 7 East. 199; Rex v. Osborne, 4 East. 327.

More than half a century before the bringing of this suit, the lessee and those claiming his title, mined coal upon the demised premises. More than ten years before suit was brought they made valuable improvements for the purpose of mining coal, and annually mined, since 1855, from 3,000 to 5,000 tons. During all this period the lessors were annually, or from time to time, receiving the stipulated rent, without, so far as appears in the case, a word of complaint either from the trustees or any inhabitant. It is true that it is not expressly stated that the trustees had notice of the opening of mines by the

tenant; but after this great lapse of time, and the notoriety which always attends the operations of mining coal, it may fairly be presumed and taken as *prima facie* evidence that not only the committee, but all the inhabitants of the township had full knowledge, as well of the acts of the tenant in mining, as of the large amount expended in the way of improvements for the purpose of mining. Under these facts, if it were even doubtful whether the words, "every privilege to the premises belonging, whether mines or minerals," &c., were intended to give the right to dig for, mine and take away coal, the meaning of the parties is elucidated by the conduct which they have pursued. The right to mine coal, as claimed by the lessee, has been exercised since 1810, and fully acquiesced in by the lessor by the receipt of the rent down to the 1st day of January, 1865.

But I put the decision of the case upon higher ground than that of waiver of forfeiture, and hold, that upon the face of the lease there is granted the absolute right to take minerals from the land demised, and for that purpose to dig the soil and open mines. When a lease permits the opening of mines, it is not waste for the tenant to work them even to exhaustion. Per Read, J., Kier v. Peterson, 5 Wright, 361. The conclusions at which I have arrived in this case may be summed up and briefly stated as follow:

1st. That Joseph W. Griffin, the plaintiff, at the commencement of this suit held the legal title to the land in question by virtue of a deed from two of the trustees of the public land of the certified township of Providence.

2d. That the lease by the public committee of said township, made on the 8th day of September, 1796, to Joseph Fellows, for the term of nine hundred and ninety-nine years, for the rent of four pounds and four shillings annually, is a valid and binding instrument, and the conveyance of the legal title to the plaintiff was subject to all the rights of the defendants as assignees holding under that lease.

3d. That the articles of agreement entered into by Joseph Fellows, the present holder of the leasehold interest, to sell and convey in fee simple certain lots to Joseph J. Postens, W. B. Carling and others, did not operate as a forfeiture of the term. If he had conveyed by deed, the only effect would have been to convey the residue of the term of years, and therefore no injury to the reversioner.

4th. By the terms of the lease, as well as by the construction given to it by the acts of the parties for more than fifty years before the plaintiff acquired his title, the lessee and his assigns have the right to mine coal and quarry stone for the purpose of sale.

5th. Upon the whole case, the defendants, holding as assignee of the original lessee, have the right of possession as against the plaintiff. Therefore, judgment for the defendants upon the case stated.

D. R. Randall, Esq., for plaintiff.

A. T. McClintock, Esq., for defendants.

Note. This case was taken to the Supreme Court by writ of error, and affirmed in the opinion of the court below, March, 1873.

U. S. Circuit Court of Texas.

UNITED STATES v. THROCKMORTON et al.

A surety in a bond of a public officer to the government, is by his discharge in bankruptcy released from liability on said bond, even though the officer had made no default at the time of the surety's discharge.

The opinion of the court was delivered by DUVAL, J.

This suit was brought on the 21st day of May, 1872, against the defendants, as sureties upon the bond of Robert H. Lane, deceased, given as collector of internal revenue for the second collection district of the State of Texas.

In bar of the action, one of the defendants, William Hooks, has pleaded his discharge in bankruptcy, setting out the same in *hæc verba;* and the question for decision is whether this defendant, as a surety to the government, is discharged under the bankrupt act. The discharge is dated 16th March, 1868. The 34th section of the act provides "that a discharge duly granted under this act shall (with certain exceptions thereto) release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded by a simple averment that on the day of its date such discharge was granted to him, setting the same forth in *hæc verba*, as a full and complete bar to all suits brought on any such debts, claims, liabilities or demands, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact of the regularity of such discharge."

The exceptions referred to, and which the discharge would not bar, are specified in the 33d section of the act. It provides "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; * * and no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, endorsee, surety, or otherwise."

Now, does the case of the defendant, Hooks, fall within any of these exceptions? I think not. He has committed no defalcation as a public officer, because he held no office; neither as a surety for the collector, can he be regarded as acting in a fiduciary character. If the defendant has committed no defalcation as a public officer, and was not acting in a fiduciary capacity (which in my judgment he was not), no other portions of the exceptions specified in the act can have any possible application to his case.

That the discharge is a bar in this case, is further apparent to my mind by a consideration of the 14th section of the act. It is therein provided "that if the bankrupt shall be bound as owner, endorsee surety, bail or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared. In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained."

My construction of this provision is, that where the payment of a debt cannot be enforced until the happening of some contingency, such debt, being readily estimated, may be proved; or if the extent of a liability depends on the happening of a contingency, and such contingency is reasonably certain to happen before final dividend, the court may, by some method, determine the value to be placed by the claimant on such value, and admit him to prove it. But in this case the contingency did not happen before the final dividend; or, if it did, the government made no effort to have the value of the liability ascertained, or to prove it in the bankrupt court. A final dividend was made and the defendant discharged nearly four years before the bringing of this suit. To this hour the extent of the liability of the sureties on Lane's bond is undetermined, and can only be fixed by judicial determination yet to be had.

I am unable to see, either from any provisions of the bankrupt act, or any principle of general law, that the government is excepted out of the provisions of the bankrupt law making the discharge in this case a bar to the action. My opinion on this subject is sustained by Judge McLean, in the case of the United States v. Davis, 3d McLean R. 483.

The plea in bar is sustained, and the case dismissed as to defendant Hooks.

Recent Decisions.

PENNSYLVANIA.

[Our thanks are due to P. F. Smith, Esq., State Reporter, for advance sheets of Vol. 20 of his reports (Vol. 70 Pa. State Reports). We make the following selections from them.]

ST. MARY'S BENEFICIAL SOCIETY v. BURFORD'S ADMINISTRATOR.

1. The charter of a beneficial society stated its object to be to afford relief to its members and their families, to defray expenses of their funerals, or such other cases of distress as should be defined by the by-laws; it authorized the society to ordain, &c., by-laws, &c., necessary for its government, and generally to do the matters, &c., lawful for them to do for the well being of the society, &c. A by-law provided, that at the death of a member "entitled to benefits," $60 should be paid to his widow or legal representatives. *Held*, that this provision was within the power of legislating for the well being of the society.

2. A by-law provided, that the steward should withhold benefits, when intemperance, debauchery, &c., were the cause of death. *Held*, not to be an unreasonable regulation.

3. The regulation is not a determination of the right of the member; the member or his widow may call for a proper trial in the society; it merely restrains the steward from paying until the right is so decided.

4. The provision that the widow of a member who dies from intemperance shall not receive benefits, is reasonable.

5. A purely voluntary association may adopt such reasonable regulations as conduce to their interest.

6. Such societies may prohibit their members from indulgence in vices which multiply disease and death among them, and thus diminish their general fund.

7. Such provisions are not to regulate behavior, but to strike at acts on whose results relief is to depend.

8. The by-law withholding benefits in case of intemperance, &c., is not expulsion or total denial of benefits, but the loss of benefits, *pro hac vice;* the membership remains.

9. The title to benefits remains and attaches to every case of death not from the prohibited vices.

January 8th, 1872. Before THOMPSON, C. J., AGNEW and SHARSWOOD, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of Philadelphia county: Of July Term, 1870, No. 224.

GRIFFIN v. HENDERSON.

1. The trustees of a land company in 1808, conveyed to Ludwig land, which through various intermediate grantees came to Taylor in 1851, when all the deeds were recorded. In 1816 the trustees conveyed the same land to Baldwin, and through various grantees the title was reinvested in the company in 1814, these deeds were duly recorded. In 1854, the company by other trustees, conveyed to Cullum. *Held*, that Cullum and his grantors had constructive notice of Taylor's title.

2. What was done by the company (who were the common grantors) at any time, must be presumed to have been known by them at all times, and their intervening sale could not alter the effect of their acts to third parties.

3. A party remitted to his title is bound by his acts affecting his title before the reconveyance.

November—1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Mercer county: No. 213, to October and November Term, 1871.

BAST et al.'s APPEAL.

1. There is an implied obligation amongst partners that their property shall be used for the benefit of the firm, and that each partner shall not engage in any business which will deprive the partnership of a portion of his skill or diligence, or capital which he is bound to employ in it.

2. A partner is in a fiduciary relation to his fellows, and must account for all money received in and through the firm's legitimate business.

3. Before partners can be estopped from claiming the labor of one of their fellows, or profits earned in the business, it must be clear that they have yielded their right to them.

4. In this case transactions in the name of one partner, and intended by him for his individual benefit, held to be for the firm.

January 4th, 1872. Before THOMPSON, C. J., AGNEW and SHARSWOOD, JJ. WILLIAMS, J., at Nisi Prius.

Appeal from the decree at Nisi Prius: In Equity.

LEGAL GAZETTE.

Friday, August 22, 1873.

JOHN H. CAMPBELL,
EDITOR.

THEODORE F. JENKINS,
ASSOCIATE EDITOR.

DEATH OF HON. WILLIAM MORRIS MEREDITH.

On Sunday last, August 17th, 1873, died the Hon. William Morris Meredith, aged 75 years. By his death Philadelphia has lost one of its truest citizens, its bar has lost one of its greatest lawyers, and our country is compelled to mourn the demise of one of its brightest and best patriots. Like many other great lawyers, Mr. Meredith passed the early years of his professional career in comparative obscurity. He was admitted to the bar in 1817, but he had to wait several years before his eminent abilities were in the slightest degree appreciated. This interval he improved by the most arduous and diligent study.

From the time of Mr. Meredith's first appearance in public life, he gave proof of those superior talents and that excellent genius which won him the first rank of his profession, and the esteem, love and respect of his fellow citizens. Whether he be viewed as a man, a lawyer, or a citizen, every one must testify to his pre-eminent learning, wisdom and characteristic purity. He now is gone, and we cannot better picture his many virtues, than by publishing in full the proceedings in the Court of Quarter Sessions on Monday last, and at the bar meeting on Wednesday.

In the Court of Quarter Sessions on Monday last, after the hearing of the habeas corpus cases, the following proceedings were had. District Attorney Mann, arising inside the bar, said:

May it please the court—"It is with sincere and deep regret that I announce to the court the death of the Hon. William M. Meredith. No one can more keenly than your honor realize the great loss that his death has inflicted upon this bar, and upon the State and Nation.

Mr. Meredith was yesterday the acknowledged head of our bar—to-day we are without a leader—for his acquirements were so extensive, his knowledge so profound, and his abilities so great, that the mind cannot rest upon any one, or even suggest one so pre-eminent as worthy to be called his successor. His private virtues endeared him to all who knew him; his public services will always be gratefully admitted and acknowledged.

To do justice to his memory requires an abler voice than mine. I will not attempt it. I simply move, in respect to it, that this court do now adjourn."

Judge Ludlow, in reply, said: "It is eminently proper for the only court now in session in this county to pause in the transaction of its ordinary business, and pay a just tribute to the memory of an illustrious man. For more than a quarter of a century, William M. Meredith has occupied the position of a leader at the Pennsylvania bar; his reputation long since established, was maintained to the end. Distinguished alike for his keen wit, powerful logic and commanding eloquence, he was a most remarkable man, and his loss is one which, while it will create a wide-spread and sincere sorrow, is almost irreparable.

The links which bind us to the past are one after another broken; the man we have been accustomed to admire departs, the lips from which we have learned lessons of profound wisdom are closed forever, but there is a victory which death cannot achieve, for a life adorned by intellectual efforts of the highest order, and illustrated by every Christian virtue, is immortal. This is not the time or place for an extended eulogy upon the deceased, but I am thankful for an opportunity as a judicial officer thus to pay an imperfect but honest public tribute to the memory of my old teacher and friend.

And now, August 18th, 1873, let a minute of these proceedings be entered at length upon the records of this court, and let the court stand adjourned until Tuesday morning, at 10 A. M."

At noon on Wednesday a meeting of the members of the bar, attended by almost all the lawyers now present in the city, was held in District Court Room No. 1, to take action relative to Mr. Meredith's death.

Precisely at 12 o'clock, Hon. William M. Stokes arose and said that he had been requested to call this meeting to order, and to propose the selection of officers. He then recommended Judge Sharswood as chairman of the meeting. Mr. Edward M. Shippen was elected Secretary.

Judge Sharswood, in assuming the chair, said it would have been more appropriate for the chief justice to have taken this chair, but his absence from the city prevented him. He then read the following letter from the chief justice:

"I didn't know of Mr. Meredith's death until this morning, and then through the Philadelphia papers of Monday. He was one of my earliest friends, and we were classmates in the University of Pennsylvania, and graduated July, 1812. He was the youngest, and I was the next youngest in our class. I need not speak of his great ability, which fitted him both for the bar and the Senate. I had a warm affection for him as friend and associate."

Judge Sharswood resumed by referring to the death of Mr. Meredith; and stating that in him were nobly blended characters which rarely meet in the same person; characters which go to make up the profound lawyer and sound and safe counsel. There are some men who are noted for one of these characters. One has the powers of great research, and it is seldom that you find one possessing this faculty with that of fluency of speech.

Mr. Meredith was remarkable for a faculty known as acumen. With a jury, who had more power? Who could seize the points of a case with such readiness, or place them before the jury as it suited him? In every assembly with which he was connected, he was at the lead. We all knew the characteristics of his private life—that geniality of temper and fund of humor for which he was noted.

Henry J. Williams, Esq., said:

This is not an ordinary occasion. A great man had fallen, and he could not fail to add his mite to the testimonials of regret that would be showered upon his memory. Mr. Meredith and the speaker began their labors at the bar at about the same time.

They had always been intimate, and their association constant, and they frequently discussed the prospect and probabilities of their success, and occasionally gave way to despondency. We all know that Mr. Meredith had no cause for this despondency. Fortunately for us and fortunately for himself, he did not leave Philadelphia, as he once almost determined to do. Success came to him slowly, but it came surely, and when it did come, it was overflowing.

The speaker cited a case in which Mr. Meredith was early engaged, in which there was not a single point which he made which was not decided in his favor. The result of this case established Mr. Meredith's character as a sound lawyer, and from that time there was no doubt as to his ability.

Mr. Meredith was not only a profound lawyer but the most eloquent advocate. It was not eloquence in manner, but the power of thought to which he gave expression in the most fitting words. There were very few speakers to whom he listened with such gratification as to Mr. Meredith.

Can any one doubt that the death of such a man is a loss not only to the profession, but to the community? It has been said that the life of a lawyer is like the traces of sand on the sea-shore, obliterated by the first turn of tide. I cannot believe it. Mr. Chairman, I cannot but believe that the talent of Mr. Meredith will long be remembered by the gentlemen of the bar throughout the country.

Mr. Williams then offered the following resolutions:—

Resolved, That the bar of Philadelphia have learned with profound regret the decease of their late fellow member, the Hon. Wm. M. Meredith.

Resolved, That the bar desire on this occasion to record their sense of the deep loss which they, in connection with the public, have sustained by the death of Mr. Meredith.

Gifted with abilities of the highest order, he was equally distinguished for his legal learning and various attainments, for strict integrity and high tone of professional conduct. His shining talents and purity of character threw a lustre over the bar of which for many years he was the acknowledged leader. In the numerous important positions which he held during his long and brilliant career, he rendered eminent services to his State and country.

Resolved, That a committee of —— be appointed to communicate the proceedings of this meeting to the family of the deceased, and to tender to them the heartfelt condolence of the bar.

Judge Cadwalader, in seconding the resolutions, said:

I estimated Mr. Meredith as a self-educated statesman. He should be recollected before we speak of him as a lawyer, not merely as an educated but a practical statesman. He came into life inheriting the principles of the old Federal party, and he adhered to them. He became a politician, but with him it was the conduct of a dutiful citizen; and in his political relation he served his country, and he thought he did so by serving his party. He seems to have disregarded the rank in which he should render public service.

In whatever relation you found him, he looked down from above, and gave his own views of the petty contentions of public men. Mr. Meredith believed that the government of a free country could not be exercised without strict adherence to party organization.

Through this primary education as a statesman, he looked downward from above instead of upward from below in his search after a knowledge of general jurisprudence. It was easy to him. It was the general, uniform, complete organization of everything in the practice of his profession which renders his career remarkable. As to Mr. Meredith, when he was a toiling young man, I can say that those who were his immediate friends, never doubted that he was to be a leader in every walk of life, in which he might be engaged. The last relation in which he was publicly known, is one which admonishes us of the uncertainty of destiny. I refer to the Geneva arbitration, the greatest tribunal which ever sat for the dispensation of public justice.

We had a gleam of sunshine when we thought that our fellow citizen was to participate in the action of that body but he was prevented by the organic disease that finally caused his death. When we read the report of the proceedings of that "more than Amphictyonic counsel," we must feel that the whole human race were losers by his absence. We will never see a greater, and it may be, perhaps, long before we will see an equal statesman and lawyer.

Peter McCall, Esq., the next speaker, said:

Words are inadequate to express the sentiments that all feel. I believe that the death of Mr. Meredith is a public calamity. We shall no more look up to him for guidance and counsel; the ripe fruit, sir, has fallen into its mother earth; he has gone from us forever. Surely the path of glory leads but to the grave. I do not desire to deal in excessive praise, for no man was more averse to that than the man whose death we lament. There was in him a combination of faculties and powers, such as are rarely found in one man. He was a brilliant man, and sound as well as brilliant, and these natural faculties were improved by the highest culture. His extensive knowledge on all subjects made him the most delightful converser. Sir, he was a great lawyer; not a case lawyer, but a philosophical lawyer; his mind had been built on the foundations of law; he had drunk deep of the fountain of jurisprudence. Thus saturated with legal principles, when a new case arose, depending upon analogy, there he showed his great power, and he was a valuable assistant. His manner of speaking has been dwelt upon here. It was of the Demosthenian order. Often he enlivened his discourse with flashes of wit, and was capable, sir, of the deepest pathos. His professional escutcheon is

without a stain; himself the sense of honor, he was keenly alive to the honor of his profession. He set his face like a flint against the practice of contingent fees. I have known him on more than one occasion return a very large fee, such was his delicacy in all money matters. His emoluments as district attorney of the United States were but eight hundred per year. He was not a mere money maker, he argued a case for the principles it contained.

Mr. Meredith was a great debater. He ought to have been in the Senate of the United States. His efforts in the Constitutional Convention which framed the present law of Pennsylvania, established his reputation in this State.

In the present Constitutional Convention he was selected as chairman, but stayed there, alas! too long; he died in harness, and died, as he would like to have died, in the public service.

Mr. Hazlehurst said:

He would add a very few words to what had already been said in reference to the estimable man whose death had occasioned this meeting. A useful and valued life had been brought to a close—an honorable counsellor had fallen. The members of the profession will cherish his memory with affectionate recollections. Our community will hold in grateful remembrance the faithful performance of all the duties which were imposed upon him. They were all well performed, having reference to their interests and to his character. As an advocate he was unsurpassed. Loving his profession, he at all times maitained its dignity and the rights of its members.

His charming manners, simple habits, and pure life secured for him the confidence of the people of the city of his birth and affections—he never betrayed them. No suspicion ever reached any act of his. His course was onward and upward. In your councils, as a member of the Legislature, called upon on two different occasions to aid in reforming the organic law of this commonwealth, and, dying, it may be said, with the baton in his hand, he was the bright exemplar of all that was faithful and true. It is here that the great loss is felt—the loss of his exemple.

Judge Ludlow addressed the meeting as follows:

Upon Monday last it became my duty as a public officer to pay a tribute of respect to the memory of William M. Meredith. Now I mingle with my brethren of this bar to pay a like tribute, as a lawyer and as a man, to the memory of one who was my master, benefactor and friend.

More than thirty years since, as a youth, I was introduced to this great leader of our bar, and from that time to this I enjoyed his friendship. Of the many students who received his instruction during my time, six have died, while of the remainder, two are at this bar at this time (though not in active practice), and I find myself to-day the only surviving representative of that office. Judge Hare preceeded me, and I regret that his absence from the city prevents his attendance today. Mr. Meredith was a conscientious teacher. He taught to his students the doctrines of the common law, and moreover imbued their minds with true principles of honor. He rigidly examined such of his students as desired it from October to May in each year.

The most striking characteristic of Mr. Meredith was strength. His large and commanding frame attracted the attention of every one. In the calm quiet of the office, in the social circle, and as he approached the bar of the court, his very appearance commanded your notice, and his robust constitution enabled him to contend against a disease which would long since have terminated the career of any ordinary man. As some one has elsewhere said, "He was before you like a column, on which no ordinary weight of public burden might be safely laid." The very lines of his countenance, the flash of his eye, betokened no ordinary decision or strength of purpose. His intellect was strong; its rugged proportions were toned down by cultivation, but his logic was profound, his analysis like a sledge-hammer, and woe betide the antagonist who misunderstood the strength of the one or the perfection and power of the other. His will was strong. He aimed at the truth, and would reach it if success were possible. Even his wit had an element of strength about it which was wonderful, and I have witnessed on more than one occasion the utter discomfiture and overthrow of an antagonist by the use of this, in his hands, most powerful weapon. His affections were strong. To any one who looked upon his large frame and rugged features, this remark might be considered inappropriate, but by those who knew him in social life, his students, his associates, and his family, I know the truth of the remark will be admitted.

It will not do to draw aside the veil which divides his family from the world; but I can and will say that when, as a student, I saw the manifestations of his regard for his family, especially his younger children, no one could doubt the strength of his affections, or cease to admire the man who could amuse his children as only a great man can do. But his affections were not restrained to the limit of the family circle—they went beyond it, and I have especial reason thus to speak; for, in addition to that kindness which marked my daily intercourse with him, it is impossible to forget the moments of my life when, with a firm purpose and the strength of his great manhood, he stood beside me as my benefactor and friend. The voice of eulogy cannot reach him now. The admiration of this world counts as nothing, but turning my eyes heavenward I can and will exclaim, may God's riches blessings descend upon his children, and his children's children, from generation to generation!

Only last spring our deceased friend spoke to me concerning the state of his health. He knew that his disease was fatal, and that at any moment he might cease to live, but like such a man he calmly surveyed his approaching dissolution, and he died as calmly as shuts the eye of day at eventide, or as dies a wave along the shore.

He has departed, but shall we call his dissolution death? Ah no, of such a man, adorned by every virtue, with the sacred poet may we not truly say:

> "It is not death to die,
> To leave this weary road,
> And with the brotherhood on high
> To be at home with God."

Mr. Charles H. A. Essling said:

He hoped it would not be deemed inappropriate for the younger members of the bar to add their tribute to the memory of the deceased. He, as among the last line of students, thought it proper to make a few remarks, as upon the death of the sire, the youngest as well as the oldest receive alike their heritage of grief.

When a student, the speaker, while sitting in Mr. Meredith's office alone, often thought that his clients were not laymen, but lawyers, great lawyers, who went to him for advice.

After he was admitted he went to his preceptor with some knotty question, simple to an older lawyer, but knotty to a beginner, and his explanation was so plain and simple that it almost caused doubt of his great legal ability; it seemed but the voice of his good common sense. Especially to the younger members of the bar is he commended for his example. The speaker closed with an epitaph, touching in its reference to the life and death of the departed.

Upon the conclusion of Mr. Esling's remarks the question was put upon the resolutions given above, and they were adopted. The blank in them was filled with the number seven, and the chairman appointed the following gentlemen as the committee.

Chief Justice Read, Judge Cadwalader, Judge Ludlow, Henry J. Williams, Esq., Hon. Eli K. Price, Hon. Peter McCall, and Hon. William A. Stokes.

To these were added the officers, and the meeting then adjourned.

TWENTY-FIRST JUDICIAL DIST.

Court of Common Pleas, Schuylkill County.

MINERS' TRUST CO. BANK v. JAMES WREN, JOHN T. NOBLE, AND MATTHEW RHODA.

W., N. & R. formed a co-partnership for the single purpose of erecting a furnace for the Emaus Iron Co. They borrowed for partnership purposes, $15,000 from the Miners' Trust Company Bank, for which they gave their joint judgment obligation, and also deposited with the bank, stock of the Emaus Iron Co. as collateral security. The partnership was dissolved before the work was completed, and a short time thereafter W. was declared a bankrupt. His assignee in bankruptcy sold his real estate, at which time notice was given of the above judgment. On petition presented by the purchaser for a rule to show cause why the real estate bound by the lien of said judgment, including that of N. and R., should not be sold in the proportion or in the succession that the owners were liable to contribute to the payment of said judgment, otherwise on the payment of the judgment, that the Miners' Trust Company Bank might be compelled to assign the judgment and the collaterals for such uses as the court might direct.

Held:

1. That as between the original parties, until there was a final settlement of the partnership business the court would not subrogate W. to the rights of the plaintiff in the judgment, notwithstanding the agreement of N. and R. to pay the partnership debts, it being alleged that the partnership transactions were unsettled, that W was a debtor to N. and R. in a large amount, and that the consideration for the promise of N. and R. to pay said partnership debts had failed.
2. That the purchase of the real estate having been made with notice of the judgment, was made subject to its payment by the purchaser, and that he had no claim to subrogation or contribution.

Legal Chronicle.

Opinion delivered by PERSHING, P. J.

The material facts in this case are as follows: James Wren, John T. Noble and Matthew Rhoda, in July, 1870, made an agreement by which they became partners, under the firm style of James Wren & Co., for the erection of a furnace for the Emaus Iron Company, and for no other purpose. Of this firm Mr. Wren was the treasurer. The interest of Wren in this contract was the one-half, whilst Noble and Rhoda jointly held the other half. Before the work was completed, viz., on the 16th October, 1871, this partnership was dissolved. By the stipulations of the agreement Noble and Rhoda were to pay all the debts due by the firm of James Wren & Co. It was also agreed that the agreement dissolving the partnership should be a "final and complete settlement of the affairs of the partnership of James Wren & Co., and of all claims and demands of each partner upon the others, arising out of the said partnership." The settlement being made, as expressed in the agreement, "with the understanding that all moneys and stock received by said James Wren, as treasurer of the firm of James Wren & Co., have been applied by him for the benefit of said firm, and any mistake or error in that particular was to be corrected, notwithstanding the settlement." This was followed on the 18th of October, 1871, by the receipt of Noble and Rhoda to James Wren for the books, papers, cash book, receipts, &c., of the firm of James Wren & Co., which the receipt states, were compared and found to be correct. On the 25th October, 1871, James Wren was adjudged a bankrupt.

During the time the firm of James Wren & Co. was in existence, viz., on July 7th, 1871, James Wren, John T. Noble, and Matthew Rhoda gave their judgment, obligation to the Miners' Trust Company Bank of Pottsville, for the sum of $15,000, which money was borrowed from the bank for the purposes of the partnership. Upon this judgment was entered on July 10th, 1861, in the Common Pleas of Schuylkill county, to No. 206, September term, 1871, the obligation having one year to run from its date. At the time this money was borrowed there was deposited with the Trust Company Bank, as collateral security for the payment of the loan, 302 shares of the stock of the Emaus Iron Company, of the par value of $50 per share, all of which stock was issued in the name of James Wren & Co., and taken by them on account of their contract for the erection of the furnace for that company. James Wren testifies that this judgment was one of the partnership debts which Noble and Rhoda agreed to pay, and that upon its payment by them, they were to receive the stock left as collateral security. Lewis C. Dougherty, assignee in bankruptcy, on the 23d March, 1872, sold three lots of ground situate in Pottsville, as the property of James Wren, to John W. Roseberry, Esq., for the sum of ten thousand dollars ($10,000), which sale was confirmed by the United States District Court. On September 3d, 1872, Mr. Roseberry presented his petition to the court, setting forth his purchase of said three lots of ground "in trust for others," that at the time of the sale by the assignee, the judgment of the Miners' Trust Company Bank was a lien on said real estate, and still was at the date of the petition a lien on said real estate, as also

a lien on the real estate of John T. Noble and Matthew Rhoda; that he was informed and believed that Wren, Noble and Rhoda had given or assigned to said Trust Company Bank 151 shares of the Emaus Iron Co., of the par value of $15,100, as collateral security for the judgment held by said bank; that in law and equity the real estate and collaterals of the said John T. Noble and Matthew Rhoda shou'd contribute their proper proportions towards the discharge of said judgment, and praying for a rule on said Miners' Trust Company Bank to show cause "why they should not levy upon and make sale of the said real estate and collaterals liable to execution for the payment of said judgment, in the proportion in which the properties of the said James Wren, John T. Noble and Matthew Rhoda shall in law or equity be liable to contribute towards the discharge of the said judgment, otherwise upon the payment of such judgment to assign the same together with such collaterals for such uses as the court may direct."

This application is based on the 9th section of the act 22d April, 1856, Purd. Dig. 827, pl. 40. This section provides that "whenever the real estate of several persons shall be subject to the lien of any judgment to which they should by law or equity contribute, or to which one should have subrogation against another or others, it shall be lawful for any one having right to have contribution or subrogation, in case of payment, upon suggestion by affidavit and proof of the facts necessary to establish such right to obtain a rule on the plaintiff, to show cause why he should not levy upon and make sale of the real estate liable for the payment of said judgment, in the proportion or in the succession in which the properties of the several owners shall in law or equity, be liable to contribute towards the discharge of the common incumbrance, otherwise upon the payment of such judgment, to assign the same for such uses as the court may direct, and the court shall have power to direct to what uses the said judgment shall be assigned," &c.

In deciding this application, we can assign Mr. Roseberry no better position than that occupied by James Wren at the date of the sale. It must be remembered that the judgment held by the Miners' Trust Company Bank was given by the members of a firm, for money borrowed for and used in the partnership business, as is shown by the evidence. Each partner is liable to pay the whole of the partnership debts, to the last acre and the last shilling, says Lord Eldon. As between partners there can be neither contribution nor subrogation. Bailey v. Brownfield, 8 H. 41, is a case in point. It is there held that where partners borrow money to be used in the business which they are jointly carrying on, it becomes a partnership fund, and no matter how they stand on the security given to the lender, they are accountable to one another as partners. The relation of principal and surety has no place between them. It is not the law that a partner, after paying a partnership debt, may be substituted to the rights of a creditor against his copartner. If as between the joint debtors themselves, there is a superior obligation, resting on one to pay the debt, the other after paying it may use the creditors' security to obtain reimbursement.

The reason why subrogation is not allowed to one partner as against his copartners, or to one merely a joint debtor as against his co-debtor, is because that as between them there is no obligation resting upon one superior to that which rests upon the other. McCormick's Administrator v. Irwin, 11 Casey, 111.

By the terms of the agreement dissolving the partnership, Noble and Rhoda agreed to pay the partnership debts of James Wren & Co., and thus took upon themselves the superior obligation, the effect of which was to fix themselves as principals and Wren as the surety, the transaction between them stopped at this point. It is well settled that a binding agreement by which one copartner or co-contractor assumes the debt or agrees to bear the whole burden of its payment in discharge of the rest, will give rise to the relation of principal and surety, and with it to the right of subrogation to the remedies of the creditor on the one hand, and to that of discharge on the other, if those remedies are wrongfully impaired or surrendered. 1 L. E. C. Equity, 153. But the right of subrogation or of contribution is subject to principles of law which are presented by the testimony taken on this rule. Where the original debt springs from a partnership transaction, there can be no substitution before a settlement of the partnership accounts, clearly evincing that the partner whose estate has been taken in satisfaction for the partnership debts, in defeat of his individual creditors, was not indebted to his fellow, and that no countervailing equities existed in the latter. And the duty of showing this devolves on the party claiming to be substituted, in the clearest manner. Sterling v. Brightbill, 5 W. 229; Gerhart v. Jordan, 1 Jones, 325. If the surety be also a debtor, he has no claim to be substituted. It has been repeatedly held that care must be taken to make no order of substitution or subrogation where injustice would be done the plaintiff or other parties whose interests are involved. In the case now before us, James Wren testifies that he complied with the conditions stated in the agreement for the dissolution of the firm of James Wren & Co., and that there has been a final settlement of the partnership business. In flat contradiction of this, John T. Noble testifies that Mr. Wren has not complied with the conditions on which the dissolution was to be a settlement of their partnership transactions; that he is indebted on these transactions to Noble and Rhoda to the amount of about nine thousand dollars ($9,000), and in effect, that the consideration upon which Noble and Rhoda agreed to pay the firm debts of James Wren & Co., has failed. Here is a conflict in the evidence which cannot be decided one way or the other in this proceeding. But until it was settled, if James Wren himself were making this application, that the joint business in which he and Noble and Rhoda were engaged has been settled, and that he (Wren) was not indebted as alleged in the deposition of Noble, it is clear from all the authorities that he could demand neither contribution nor substitution. To allow either might be to destroy countervailing equities existing in his former partners.

But there is another ground which we think fatal to this application. Mr. Roseberry purchased the real estate of James Wren, subject to the judgment of the Miners' Trust Company Bank. Assignees in bankruptcy take the property of the bankrupt, subject to the liens legally and *bona fide* existing as against him. James on Bankruptcy, 4'. The 14th section of the bankrupt law authorizes the assignee to sell the real estate subject to a mortgage, lien or other incumbrance. An assignee in bankruptcy succeeds to all the rights and interests of the bankrupt, to precisely the same extent that the bankrupt himself had, subject to and affected by all the equities, liens, and incumbrances existing against them in the hands of the bankrupt, and the same rule applies to the purchaser at the assignee's sale of the bankrupts effects. Strong v. Clawson, 5 Gilman, 346. It is part of the evidence that at the sale made by the assignee in bankruptcy of Mr. Wren, verbal and written notice was given of the existence of the judgment of the Miners' Trust Company Bank. Mr. Roseberry acknowledges it to be a subsisting lien in his petition. That his purchase was made subject to this judgment is clear. What, then, is the legal position of the purchaser? The authorities seem to answer this question fully. One who purchases subject to a prior mortgage and pays it off, does no more than his duty. Taking an assignment is fruitless for the purpose of collecting the amount from the mortgagor's assigned estate. Cooley's Appeal, 1 Gr. 401. In Hansell v. Lutz, 8 H. 284, the court says: The land was sold by the sheriff charged with the payment of the mortgage. How would this be usually and naturally understood? Unquestionably that the purchaser shall discharge the mortgage, and not that he will do it if the mortgagor should fail to pay his bond. On this account the land always sells for at least the measure of the mortgage debt less than its value. Hence it follows that the purchaser in thus buying the land, undertakes the duty of paying the mortgage, not personally but so far as the land is sufficient for that purpose. It follows also that if the obligor pay the debt, he may claim subrogation to the mortgage, else the purchaser would unjustly hold the land without having paid the entire consideration. This is explicit. Mr. Roseberry has virtually retained purchase money to the amount of this judgment. In paying it he succeeds to no right of contribution or substitution. He stands in no better attitude than if he had bought this real estate at private sale, with an obligation on his part to pay the liens against it.

Rule discharged.

For rule, *John W. Ryon, Lin Bartholomew, A. W. Schalck* and *J. W. Roseberry, Esqs.*

For Noble and Rhoda, *Wm. B. Wells*, and *Whitney & Wells.*

For Miners' Trust Company Bank, Messrs. *Hughes & Farquhar.*

For L. C. Dougherty, the assignee, *John W. Bickel, Esq.*

Supreme Court of N. H

[We are indebted to John M. Shirley, Esq., for a vanced sheets of 52 New Hampshire Reports, fr which we select the following.]

SOUTH HAMPTON v. FOWLER.

1. Where land and the franchises of a town contai ing it were granted to the same persons by the sa charter, this was held to vest no title to the land the town as a municipal body.
2. A town acquires no title, by virtue of its act of i corporation, to land within its limits not befo granted.
3. If the title to lands in Hampton not granted to i dividuals was in the town, and a new town w formed within its limits containing the land, t title still remained in Hampton; affirming the d trine of Union Baptist Soc. v. Candia, 2 N. H. 20.
4. Votes of a town in possession of land, showing claim of title, are admissible, as giving a charac to its possession; but where there is no eviden of possession, they are inadmissible.
5. Records of a town which holds land as a priv corporation, unless accompanied by possession, a not admissible, even against a stranger, to pro that the town claimed the title.

BELLOWS, C. J. It is contended by tl plaintiffs' counsel, that, by the charter incorporation granted in 1742, the unocc pied lands within its limits became tl property of South Hampton.

It will be perceived that the royal go ernor did not undertake to make a grant of land, within the bounds describe to the town, or to any person, but simp to make the inhabitants of that territo and their successors a body corporate.

It is urged that the body corpora thus constituted, at once acquired title all the lands within its limits not befo granted; and to sustain this position t plaintiffs rely much upon the views e pressed by Judge Bell, in Willey v. Por mouth, 35 N. H. 310, and by Judge Ea man, in Forsaith v Clark, 21 N. H. 41 The remarks of Judge Bell had relati to the rights and votes of the town Portsmouth soon after it had come und the government of Massachusetts in 164 and he said, "It is matter of history th the towns of this province at that tir claimed the fee of the lands within the limits, which were not granted to indiv uals. Some portion of the lands in Por mouth was held under grants by Mas or his agents; but the titles general were not under Mason, but under gran of the town. It was nearly a century aft this that the distinction began to be ma between the town and the proprietar The town exercised the rights of own and, whether well or ill founded, it w acquiesced in, and not disputed."

These remarks applied obviously to t origin of land titles at that early peri and in that part of the State which w included within the original limits of wh was afterwards known as Dover, Por mouth, Exeter, and Hampton. Th never could have been intended to be a construction that should give to a to the title to land which was granted to dividuals. In Forsaith v. Clark, Jud Eastman suggests that, in the early gra of townships in this province and Massachusetts, the grant of the land a the franchises of the town were made the same persons by the same chart and that the power of the grantees ov the land was exercised by them in th character of a town corporation, and n as a proprietary distinct from the tow and that the very early records of anci towns show that the entire managem

of the business of the proprietary was conducted in the town meetings until after 1730.

It will be perceived that here is no suggestion that the title to such land was in the town as a municipal body, but that the proprietary, down to 1730, exercised its power over its lands through the town organizations. So long as the grantees of the land and the inhabitants of the towns were the same, it is quite reasonable to suppose that the distinction should not always have been preserved; but for a very long time the distinction has been kept up, and the proprietary meetings have ever been largely held in towns other than those in which the lands lie.

We think, then, that in cases of this sort there can be no ground for a valid claim by the town to the land so granted to a proprietary, even although the same individuals are incorporated into a town by the same grant. Neither can we entertain the opinion that by the mere act of incorporation of individuals settled upon a particular territory, the town acquires the title to the land not before granted. By such incorporation the inhabitants acquire the ordinary municipal rights and privileges of a town, but acquire no title to land, unless it be provided for in the grant. Such acts of incorporation are very numerous in this State, arising out of the divisions of towns; and it has never been supposed that the title to land is affected by such incorporation unless special provision for it is made. If it were otherwise it would be fatal to the plaintiffs' case, as Seabrook was incorporated in 1768, and the lands in question are there.

We must, then, look beyond the mere charter of South Hampton, granted in 1742, for evidence of its title to the land in question; and with this view the plaintiffs' counsel urges that, by the common law of this State, the title to all the lands in the southeastern part of the State was in the settlers, collectively, before they were incorporated as towns, and that the charters simply organized the proprietors of the common and unoccupied lands without vesting any new title. In respect to the towns once known as Cochecho or Northam, Strawberry Bank, Squamscott, and Winnicumett, and now known as Dover, Portsmouth, Exeter, and Hampton, it is unquestionable that they claimed and exercised the right of disposing of the lands within their respective limits, and the titles thus granted have been to a large extent acquiesced in or otherwise established.

It would seem, indeed, that until their union with Massachusetts in 1641, which was the result of their own voluntary act, these towns exercised separately, as little democracies, most of the powers of government, including the right of granting the lands within their limits. At an earlier period than 1641, the colony of Massachusetts, as shown by their provincial records, exercised jurisdiction over what was then called Winnicumett, now Hampton, and those records furnish some evidence that the settlement of that town was commenced under authority of that colony in 1638; and by the same authority, in March, 1639, it was made a town with the usual town privileges, and the disposition of the lands within its limits was committed to the freemen thereof.

These acts of the Massachusetts colony were recorded in the first book of the records of Hampton, and the powers committed to the town were unquestionably exercised.

These four towns, which thus exercised the power of granting the lands within their limits, were much greater in extent than the present towns of those names, and, indeed, for some years comprised all the settlements in the province of New Hampshire, the territory beyond their limits being regarded as the great waste. These towns remained under the government of Massachusetts until 1679, when they were severed from it by the crown and made part of the province of New Hampshire.

The town of Winnicumett, soon changed to Hampton, embraced what is now North Hampton, South Hampton, Hampton Falls, Kensington, Seabrook, and perhaps other territory, all taken at different times from Hampton, which is now a small town.

If the title to the lands not granted to individuals was in the town of Hampton—as perhaps might be inferred from the fact that it had the power to grant the lands within its limits—then, according to the doctrine of Union Baptist Society v. Candia, 2 N. H. 20, the title still remained in Hampton, notwithstanding the lands, by a division of the town, may have fallen within the jurisdiction of a new town; and such is the law in Massachusetts. Windham v. Portland, 4 Mass. 389; Hampshire v. Franklin, 16 Mass. 86.

The same doctrine is applied to lands held by a parish for the use and support of the ministry; and the title in the old parish is not affected by the formation of a new one, even although the land fall into the new parish. Brunswick v. Dunning, 7 Mass. 445; and see Newmarket v. Smart, 45 N. H. 87, and cases cited.

If this doctrine is not to be recognized here, but the title is held to vest in the new town where the land happens to fall, then it would still be fatal to the plaintiffs' claim to recover, as the lands lie within the incorporated town of Seabrook, even if that town was formed out of South Hampton, as the case seems to assume, although the act of June 3d, 1768, assumes to form the parish of Seabrook from the southerly part of Hampton Falls parish, which appears to have been incorporated in 1712.

However this may be, whether Seabrook was in whole or in part taken from South Hampton, as would be inferred from the boundaries given in the charter of the latter in 1742, it is wholly immaterial in this view of the case.

If the title to the lands within its limits did not vest in Hampton, there is obviously no ground for claiming that the lands in South Hampton vested in that town by virtue of any usage or State common law; for it is only from the powers exercised by Hampton and the other three towns that the existence of any such right could be deduced. Without a reference to the history of these ancient towns, no plausible ground could be found to uphold the plaintiffs' claim that the title to the ungranted land vested in the town within the limits of which it was situate. Whether or not the title to such lands was vested in these ancient towns, we give no opinion; but if it did, we think it does not show a title in South Hampton to lands in Seabrook, which was once part of Hampton. We have thus referred to the existence of these ancient towns, and the fact that the towns of Seabrook and South Hampton were formed out of Hampton, upon the ground that these facts are shown by public statutes of which courts may judicially take notice. Winnipiseogee Lake Co. v. Young, 40 N. H. 429.

If the town of South Hampton entered upon the lands in question claiming title, it could, like any private person, maintain a suit against a mere wrong-doer, and, upon proving such entry and possession, any votes of the town showing a claim of title would be admissible, as giving character to that possession—much the same as the payment of taxes on land by one in possession of it. Hodgdon v. Shannon, 44 N. H. 576, and cases cited; Farrar v. Fessenden, 39 N. H. 277. The payment of the taxes is admissible only to give a character to the possession, and without the possession it would not be admissible.

The evidence offered in this case by the plaintiffs, and rejected, went to show that the town, by its votes, claimed title to the land. Had this been accompanied by proof of possession, it would clearly have been admissible; but no such proof was offered.

This raised the naked question whether proof of an assertion of title by the town is competent evidence against a stranger.

So far as respects the land in question, the town holds it, if at all, substantially as a private corporation, and not as a municipal corporation, created by the government for the purpose of executing public duties, exercising, in fact, a portion of the sovereignty of the State; but it holds the land for its own benefit, and by virtue of some special law or usage which authorizes, but does not require, the town to hold it. This distinction is well defined in Eastman v. Meredith, 36 N. H. 296, where the cases are cited and examined. It is the doctrine, also, of Oliver v. Worcester, 102 Mass. 489.

The land, then, being held as by a private corporation, the records of the town are not admissible to prove that the town claimed the title, unless it was accompanied by possession; for, although the records are competent to prove the acceptance of a charter, the organization of the corporation, the election of officers, and other corporate acts, yet in matters of a private nature they are not admissible in support of its own claims against a stranger, or even against a member who holds adversely and not under the corporation. So it is laid down in Wheeler v. Walker, 45 N. H. 358, and in several authorities there cited. Such is the doctrine of Angel & Ames on Corp. 605-7, and cases cited; and so is Haynes v. Brown, 36 N. H. 567, and Jackson *ex dem.* Donally v. Wales, 3 Johns. 226.

Of course, if the corporate act of the town became material, as to show the appointment of an agent to make entry upon the land and the like, the record would be the proper evidence so to show a claim of title to give character to an entry; but the difficulty here is, that the offer was to show a mere naked claim without any entry, and that being the case, it was properly excluded. The testimony offered by the plaintiffs from the selectmen's books may have tended to prove possession in the town, and we think was competent and had it been received, the testimony from the records offered by the plaintiffs would also have been competent; but it does not appear in the case that the plaintiffs excepted to the exclusion of this evidence offered from the books of South Hampton. This, however, is of little importance, as the nonsuit is to be set aside if the plaintiffs so elect. If the plaintiffs had excepted to the exclusion of this testimony, the nonsuit would have been set aside. It is urged that the title of South Hampton is recognized by the act of June 26th, 1822; but we are unable to see how a provision, that land in Seabrook owned by South Hampton shall be exempt from taxation so long as so owned, can be regarded as confirming any title upon South Hampton, where, as the case stands, the title to the land in question must be regarded as in Hampton or else in Seabrook, if, indeed, it had ever passed from the original proprietor.

Unless, then, the plaintiffs elect a further trial, there must be judgment on the nonsuit.

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE AMERICAN EXCHANGE BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to three million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled the INDEPENDENCE HALL BANK, to be located in Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE DRY GOODS BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE ARTISANS' BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE MARKET BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE DELAWARE RIVER BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania, to be entitled THE GROCERS' BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the conferring of the powers of a Bank of Deposit, Discount and Issue upon the Philadelphia Banking Company, incorporated in accordance with the Act of Assembly approved March 11th, 1870, and an increase of capital to five million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation, in accordance with the laws of the Commonwealth, of THE SECURITY BANK, to be located in Philadelphia, with a capital of fifty thousand dollars, with the right to increase the same to five hundred thousand dollars jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE THIRD STREET BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with a right to increase the same to twenty-five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE CHESTNUT HILL BANK, to be located at Philadelphia, with a capital of fifty thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE STATE OF PENNSYLVANIA BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to ten million dollars. jul 4-6m

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Supreme Court of Pennsylv'a.

MORGAN v. NEVILLE.

M. was indebted to N. for wages. Whilst M. was in Maryland this debt, without any collusion of his, was attached and he was summoned as garnishee. M. at once notified N. of the attachment. Judgment was given against M. by default. In an action by N. against M. to recover the wages, *Held*,

1. The proceeding being in the nature of a foreign attachment both M. and N. were bound by the judgment.
2. The statute of Pennsylvania exempting wages from attachment, was no portion of the contract between M. and N., and could not be pleaded with effect in Maryland.
3. The judgment in the attachment against M. was a defence *pro tanto* in the present action.

Error to the Court of Common Pleas of Somerset county.

Opinion by AGNEW, J. Delivered July 2d, 1873.

This action, in the court below, was for the wages of labor performed by George Neville for Wm. Morgan, a contractor upon the Sand Patch Tunnel in Somerset county. Morgan set up a payment made by him as garnishee of Neville, in an attachment issued by a justice of the peace of Alleghany county, Maryland, in favor of one Michael Shannon, served on Morgan in Maryland, and judgment against him by default. All the parties were residents of Somerset county, Pennsylvania, but there was no evidence of collusion or combination between Shannon and Morgan, to evade the Pennsylvania statute as to the wages of labor, by going into Maryland for the purpose of having the attachment executed. We must, therefore, assume that the Maryland proceeding was *bona fide*. The court below held that, because Neville, the plaintiff below, was not in Maryland and was not served with notice, he was not affected by the judgment in the attachment, and that the Maryland court ought to have enforced the Pennsylvania act, exempting the wages of labor from execution. In both of these respects the learned judge fell into error. Upon the first point, the judge seems to have misapplied the doctrine of Steel v. Smith, 7 W. & S. 447, which decided that a judgment *in personam* in a foreign attachment against a vessel, under the civil code of Louisiana, was not binding, and would not be enforced in Pennsylvania, and that the Louisiana court not having jurisdiction of the person of the defendant, the record was not within the protection of the 1st section of the article of the Constitution of the United States, requiring full faith and credit to be given in each State, to the public acts, records, and judicial proceedings of every other State. But Steel v. Smith concedes jurisdiction in the attachment over the property of the defendant within the State of Louisiana; and this is the only feature in that case applicable to this, the defendant below claiming credit only for the money paid by him under the Maryland attachment. There being no collusion, Shannon, though a citizen of Pennsylvania, had a right to sue out his attachment in Maryland. He falls within the words and spirit of the 1st clause of the 2d section of the 4th article of the Constitution of the United States, that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. One of these is the right to institute actions of any kind in the courts of another State; Corfield v. Coryell, 4 W. C. C. R. 380, 1. Shannon went into Maryland, a right he had under that clause, and there made the affidavit required by the Mayland statute, and sued out his attachment. So far then the magistrate had jurisdiction. The attachment was served personally on Morgan, the debtor of Neville, when found in Maryland. A citizen of Maryland would have an undoubted right to serve his attachment on Morgan had he found him there, in order to secure his debt against Neville; and he having this right, Shannon has the same right under the Constitution of the United States. The debt to Neville was therefore legally attached, and the jurisdiction of the Maryland justices court vested fully without notice of the writ to Neville. In foreign attachment (and this proceeding is in the nature of a foreign attachment) notice is not given to the defendant by service of the process, for the valid reason that he cannot be served, and service on his property or on his debtor is all that can be had, in the nature of the thing. The garnishee must give notice to his own creditor, if he would protect himself; and this he did in this instance, the next morning, as proved by himself and by Neville.

The Maryland tribunal having jurisdiction, it was not error to disregard the Pennsylvania act, exempting the wages of labor from attachment in the hands of the employer. The act of 15th April, 1845, P. L. 459, is a supplement to the act relating to executions, and the proviso in the 5th section has relation to the remedy for the collection of debts. It forms no part of the contract itself under which the labor was performed, though the contract was subject to it, and was limited thereby, in this State, in the means of recovery after judgment for the debt. Not being part of the contract, the Pennsylvania statute was not imported with the debt into the Maryland forum, but the remedy there was regulated by the Maryland statute, which gave an exemption to the wages of labor of the sum of ten dollars only. Besides, how could the Pennsylvania act be known in the Maryland forum, without proof or pleading it? The garnishee made default and judgment was given without evidence and without a plea of the Pennsylvania act. It was an error then, to hold, that the Pennsylvania act exempted the debt from the attachment.

Though not noticed in the opinion of the judge upon the reserved question, it is contended here, that the record of the judgment is defective in showing no judgment against the defendant or the garnishee, but only a judgment of condemnation against the property or debt. But the judgment is a judgment *in rem*, and therefore against the property or debt, and according to the 13th section of the Maryland code, which says if neither the defendant nor garnishee in whose hands the property or credits may be attached, shall appear, at the return day of the attachment, the court may *condemn the property and credits* so attached, and award execution thereof. And by the 37th section, the judgment of condemnation is made pleadable in bar, in any after action brought against the garnishee by the defendant.

It is now also objected, that it does not appear by the record, that the plaintiff gave the notice required by the 4th section, by setting up, at three or more of the public places in the district or ward, an affidavit and copy of claim and copy of the attachment. But the 42d section provides, if the defendant or garnishee shall not show cause against the attachment, the justice may condemn the property, provided he is satisfied by the oath of the plaintiff or by other proof, that the notice required above has been given. As the proof is thus, by the statute, a mere preliminary to judgment, and not a return of process to appear in the record, but is heard at the trial, the presumption in favor of judicial acts, that they have been rightly done, comes to the aid of this proceeding. We cannot presume that the justice gave judgment contrary to the statute and to his duty, but must presume he was satisfied by the oath of the plaintiff or other proof, that the plaintiff had done all that was requisite to entitle him to judgment. The return to the attachment itself is full and complete, and made by the constable, the proper officer. This being a proceeding before a magistrate, a presumption in favor of the regularity of his proceeding, is more necessary, and is strengthened by the 35th section of the code, declaring that no special pleading shall be required before a justice of the peace. This carries a belief that Maryland law as well as our own, looks benignantly upon the proceedings before justices, whose want of knowledge of legal forms must often be their excuse for informalities.

Judgment reversed and a *venire facias de novo* awarded.

Hon. A. H. Coffroth, for plaintiff in error.

A. Holborn, Esq., for defendant in error.

Court of Common Pleas of Schuylkill County.

IN EQUITY.

WITTE v. THE PEOPLE'S PASSENGER RAILWAY COMPANY.

1. When a subscriber gave two of his acceptances payable at different times for stock, upon the agreement that if neither were paid he should have no interest in the stock, and if either were paid he should have a ratable proportion, *Held*: If he pay one of the acceptances, he is not thereby entitled to a certificate until the other falls due.
2. *Quære*. Whether directors can compel certain stockholders to pay their subscriptions in cash, and take the notes of others.
3. When the charter of a corporation provides that if assessments on stock are not paid within six months it may be forfeited, a court of equity will not restrain such a forfeiture at the suit of a delinquent stockholder, who has received notice of the assessment.
4. The company need not give notice that the forfeiture will be made.

Opinion by PERSHING, P. J.

The People's Railway Company was incorporated by act of Assembly of 4th April, 1865, subject to the general railroad law, passed in 1849. By the charter, the road was required to be completed in three years. A supplement was passed April 28th, 1871, extending the time for the making of the road, and under which a reorganization of the company took place. Up to that time, it appears nothing had been done in the actual construction of the railway. The plaintiff was not a stockholder till after the passage of the supplemental act of 1871. The entire list of stockholders now embraces six persons, and we have the affidavits of five of these in this case. The plaintiff seeks by his bill to restrain the company from transferring 416 shares of the stock, and asks for an order or decree to have the same delivered to him on his paying the amount unpaid on said shares. The plaintiff at no time has paid anything on these shares, as it appears from the evidence submitted at the hearing.

Waiving any discussion as to whether the plaintiff actually subscribed for the number of the shares of stock he claims in this company, it is established that there was an understanding between themselves, that each of the six stockholders should own, by subscriptions and allotments, an equal number of the 5,000

shares, into which the stock of the company was divided. Other undisputed facts are that the directors made an assessment of $5 per share, in cash, payable on the first day of September, 1871; and at that date the plaintiff was unable to pay the assessment on his stock, and that an arrangement was made by which he gave his two acceptances, or, as shown by the evidence, his promissory notes, the nature of which arrangement is best shown by the receipt given by the treasurer, as follows:

"Received, Pottsville, September 2d, 1871, of William H. Witte, his two acceptances, one for two thousand and eighty-eight dollars and fifty-one cents, and the other for two thousand and ninety-three dollars and fifty-two cents, at fifteen and thirty days respectively, which, when paid, will entitle him to have delivered to him eight hundred and thirty-three shares of stock in the People's Railway Company, with a credit of ten per cent. paid thereon. In case default of payment of said acceptances at maturity, then all claim in said stock will be treated as released, and in case of payment of one and not the other acceptances, then only a ratable proportion of said shares to be delivered to the said W. H. Witte. The said acceptances include interest thereon from date to their maturity.

$2,088 51
2,003 52

$4,182 03

(Signed,) "L. F. WHITNEY,
Treasurer People's Railway, Pottsville."

It is not disputed, that the acceptance at fifteen days was paid, and that on the maturity of the other, the time of its payment was extended for thirty days longer. The plaintiff admits that he did not pay this renewed obligation. The sufficiency of the reasons he assigns for not paying it, will be considered hereafter.

The defendants admit, as stated in the 7th paragraph of plaintiff's bill, that on the 23d day of February, 1872, the board of directors adopted a resolution directing the secretary to notify the plaintiff, that unless he paid the renewed draft within fifteen days, the 416 shares of stock (being the same now in controversy) would be sold, and that plaintiff would be held liable for any loss or deficiency that might arise on the sale of said stock; but defendants expressly deny that the meeting at which this resolution was adopted, was not duly and legally called, and aver that the same was called in strict accordance with the by-laws of the company. It is also admitted by the defendants, as stated in the 8th paragraph of the bill, that this stock was sold. It appears from the evidence that this sale was made on the 15th day of May, 1872, and that the purchasers (who are not named by defendants nor made parties by plaintiff) had paid the assessments, with interest, up to that date.

The plaintiff avers in the 6th paragraph of his bill, that "previous to the time of the maturity of the renewed draft, he demanded the delivery to him of 417 shares of stock, being the ratable proportion for which he had paid at that time," and that the delivery was refused by the company; and he alleges in the 9th paragraph, that it was in consequence of this refusal, that he, the plaintiff, refused to pay the said renewed draft at its maturity; that he has at all times been and is now ready to pay the amount of said draft, with interest, upon the receipt of said stock; that previous to the meeting aforesaid and alleged sale, the plaintiff tendered (and is ready to tender now) the amount of said draft, with interest, and demanded the delivery of the stock, but the defendants always refused to accept said money and deliver the said stock."

The defendants, in answer, aver in their affidavits, that the plaintiff was to receive 833 shares of the stock "on paying for the same as required by the board of directors;" and that by an agreement, to which the plaintiff was a party, no formal certificates of stock were to be issued until the full amount which the company might require to be paid thereon, should have been paid; that upon the latter ground, plaintiff had no right to make any demand for the delivery of stock, even had he not expressly agreed not to do so. Defendants also allege, that after plaintiff paid his first acceptance, he requested from L. F. Whitney, the secretary and treasurer of the company, certificates of stock on which he had paid $5 per share, and that on being reminded of the agreement that no regular certificates should issue, he, the plaintiff, agreed to receive, and did receive an informal certificate for such stock, the same as had been issued to other subscribers to the stock of the company. Defendants deny that the plaintiff refused to pay the renewed draft because of any refusal on the part of the company to deliver stock, as stated in the 6th paragraph of plaintiff's bill, and deny that plaintiff ever made any such tender as he alleges, and that he was at all times ready to pay the renewed draft. In proof of this they gave in evidence a letter of the plaintiff, dated November 2d, 1871, to L. F. Whitney, secretary, in which he states that he cannot arrange for the payment of his note, due on the 5th of that month, because he had only a certificate, and not the stock itself, and proposing a further extension for fifteen days, at which time he would be able to pay.

Now, looking at the facts which are admitted by both parties, has the plaintiff a valid claim to the 416 shares of stock he asks to be decreed to him? By his own agreement, as embraced in the receipt of L. F. Whitney, treasurer, dated September 2d, 1871, plaintiff was entitled to receive 833 shares of stock if he paid both acceptances; if he made default in the payment of both, all claim to the stock was relinquished; if he paid the one and not the other, then he was entitled to only a ratable proportion of said shares, and the company was released as to the balance of the 833 shares, by a fair construction of this contract. We think it also clear, that no demand could legally be made after the payment of the first acceptance, for a ratable proportion of the shares of stock, till after the date of the maturity of the second acceptance, and a failure on the part of the plaintiff to pay it. The plaintiff admits he made his demand before that time, and because he failed to receive a ratable proportion of the stock, he refused to pay his renewed obligation when it fell due afterwards, viz.: 2d or 5th of November, 1871. By his own act, the plaintiff lost his claim for any stock beyond that for which he now holds a certificate. The refusal of the company to comply with a demand which was made out of time, could furnish the plaintiff no excuse for the refusal to pay his renewed acceptance or note when it matured.

Was there a forfeiture of this stock under the act of 1849, to which the company was made subject? The plaintiff contends there was not, upon the grounds that the meeting of the 23d of February, 1872, at which notice was directed to be given to him, was not called in accordance with the by-laws of the company, and that he had not been in default for a period of six months, as required by the statute. The by-law provides that special meetings may be called by the directors as often as they may deem expedient. Other special meetings are to be called by the secretary, on the request of the holders of one-tenth of the stock of the company, and in these the purpose and object of the meeting shall be stated. The defendants aver that in the meeting called for February 23d, 1871, the by-law was strictly complied with.

A company in enforcing the payment of calls by forfeiture of the stock, must strictly pursue the mode pointed out in its charter, and the general laws of the State. This is a universal rule, which the courts will rigidly enforce. 13 Vesey, 428.

In this case, the second acceptance or note, as renewed, became payable on the 2d of November, 1871, or allowing the days of grace, on the 5th day of November, 1871. The sale was made of the stock on the 15th day of May, 1872, more than the required six months having elapsed since the renewed note became due, and the plaintiff was in default. We are not clear, however, that the taking of plaintiff's acceptances extended the time beyond the first day of September, 1871, from which the six months of default were to be reckoned. If this company was made up of a large company of stockholders, it might be proper to discuss the power of a board of directors to exact money in payment of assessments from the body of the stockholders, and favor others by taking their obligations and extending the payment of them from time to time. We have not met any decision on the exact point, but the general current of authority throws a strong doubt on the power of the directors of a corporation to make any discrimination between stockholders. They cannot accept from shareholders a sum of money in discharge of his liability to calls. 27 Eng. L. Eq. R. 575. Directors are agents with limited powers. All subscribers to the stock must stand on an equality. These points have been frequently decided. The discretion of the managers as to calls are modal, merely relating to the time and manner of making payment. Ger. Pass. R. W. Co. v. Fitler, 10 P. F. Smith, 132. It is not necessary to pursue this question. Here the number of stockholders is limited, and the taking of plaintiff's paper, and the extension of the time of payment, were done with the consent of all.

There is no provision in the charter of this company, nor in the general railroad law of 1849, which requires actual notice to a stockholder in default, before forfeiting his stock. The notice to the plaintiff of 23d February, 1871, was not necessary on the part of the company. The plaintiff, as a subscriber to the stock, and a member of the corporation, must be presumed to know its terms. It is not denied that the call for the assessment was duly made, and that the plaintiff had personal knowledge of it; and it is clear that six months had elapsed after his default before the stock was forfeited and sold to other parties. He has no right to any other or further notice. Ger. Pass. R. W. Co. v. Fitler, 10 P. F. Smith, 130. That equity will not relieve against such a forfeiture, has been a settled doctrine of the court ever since Sparks v. The Liverpool Water Works, 13 Ves. 438. At the expiration of six months, the time limited in the charter, the power of the managers to forfeit the stock was perfect, and the defaulting stockholder could claim no further delay, or any other notice than he had already received. Ger. Pass. R. W. Co. v. Fitler, *supra*. Nor is it necessary that the sale should be a public one, for, as it is held, the defaulting stockholder by the forfeit is relieved from future liability, and is not entitled to any surplus accruing from the same. Ang. & Ames, § 551.

There is another reason for dissolving the injunction granted on the filing of the bill in this case: All the equities of plaintiff's case are denied. That no injunction can issue or be continued where the equities of comlainant's case are denied, is a proposition too well fortified by reason and authority to be successfully attacked. Claplian v. White, 8 Ves. 35. Affidavits entirely responsive to a bill, must dissolve the injunction if granted, if they deny materially every fact alleged, though not with the particularity required in an answer. It is the universal practice to dissolve an injunction on an affidavit denying the facts and equity upon which it has been granted. Carpenter v. Burden, 2 Pars. 24, cited in Dull v. Holl, 1 Phila. R. 258.

And as a final reason for our present action, the plaintiff, if he at any time had a claim to this stock, has lost it by his own neglect to assert his right at the proper time. The action of the board of directors on February 22d, 1872, gave him notice of the contemplated action of the company. He made no effort to prevent the sale, nor has he taken any step since, till the filing of this bill, more than a year after the sale of the stock. When the first assessment was made in 1871, the company had neither road nor cars, and the stock was of no marketable value. Since then the road has been constructed and put into operation. That the stock is increasing in value, is asserted by both parties. The plaintiff now comes forward and claims 416 shares of the stock, upon which he has heretofore paid nothing, and asserts his willingness "to pay the amount unpaid on them," including, we suppose, the two additional assessments made by the directors since the one which was made payable on September 1st, 1871. The case of the Germantown Pass. R. W. Co. v. Fitler, 10 P. F. Smith, 124, is similar to this one in many of its features, and we cannot do better than quote the conclusion of the opinion of Judge Strong in that case: "It would be a strange equity thus to allow a party to speculate upon contingencies. The forfeiture relieved him from all the obligations of his subscription. The company could not

have pretended to enforce those obligations. Thus, he alone would be allowed to play fast or loose. Equity aids the vigilant and active, not the sleeping and indolent. Nothing, in the language of Lord Camden, can call forth this court into activity but conscience, good faith and reasonable diligence. When these are wanting, the court is passive and does nothing. Smith v. Clay, 3 Bro. C. C. 639, note." The preliminary injunction is dissolved.

Geo. R. Kaercher and *Chas. W. Wells, Esqs.*, for plaintiff.

Hughes & Farquhar, and *Lin Bartholomew, Esqs.*, for defendants.

DISTRICT OF INDIANA.

United States Circuit Court.

In re INDIANAPOLIS, CINCINNATI AND LAFAYETTE RAILROAD COMPANY.

When an estate was large, and all of the creditors except two desired it to be withdrawn from the bankrupt court, the court in the exercise of its equitable discretion ordered that the proceedings in bankruptcy should be dismissed upon security being given for the payment of the claims of the dissenting creditors.

Opinion of the court by DRUMMOND, J.

It is to be observed that there was no property in possession of the bankrupt court. Assignees had been appointed, but they were nominal, and were the same persons that were receivers under the order of the State court, and that of the Circuit Court of the United States; and all the property of the bankrupt was held by the receivers of the road, managed by them, and, of course, subject to all valid liens subsisting against the company; and if the property had been ultimately controlled by the bankrupt court, it, of course, would have been disposed of in such a way as to marshal the different claims and liens existing against the road, and they must have been paid according to their priority, the bondholders confessedly holding the first lien.

It was to avoid the sacrifice of so much property, which it was thought would be necessarily incurred, if it remained in the bankrupt court, that the stockholders made the arrangement which has been referred to, and which was assented to by all the creditors except only Charles Dwight and the Whitewater Valley R. R. Co., and the question is, whether with such an immense property, with so many and various liens and incumbrances upon it, and such a great preponderance both in numbers and amounts of those holding these liens, desiring the withdrawal of the case from the bankrupt court, it should be prevented by the opposition of the two creditors already named. It is quite clear that if the case had been wound up in the bankrupt court, and the property disposed of, the probability of its realizing anything for the two non-assenting creditors would not have been very great, as all these other claims would have first to be paid; and, in fact, there would be great doubt, perhaps, whether any portion of the floating debt would be paid, under which, of course, would be included that of the two non-assenting creditors, and, therefore, it may be a question whether it was not most for the interest of these non-assenting creditors themselves that the case should be withdrawn from the bankrupt court, and some arrangement made by which their claims could be satisfied, and thus leave this large property in the control of the company, with the assent of the other creditors, to be made available, if it can be, for the ultimate payment of the claims which might be brought against it.

It is also a question whether, in a case like this, it is for the interest of all the various parties that the property should remain in the bankrupt court, or be withdrawn from it. For example, there could be no controversy that it would be entirely competent for the party against whom a decree in bankruptcy was made, with the assent of all his creditors, to withdraw it from the bankrupt court, and the question is, whether the opposition of an insignificant portion of the creditors can prevent that result. I think that the bankrupt court, as a court of equity, has a full equitable discretion upon this subject, and can allow a case to be withdrawn from it, provided it is done without prejudice to the interests of any of the parties, debtors or creditors, who are before it. And in this case I think it was competent for the bankrupt court to allow the case to be withdrawn from it, protecting the interests of the different non-assenting creditors. And if the court had given the same protection to the claims of the Whitewater Valley R. R. Co. that it did to that of Dwight, this court would not feel inclined to interfere with the decree. The reason why the District Court made a distinction between the claims of the two non-assenting creditors was undoubtedly because that of the Whitewater Valley Railroad Company was not set forth so distinctly as the other, being somewhat vague and uncertain, and depending more or less upon contingencies. But it seems to me, as long as there was a creditor who *prima facie* had a claim against the bankrupt company which was liable to be proved, before the court could dismiss the proceedings, it should have given some security or protection to that claim. And it will be recollected that there was an allegation which was not denied, that the Whitewater Valley R. R. Co. had paid a considerable amount as drawer of bills of exchange, held by the Globe National Bank, and which, therefore, was a distinct and positive claim, either legal or equitable, against the bankrupt. And it is further to be observed, perhaps as a reason why the District Court made a discrimination between the claims of the non-assenting creditors, that the proceedings in bankruptcy had been pending some time; that all the other claims had been proved in the bankrupt court except that of the Whitewater Valley R. R. Co. Some excuse is given for the fact that these claims of the latter company were not proved in bankruptcy, that one of the assignees, who was also one of the receivers, had requested that the proof should be postponed and should not then be presented in the bankrupt court.

On the whole, then, it seems to me, that if the proper protection can be given to the claims of Dwight and of the Whitewater Valley R. R. Co., it would be unwise and contrary to the best interests of all concerned, for the property to remain in the bankrupt court; and that it is desirable that it should be restored to the company, to enable it, with the aid and co-operation of all the principal creditors, and that of the stockholders, to endeavor to retrieve itself from its present embarrassments. The property is very large, the business done is apparently quite profitable, and there is certainly strong reason for supposing that with time the company may be able to extricate itself from the load of debt which now oppresses it. It seems to me, therefore, nothing more than the exercise of a reasonable equitable power, which rests in the bankrupt court, to allow the case to be withdrawn from its jurisdiction, under circumstances like these, and giving adequate security to one or two parties holding claims, who are opposed to the withdrawal, from causes which do not fully appear, and which are either real or imaginary, but the prominent object of whose opposition is to coerce some settlement from the great mass of the creditors. Therefore, this court, while conceding the correctness of the principle upon which the decree of the District Court was made, will modify its order dismissing the proceedings in bankruptcy, and will allow it to be done upon the condition that the bonds which have been deposited for the security of Mr. Dwight shall be put in some safe place as indemnity for any decree or judgment which he may obtain for his claim against the Indianapolis, Cincinnati and Lafayette R. R. Company, they to remain until the case is ultimately disposed of by the highest court to which it can be taken; and in this particular instance, as Mr. Dwight is a citizen of Ohio, the court will require the suit to be brought in the Circuit Court of the United States for this district, and also upon the condition that adequate security is given for any claims which may ultimately be established by the Whitewater Valley R. R. Co., against the Indianapolis, Cincinnati and Lafayette R. R. Co.; the claims both of Dwight and the Whitewater Valley R. R. Co. to be presented and prosecuted with reasonable diligence, and in default thereof, any of the parties in interest to have the right to apply to the District Court for the withdrawal of the bonds and securities so deposited.

Decree accordingly.

Messrs. *Porter, Harrison & Hines*, for petitioners.

Messrs. *Baker, Hurd, Hendricks & McDonald*, for bankrupt and other creditors.

Recent Decisions.

PENNSYLVANIA.

[Our thanks are due to P. F. Smith, Esq., State Reporter, for advance sheets of Vol. 20 of his reports (Vol. 70 Pa. State Reports). We make the following selections from them.]

MICHELTREE et al. v. SWEEZY.

1. Shortly before the bounty act of March 25th, 1864, a meeting of citizens of a township at which the school directors were present, agreed that money should be borrowed for filling the township's quota. It was "understood and agreed" with the directors, that if the law should be passed they would levy a tax to pay the borrowed money. The money was borrowed. After the passage of the act of 1864, the directors adopted a resolution to levy a tax to repay it, and a warrant was issued for its collection. In 1866 an act was passed legalizing all the acts of the directors, and authorizing the collection of the tax, &c. This justified the levying and collecting the tax.

2. The resolution of the directors was an official recognition of the money raised to fill the quota, needing only a legal sanction to make it binding on the citizens, which the act of 1866 was.

3. Tyson v. Halifax, 1 P. F. Smith, 9, distinguished; Grim v. Weissenberg, 7 P. F. Smith, 433; Weister v. Hade, 2 Id. 474, adopted.

November—1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Mercer county; No. 221, to October and November Term, 1871.

STEWART v. MAPLE.

1. The assessors returned a valuation of property of defendant, who was notified of the day of appeal. He did not attend nor appeal; the county commissioners, under sect. 9 of act May 15th, 1841, raised the valuation. The supervisor of his township rated him on the basis of the county valuation. *Held*, in a suit for road tax he could not defend on the ground that the valuation had been improperly raised; his remedy was by appeal.

2. Until altered by the commissioners, the increased rate was the proper basis for township rates.

3. If aggrieved by the township rating, his remedy was by appeal to the Quarter Sessions, under the 30th section of act of April 15th, 1834.

4. The remedy for illegal taxation under a general power to tax, is by appeal to the proper appellate tribunal; when no appeal is given, the courts cannot reverse the judgment of the tax officers.

5. Clinton District's Appeal, 6 P. F. Smith, 315, recognized.

November — 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Greene county; No. 159, to October and November Term, 1871.

CARRIER and McPHERSON v. ESBAUGH.

1. Sheriff made a levy lawfully under a fi. fa., and sold the goods after only five days' notice. *Held*, that trespass and not case was the proper remedy against him.

2. So selling was an abuse of authority, and made the sheriff a trespasser *ab initio*.

3. The writ gave the sheriff no authority to sell without giving notice, and the sheriff stood as if his acts had been illegal from the beginning.

4. The sheriff paid the plaintiff the execution debt from the proceeds of the sale. *Held*, in an action of trespass against the sheriff, not to be evidence in mitigation of damages.

5. The regulations of the statute for the seizure and sale of chattels, should be lawfully and strictly complied with.

6. Dallam v. Fitler, 6 W. & S. 323; McMichael v. Mason, 1 Harris, 214; Wilson v. McElroy, 8 Casey, 82.

November 21st, 1871. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Jefferson county: No. 32, to October and November Term, 1871.

LEGAL GAZETTE.

Friday, August 29, 1873.

JOHN H. CAMPBELL,
EDITOR.

THEODORE F. JENKINS,
ASSOCIATE EDITOR.

Court of Appeals of N. Y.

BACHELLER v. PEOPLE ex rel. THE DUNKIRK, &c., R. R. CO.

1. A railroad company, as to the building and operation of its road, is a public corporation, but as to the ownership of its property, and the profits of its business, it is private.
2. Municipalities are created by the Legislature as instrumentalities of the government, and so far as legislation for governmental purposes is concerned, are absolutely subject to its control.
3. A municipal corporation may be compelled to enter into contracts for an exclusively public purpose, but not when the purpose is private.
4. When a municipal corporation engages in things not public in their nature, such as subscribing to stock, it acts as a private individual. The Legislature cannot compel it so to act.
5. Under a statute a town consented to its supervisor issuing bonds to raise funds for a subscription to the stock of a railroad company. A subsequent act superseding the former and materially altering the conditions of the subscription was passed. The supervisor refused to issue the bonds. *Held:* So far as the second act would compel a subscription contrary to the assent of the town, it was unconstitutional, and a mandamus to the supervisor to issue the bonds was refused.

Opinion by GROVER, J.

Section 1, chapter 672, Laws of 1867, enacts that it shall be lawful for the supervisor of any town in the county of Chautauqua through which the Dunkirk, &c., Railroad shall run, or of any town adjoining either of the towns through which said railroad shall run, to borrow, on the faith or credit of such town, any sum of money not exceeding twenty per cent. of the assessed valuation of the real and personal property of such town, as shown by the last assessment roll previous to the issuing of the bonds authorized by the act, at a rate of interest not exceeding seven per cent., and for a period not exceeding thirty years, and to execute bonds therefor, provided that the power and authority conferred shall only be exercised upon the condition that the consent shall first be obtained in writing of a majority of the taxpayers of such town owning or representing, &c., more than one-half of the taxable property of said town assessed and appearing upon the assessment roll of the year last preceding the issuing of the bonds authorized, proved or acknowledged as therein specified, and that such consent shall be procured within three years from the passage of the act. That such consent shall state the amount of money to be raised, and the fact that a majority of the taxpayers owning or representing a majority of the taxable property, as appeared from the assessment roll, had been obtained, should be proved by the affidavit of one of the assessors of the town, or that of the town or county clerk, endorsed upon or annexed to such written consent, which should be filed and have the effect specified in said section.

Sect. 2 provides that said supervisor may, in his discretion, dispose of such bonds or any part thereof to such persons, and upon such terms, not less than par, as he may deem most advantageous to the town, and that the money raised by loan or sale of the bonds shall be invested in the stock of the railroad company, and that the same should be used in the construction of the railroad, &c., the public necessity and utility of which was thereby declared, and that in its construction, the said towns were immediately interested. And that for the purpose of such construction the said supervisor, in the name of the town, might subscribe for and purchase the stock of said company to the amount to which the tax payers had consented, as above specified, and that, by virtue of such subscription and purchase, the town should acquire all the rights and privileges and incur all the responsibilities as other stockholders of the company.

Other sections provide for levying and collecting taxes for the payment of the interest and principal of the bonds to be issued, and other matters not material to the question in this case.

Between the passage of the above act and before the passage of chapter 472, vol. 1, page 850, Laws of 1868, the town of Stockton was not bonded.

By the first section of the last-mentioned act it was provided that, in case the written consent of the taxpayers of any town has been or should thereafter be obtained in the manner provided by the first-mentioned act, its supervisor was authorized and required to make a subscription to the stock of the company to the amount fixed in such consent, and to issue the bonds of the town and dispose of the same as required by the said first-mentioned act.

Sect. 3 of the last act provides that the supervisor of Stockton shall not be required to issue the bonds of that town, although authorized as required by the act of eighteen hundred and sixty-seven, until the iron was laid upon the road from Dunkirk to the Pennsylvania line.

The following consent of taxpayers was introduced in the evidence upon the trial: "The undersigned, taxpayers of the town of Stockton, hereby consent that the supervisor of the town of Stockton may borrow the sum of thirty-four thousand dollars on the faith and credit of said town, at a rate of interest not exceeding seven per cent. for a term not exceeding thirty years, and execute bonds therefore under his hand and seal, and that the said supervisor may, in his discretion, dispose of such bonds or any part thereof, and that the proceeds of the sale of such bonds shall be invested in the stocks of the Dunkirk, &c., Railroad Company; and that the said supervisor may exercise full and complete powers for said town under the first-mentioned act." This consent was signed by a considerable number of taxpayers, whose signatures were proved or acknowledged as required by the act, to which was annexed an affidavit of Corydon Putnam, one of the assessors of the town, to the effect "that the persons whose names appear attached to said consent, and which appear on the assessment roll of the town for the year 1867, were a majority of all the taxpayers of the town of Stockton, whose names appear upon said assessment roll, and that they are a majority of all the taxpayers in the said town of Stockton whose names appear upon the assessment roll for the year 1867, including resident taxpayers, owners of non-resident lands, and including agents representing owners of taxable property, and that each person so signing such consent has in due from acknowledged the same, or his signature been proved in due form of law." This affidavit was sworn to, November 21st, 1867, but the papers were not filed in the town clerk's office until April 25th, 1868. No further steps to bond the town appear to have been taken until after the passage of chapter 282, Laws of 1870, vol 1, p. 634.

Sect. 2 of this act provides, that in any case where the written consent authorizing the supervisor of any town to subscribe to the stock of the Dunkirk, etc., Railroad Company, shall have been filed in the town clerk's office of the town, and a copy thereof in the county clerk's office of the county, with the affidavit of one of the assessors of the town, etc., endorsed or annexed to such written consent, and such affidavit shall be based upon the assessment roll of such towns for either of the years 1867, 1868 or 1869, or for the last year previous to the issuing of the bonds as authorized, such affidavit shall be evidence in all courts and for all purposes, and such consent shall authorize, uphold and require the respective subscriptions to be made to such stock, and authorize, uphold and require the issue of bonds to the amount specified in such consent for such towns respectively, and such bonds shall bear date and interest from the respective dates of the first filing of said copy of consent and affidavit in the Chautauqua county clerk's office, and no clerical or other defects in any of such affidavits shall invalidate such proof or the subscription to the stock of the said bonds.

Sect. 3 provides, that if the said bonds, when issued, shall not be sold for money, as required by the original act, within thirty days from the time when they are ready for sale, the supervisor of the town issuing the same shall deliver said bonds to the railroad company, receiving therefor the par value of the principal of said bonds in the stock of the company at its par value.

Sect. 4 repeals section 3 of the act of 1868, which provided that the supervisor of Stockton should not be required to issue the bonds of the town until the iron was laid on the road from Dunkirk to the Pennsylvania line.

The act of 1867 was a mere enabling act, conferring power upon the several towns embraced therein, to issue bonds upon the conditions therein specified, to aid the construction of the railroad, &c. It conferred no right upon the railroad company or any one else, where proceedings for bonding had been commenced, to have any further steps taken until bonds had been actually issued under the act. Then such rights were acquired. The railroad company could then enforce the application of the proceeds to the construction of its road according to its provisions, assuming the act to be constitutional. The consent of the taxpayers was given under this act. The entire language of the consent shows that the signers understood the act and their consent as conferring discretionary power upon the supervisor to act upon his views as to the interest of the town. They consent that he may borrow the sum of $34,000 upon the faith and credit of the town, &c., and execute bonds therefor. That he may, in his discretion, dispose of such bonds or any part thereof and invest the proceeds in the stock of the railroad company, and that he may exercise full and complete powers for said town under the act. Sometimes the word "may" is construed as "shall," but only where the context shows that such was the intention, or where the public have an interest in the exercise of the powers so conferred upon officers, or official boards or tribunals.

The import of the word as used in the consent and the act is to give power, leave, license and permissions, not to require or enforce the performance of any one of the specified acts. This view is confirmed by the different language of the acts of 1868 and 1870, relating to the same subject, the latter showing an intention to compel the supervisor to bond the town, and if he failed to sell the bonds at par within thirty days after they were ready for sale, he is not authorized, but required to deliver the bonds to the railroad company upon receipt from it of an amount of stock equal to the principal of such bonds. Under the act of 1867, care was taken that the bonds should not be issued for less than the par value in cash. This would be the result whether the money was borrowed upon the faith and credit of the town, and the bonds given as security, or the bonds sold at not less than par. Thus there would, in case the town was bonded, be secured for the construction of the road, cash equal to the principal of the bonds. If the bonds are delivered to the company upon the receipt of stock to an amount equal to the principal of the bonds, pursuant to the act of 1870, the bonds become the property of the railroad company, and may be sold upon the market much below par, and thus much less money accrue therefrom for the construction of the road.

It is obvious that the consent given does not embrace any such transaction. Again, the act of 1867 requires that the consent shall be based upon the assessment roll of the year last previous to the issuing of the bonds. This is entirely departed from in the act of 1870. Had there been no subsequent legislation, it is clear that no bonds could have been issued upon the consent given and affidavit made after the completion of the roll of 1868. Had bonds been issued under the provisions of the act of 1867, and the town had complied with its provisions, it would not have been liable to pay a tax at any one time to pay more than one year's interest upon the bonds, as none would have accrued prior to the issue: while the act of 1870 requires, in effect, that they should bear date and be upon interest from April 25th, 1868, the time of filing the consent and affidavit in the town clerk's office, thus subjecting the town to a tax for this

LEGAL GAZETTE

[SUPPLEMENT.]

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PHILADELPHIA, FRIDAY, AUGUST 29, 1873.

QUARTER SESSIONS.

Saturday, August 30, 1873.

1 Commonwealth ex rel Daniel Drain v Keeper of County Prison; Hab Corpus; Pratt.

2 Commonwealth ex rel John Boyle v Keeper of County Prison; Hab Corpus; E Randall.

3 Commonwealth ex rel Samuel Hammell v The Sheriff; Hab Corpus; Shapley.

4 Commonwealth ex rel Charles Kaufman v The Sheriff; Hab Corpus; Chapman.

5 Commonwealth ex rel Lawrence D Peyton v Keeper of County Prison; Hab Corpus; Grady & Oehlschlager.

6 Commonwealth ex rel John McGill v The Sheriff; Hab Corpus; Bonham.

7 Commonwealth ex rel Charles Bonsall v Dr Kirkbride; Hab Corpus; T E McElroy.

8 Commonwealth ex rel Catharine Farley v J L Borne; Hab Corpus; Hinckley.

back interest, in addition to such as should accrue after the issue. No taxpayer of the town has ever consented to any such issue of its bonds. The judgment awards a mandamus to the appellant, compelling him to issue bonds according to the requirements of the act of 1870. If the consent of the taxpayers, or any part of them, or of any of the town boards or officers, or any of the electors of the town is necessary, this judgment cannot be sustained, as no such consent has been given to such an issue of the bonds as the judgment commands.

But before examining this question, it may be well to consider the point made by the counsel for the respondent, that the appellant having made a return to the alternative writ, and issue having been taken upon such return by the relator, and a verdict having been found in his favor, he is entitled to judgment thereon awarding a peremptory mandamus together with damages and costs, of course, and therefore the question whether any of the acts in question are constitutional cannot be raised by the appellant either in this or the Supreme Court.

2 R. S. 587, section 57, cited by counsel, provides that, in case a verdict shall be found for the person suing out such writ, or if judgment be given for him upon demurrer or by default, he shall recover damages and costs in like manner as he might have done in an action on the case as aforesaid, and a peremptory mandamus shall be granted to him notwithstanding.

The common law, providing and regulating the remedy by mandamus, will show that the purpose of enacting this and other provisions of the statute and that of 9 Anne, chap. 90, was to authorize such pleadings in the proceedings as would present to the court the real merits for adjudication instead of compelling the relator to resort to an action on the case for the recovery of damages and to obtain a peremptory writ in case of a false return to the alternative. A review of the common law and the reasons for the passage of statute will be found in the opinion of Marvin, J., in The People v. The Supervisors of Richmond County, 28 N. Y. 112.

This shows that it was the intention of the statute to do complete justice in the proceeding itself, without a resort to any other.

The People v. The Board of Metropolitan Police, 26 N. Y. 316, was decided upon a point not affecting the present question, and while the opinion of Wright, J., seems to sustain the position of the counsel, he does not place his judgment upon that ground. It could not have been intended by the statute to give a peremptory writ when the record showed no legal right because of a mistake in the return in matters of fact resulting in a verdict for the relator.

The Commercial Bank of Albany v. The Canal Commissioners, 10 Wend. 25, gives the true rule. That at any time after a return and before a peremptory mandamus is awarded, the defendant may object to a want of sufficient title in the relator to the relief sought, or show any other defect of substance, though he cannot, after return, object to defects in form.

If the law gave an absolute right to the writ where a verdict was found for the relator although from the entire record it appeared he had no such right, great injustice might be the result.

This brings us to the question, whether a mandatory statute compelling a town or other municipal corporation to become a stockholder in a railroad or other corporation, by exchanging its bonds for stock upon the ter s prescribed by the statute, without its consent in any way given, is constitutional. This is a different question from that decided by this court in The Bank of Rome v. The Village of Rome, 18 N. Y. 38, and in subsequent cases. In these the question was, whether enabling statutes, conferring power upon such corporations to contract debts with their own consent, and investing the money thus raised in the stock of railroad corporations, or of exchanging directly its bonds for such stock, were valid. These facts were held constitutional by this court, but this does not determine that municipal corporations may be compelled by the mere authority of the Legislature to enter into this class of contracts and become such stockholders without their consent and against their will.

In The People v. Flagg, 46 N. Y. 401, it was held that an act requiring the town of Yonkers, without its consent, to issue bonds for raising money, which was to be expended in the construction of highways in the town in the manner prescribed by the act, was constitutional. This was so determined upon the ground that the making and improving of public highways, and providing the means therefor, were appropriate subjects of legislation. That towns possess such powers as are conferred by the Legislature, that they are a part of the machinery of the State government, and perform important municipal functions, subject to the regulation and control of the Legislature; in short, that the act was the mere exercise of the unquestioned power of the Legislature to determine what highways should be constructed, and of the taxing power in providing means to defray the expenses incurred in their construction.

But it is said in the opinion, that if the object of the expenditure was private, or, if the money to be raised was directed to be paid to a private corporation, which is authorized to use the improvement for private gain, the question would be quite different, and in this respect there is a limit beyond which legislative power cannot legitimately be exercised. It is manifest that the question presented in the present case was not determined in that, unless it shall be further held that a railroad owned and controlled by a corporation, and operated by it for the benefit of its stockholders, is a public highway in the same sense as the common roads of the country. The towns through which the latter run may be compelled to construct and keep them in repair for the common use of the public. The substantial question in the present case is, whether they may be so compelled to construct and repair railroads owned and operated by corporations for the benefit of the stockholders.

It is clear that they may be, if they are public highways, in the same sense as common roads. It has been uniformly held that the right of eminent domain may be exercised so far in behalf of railroad corporations as is necessary for the construction and operation of the road, upon the ground that the road and its operation was for a public purpose, and the real estate condemned for its use was taken for public and not private use. But it is equally clear that the property acquired by the corporation belongs to it exclusively, and its ownership is as absolute as that of any private individual of property belonging to him. It is also clear that, so far as the road is operated for the benefit of its stockholders, the corporation is private. We have then an artificial being created by the Legislature, endowed with public franchises, the absolute owner of property of which it cannot be deprived by legislation, except for public purposes, carrying on business for the private emolument of its stockholders. The People v. Flagg determines that towns may be compelled to provide for the construction and maintenance of improvements of a public character exclusively.

But here we have an attempt to compel them to aid in the construction of a work, public in some respects, but private in others, of at least equal importance. It is said that municipal corporations are creatures of the Legislature, and subject to its control. In a certain sense this is true. They are created by the Legislature as instrumentalities of the government, and, so far as legislation for governmental purposes is concerned, are absolutely subject to its control. The power of legislation over individuals is given to the Legislature for all the purposes of government, subject to such restrictions as are contained in the Constitution, yet no one would claim that an individual could be compelled by a statute to exchange his note or bond and mortgage with a railroad corporation for its stock, against his will, upon such terms as were prescribed in the act, or any other.

It is within the province of the Legislature to provide for enforcing the performance of contracts when made, but to enforce the making of them by individuals is entirely beyond it. We have seen that municipal corporations may be compelled to enter into contracts for an exclusively public purpose, but I think they cannot be when the purpose is private. This is equally beyond the province of legislation in the case of such corporations as in those of private corporations or individuals.

In Atkins v. The Town of Randolph, 31 Vt. 226, it was held that an act providing for the appointment of an agent of the town by the county commissioner, with power to purchase liquors on the credit of the town, and to sell the same for certain specified purposes, and account for and pay over the proceeds to the town as prescribed, was unconstitutional, and the town not having consented to the appointment or ratified the contract, was not liable for the liquors purchased upon its credit by such agent pursuant to the act. This judgment is based upon the grounds that the legislative power over municipal corporations is not supreme, and does not include the power of compelling them to enter into contracts of a private character, although such contract would conduce to the public good, by enabling the government to suppress traffic in intoxicating liquors.

In the Western Saving Fund Society of Philadelphia v City of Philadelphia, 31 Penn. St. 175, 185, it was held that when a municipal corporation engages in things not public in their nature, it acts as a private individual, and in the same case between the same parties, Id. 175, it was held that it so acted in supplying its inhabitants with gas.

In Bailey v. The Mayor, &c., 3 Hill, it was held that a municipal corporation was to be regarded as private as to its ownership of lands and other property and that the test, whether powers exercised by a municipal corporation were public or private, was whether they were for the benefit and emolument of the corporation, or for public purposes; and it was further held, that the city of New York, under the act to supply the city with pure and wholesome water (Laws 1834, p. 451), acted as a private corporation, and was responsible as such for the acts of those appointed by the act, for the reason that the corporation had accepted and consented to the act.

Surely a town acts as a private corporation in becoming a stockholder in a railroad corporation, and as such interested in the operation of the road for the benefit of the stockholders.

When a municipal acts as a private corporation, it acts as a private individual.

In Taylor v. Porter, 4 Hill, 140, it was tersely said by Bronson, J., that the power of making bargains for individuals has not been conferred upon any department of the government.

In The People v. Morris, 13 Wend. 325, the distinction between the nature of the action of public and private corporations is clearly given.

Olcott v. The Board of Supervisors of Fond du Lac, recently decided in the Supreme Court of the United States, not reported, is cited as decisive of the question now under consideration in the present case. But this question was not in that case. That action was for the recovery of notes and orders issued by the Sheboygan and Fond du Lac Railroad Company, in pursuance of an enabling act, passed by the Legislature, which required such issue to be approved by a majority of the votes given at an election to be held for the purpose of determining whether such majority approved such issue. The question was, whether the enabling act was constitutional? The Circuit Court held it was not, and gave judgment for the defendant upon the ground that the Supreme Court of Wisconsin had previously so determined, and that as the question was, whether an act of the State Legislature was authorized by the constitution of the State, the Federal courts must adopt the determination of the State court. This judgment was reversed by the Supreme Court, the chief justice and Justices Davis and Miller dissenting.

Upon the question involved, the Supreme Court has no appellate jurisdiction from judgments of the State courts; and, hence, its judgment is not controlling in the determination. I concur in the views of the dissenting justices, that when the Federal courts acquire jurisdiction by reason of the residence of the parties, they ought in such questions to follow the determination of the courts of the State.

Justice Strong, in the prevailing opinion, holds that the taxing power can be exercised for the public purposes only, but insists that the construction of railroads

falls within this class, and that the taxing power may be resorted to therefor.

But the exercise of the taxing power, either general or local, for this purpose is altogether different from compelling a town to take stock in the corporation without its consent, and to that extent engage in the business of a common carrier.

I think it would not be claimed that a town could be compelled to become a stockholder in a banking or manufacturing corporation, although it appeared that the particular corporation would largely promote the public interest where the business was conducted. Such legislation could only be sustained by holding the power of the Legislature supreme over municipal corporations, for private as well as public purposes. Upon principle and authority, I think it is not as to the former, although it is as to the latter. The test is whether the purpose to be effected is public or private. If the former, a mandatory statute, is valid. If the latter, it is not within the province of legislation, and consequently not within the power of the Legislature, and the act is therefore void.

We have seen that a railroad corporation possesses some of the characteristics of both—public as to its franchise, private as to the ownership of its property and its relations to its stockholders. Were it exclusively public, the act of 1870 would be valid, but void if exclusively private. It follows that, as the Legislature is supreme only as to public purposes, and as the act in question relates in part to private, to this extent it is void; and as the latter is inseparably connected with the former, the entire act must be held void.

In Sweet v. Hulbert, 51 Barb. 312, it was held that an enabling act to issue bonds and donate the same, or the proceeds, to a railroad corporation to aid in the construction of its road, was void.

It is unnecessary to go so far in the present case.

It is argued that the power of taxation for any purpose is supreme, and such power may be exercised upon the State at large, or any particular locality, in the discretion of the Legislature, and that the act in question is but the mere exercise of this power of taxation, and therefore valid.

The People v. Mayor of Brooklyn, 4 Comst. 419, and Town of Guilford v. Supervisors of Chenango, are relied upon to sustain the position. These cases do not go quite as far as claimed by the counsel. The former only determines that an act to provide for the expense incurred in grading and improving the streets of a city, by assessment upon the people properly benefited, is a legitimate exercise of the taxing power, and therefore valid; and the latter, that the Legislature can recognise claims founded in equity and justice in the largest sense of these terms, or in gratitude and charity, and providing for their payment by imposing a tax upon those who ought to pay them.

The act in question cannot be maintained upon the taxing power.

A municipal corporation cannot be compelled to embark in a business of a private character, because its prosecution by it will probably or certainly lead to its taxation for the capital to be invested or expenses incurred therein.

The above view renders an examination of the other questions discussed unnecessary.

The judgment appealed from must be reversed, and a judgment rendered declaring the relator not entitled to a peremptory writ, with costs to the appellant.

Church, Ch. J., Allen and Peckham, JJ., concur. Folger, J., in result. Andrews, J., dissenting. Rapallo, J., not voting.

John Ganson, Esq., for appellant.

E. C. Sprague, Esq., for respondent.

Olcott v. The Supervisors of Fond du Lac. Co. is reported in 5 Leg. Gaz. 204.

Supreme Court of New York.

FIRST DEPARTMENT.

BARCLAY v. THE PEOPLE.

Jurors who have tried and decided a criminal case are not competent to sit on a second trial of the same case. The act of 1872 (ch. 475), relating to challenges of jurors in criminal cases, does not apply to such a case.—*Al. L. J.*

The plaintiff in error was indicted, charged with committing the crime of grand larceny in the dwelling house of Henry M. Smith, by feloniously taking and carrying away the personal property of John H. Morrell in the night time. The indictment also charged, that the plaintiff in error had been theretofore convicted of a felonious crime and had been imprisoned upon such conviction. For some cause not stated, a previous trial and conviction of the prisoner on the 23d of May, 1873, was set aside, and the prisoner was tried and again convicted on the following day. On the trial, Stephen Price was called as a juror and challenged by prisoner's counsel for principal cause. Q. You were on the jury? A. Yes, sir. Q. Did you hear the case tried, and did you form an opinion of the guilt of the accused? A. Yes, sir. By district attorney. Q. Mr. Price, do you believe that, having taking an oath as a juror in this case, you can decide the case upon the evidence that may be adduced, irrespective and wholly disregarding any present impressions you may have; in other words, will you be governed by the view you may have of the case now, or will you be governed in your verdict exclusively by the evidence that may be brought out in the trial? A. The view I have of the case now. Q. That will control you, regardless of what the evidence may be? A. Yes, sir.

By counsel for the prisoner:

Q. You heard the case tried yesterday? A. Yes, sir. Q. You rendered a verdict of guilty against this man on the very same indictment you are now to try this man? A. Yes, sir. Q. If you were to hear the same evidence to-day, would your verdict be the same? A. Yes, sir. Q. Have you at this moment formed a belief as to the guilt of the prisoner? A. Yes, sir. Q. That impression remains with you now? A. Yes, sir. Q. If you were sworn, you would render a verdict of guilty? A. Yes, sir. The court—He is competent. The prisoner's counsel then moved that the juror be rejected as incompetent for principal cause. The motion was denied and counsel excepted. Several other jurors on the former trial were also accepted as jurors subject to exception. Several other exceptions were taken, which are referred to in the opinion herein. The prisoner was convicted and sentenced to the State prison for eight years. On appeal from motion denying a new trial.

William F. Howe, for plaintiff in error. The court erred in overruling the objections to the juror Stephen Price; also to the other jurors on the former trial. Cancemi v. The People, 16 N. Y. 507; Willis v. The People, 32 Id. 715. The act of May 3d, 1872, "in relation to challenges of jurors in criminal cases," is unconstitutional. Const. N. Y., art. 1, § 6; Taylor v. Roster, 4 Hill, 140; Wynehamer v. The People, 13 N. Y. 446; Coke Inst., part 1, Lib. 2, chap. 12, § 234, 157 *b*.

Benjamin K. Phelps, district attorney, for defendants in error, cites Walter v. The People, 32 N. Y. 147; Sedg. Const. Law, p. 457; Beers v. Beers, 4 Conn. 539; Colt v. Eus, 12 Id. 243.

INGRAHAM, P. J. The prisoner was indicted for grand larceny, and for a second offence.

The indictment charged that the prisoner on the 8th of November, 1866, had been convicted of an attempt to commit grand larceny, and had been sentenced to the penitentiary and to pay a fine, and had been duly discharged and remitted of such judgment.

It further charged that on the 11th May, 1872, the prisoner was guilty of grand larceny in stealing the property of John H. Merick, in the dwelling house of one Henry M. Smith.

The prisoner had been tried in the general sessions on the previous day for the same offence, and had been found guilty. For some cause, not stated in the error book, that trial and conviction was set aside, and the prisoner was tried on the 24th May, 1872.

Several of the jurors who had served upon the former trial were called and sworn as jurors on this trial, after having been challenged for cause by the prisoner's counsel.

On the trial, the people gave in evidence the arrest of the prisoner in 1866, and his conviction then of an attempt to commit grand larceny. All these matters were duly excepted to by the counsel for the prisoner.

It is objected that the act in relation to challenges of jurors in criminal cases (Laws 1872, ch. 475), is unconstitutional and void, for the reason that the constitution (art. 1, § 1) declares the trial by jury shall remain inviolate forever, and in article 1, section 6, provides that no person shall be deprived of liberty, &c., without due process of law.

The construction of the sixth section was passed upon by Bronson, J., in Taylor v. Porter, 4 Hill, 140, where he says: "The meaning of this section seems to be, that no member of the State shall be disfranchised or deprived of any of his rights or privileges, unless the matter be adjudged against him upon the trial had, according to the course of the common law. It must be ascertained judicially;" and again he says: "The words *due process of law* cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt."

In Wynehamer v. The People, 13 N. Y. 446, Judge Selden says: "The clause in question was intended to secure to every citizen the benefit of those rules of the common law by which judicial trials are regulated, and to place them beyond the reach of legislative subversion, and Hubbard, J., defines due process of law as meaning an ordinary judicial proceeding; in a criminal case an arraignment, formal complaint, confronting of witnesses, trial, conviction and judgment. Such trials, therefore, are to be regulated and conducted according to the common law, viz., by indictment, trial by jury, proof of guilt, unanimous verdict of jury, and those rules which the defendant at common law had a right to insist upon in his defence. These requisites do not control the Legislature as to the rules of evidence, the qualifications of jurors, the nature of crime, and the punishment to be inflicted for its commission. All these are matters left to the discretion of the Legislature. Any other rule would prevent the Legislature from changing the qualification of jurors, altering the age at which they should be excused from serving, prescribing who may and who may not be witnesses, and many other regulations in regard to trials which do not necessarily violate that provision."

In Walters v. The People, 32 N. Y. 147, 159, Wright, J., says, in regard to these constitutional provisions: "There are no limitations or restrictions upon legislative power, except as to the right guaranteed, viz., a jury trial in all cases in which it had been used before the adoption of the instrument. Trial by jury cannot be dispensed with in criminal cases, but it is obviously within the scope of legislation to regulate such trial."

If these views are correct, then there is no force in the objection that the act referred to is in violation of the constitution in regulating the right of challenge to jurors, and providing the necessary qualifications, even if it does alter the rule of the common law on that subject. But does the law referred to make any such alteration?

In regard to challenges to the favor, they remain unaffected by that statute. The statute is confined to challenges for principal cause only, and in no way changes the law as to challenges to the favor.

It provides that "the previous formation or expression of an opinion, or impression on which any criminal action at law is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, shall not be a sufficient ground of challenge for principal cause, provided the person proposed as a juror shall declare, on oath, that he verily believes that he can render an impartial verdict according to the evidence; that such opinion or impression will not bias or influence his verdict; and provided the court shall be satisfied that the proposed juror does not entertain such a present opinion as would influence his verdict as a juror." It is difficult to see how this law changes the common law rules as to the qualification of jurors.

If we go back to the common law as it

existed prior to statutory provisions, it must be remembered that jurors were always selected from the vicinage. In Coke's Littleton, vol. 3, p. 464, it is said: "Every trial shall be out of that town, parish or hamlet, or place known out of the town within the record, within which the matter of fact issuable is alleged, which is most certain and nearest thereto, the inhabitants whereof may have the better and more certain knowledge of the fact." And in Cro. Eliz. 260, it is said: "So essential did the common law deem the having some of the neighbors on the jury, that if the visne appeared on the record to be a wrong place, it was a mistrial."

Afterward, by statute 16 Charles II., it was provided that the cause might be tried by a jury from any part of the county. These provisions show that by the common law, it was a matter of right that neighbors should form the jury, because they had more knowledge of the accused, and of the facts connected with the alleged offence. These provisions have been altered from time to time, so that now, partly by the English statutes before the formation of this government, and since then by laws passed by the Legislature, the qualifications of jurors have been changed, and all that is now required is that a juror shall be impartial, unbiassed, and capable of rendering a true verdict upon the evidence.

The act of 1872 makes no different provision, and takes away no qualification which existed previously.

The same rule which is incorporated in this statute, has been repeatedly adjudged by the courts and adopted for years previous to its passage. In Darell v. Mosher, 8 J. R. 347, a juror, on challenge, said that he had said that the defendant was wrong and the plaintiff was right; but he also said he had no personal knowledge of the matter in dispute, but if the reports were correct the defendant was wrong and the plaintiff was right. The court held that the objection was unfounded. In Freeman v. The People, 4 Denio, 9, 34, the jurors had an impression that the prisoner was guilty, but not an absolute opinion. The challenge was not sustained. In Lohman v. The People, 1 Com. 384; The People v. Bodine, 3 Denio, 122, questions were put to jurors whether they could try the case and render an impartial verdict, notwithstanding their impressions or opinions, and on answering that they could, they were held to be good jurors.

In The Commonwealth v. Webster, 5 Cush. 295, where the juror had an opinion, but said it was not strong enough to cause him to prejudge the case or to prevent a candid judgment on the evidence, he was held to be competent.

Such seems to be the general rule where the opinion is formed from mere rumor or newspaper statements, and would not influence the juror in deciding on the evidence, and he would not be disqualified thereby.

The statute of 1872 does not require anything different. The juror is not only to declare, on oath, that he believes he can render an impartial verdict on the evidence, and that the opinion or impression he has will not bias or influence his verdict, but the court must also be satisfied that such juror does not entertain such a present opinion as would influence his verdict.

These requisites would seem to require that the juror, before he is accepted, must be free from bias, and must satisfy the court of his impartiality.

The alteration of the qualifications as to the juror, if any such alteration is made by this statute, only applies to the challenge for cause. The objection is not taken away from the other challenge, and the same can be available on the challenge to the favor if it really exists. It amounts then to nothing more than providing that if the juror says he can try the case without being influenced by such impressions, it shall not be a good cause for rejecting the juror on that challenge, and does not compel the trial by a juror not qualified, if the party challenging sees fit to use the challenge to the favor.

If it be conceded that the constitutional restriction included in its provisions the right to have impartial jurors, as stated in The Matter of Vermilyea, 6 Cow. 555, still there is nothing in this law which takes it away or interferes with its exercise. It is a mere regulation of the challenge for principal cause, prescribing what shall not be a sufficient ground to sustain such challenge. The Legislature may change or regulate the mode of challenging. So long as the right of a jury trial is preserved, and means provided by which impartial jurors can be obtained, there is no violation of the costitutional guarantee of a trial by jury.

There is no ground, therefore, on which the act referred to can be held to be unconstitutional.

The objection to the jurors who were held to be competent on the second trial, when they had tried the cause previously, and had found a verdict against the prisoner, is of a different character

Stephen Price was challenged for principal cause. He stated he was on the first jury, and heard the case; that he had formed his opinion; that the view he then had of the case would control him, regardless of what the evidence might be; that his verdict would be the same on the same evidence, and if sworn, that he would render a verdict of guilty. In answer to a question from the court whether, without regard to previous impressions, he could give a true verdict upon the evidence, and try the case fairly and impartially, he answered that he could do so.

The opinion or impression which is referred to in the act of 1872, is not intended to apply to such a case. The words are: "The previous formation or expression of an opinion or impression in reference to the circumstances upon which any criminal action at law is based, or in reference to the guilt or innocence of the prisoner, shall not be a sufficient ground of challenge for principal cause," &c. Such an opinion or impression was not intended to include the case of jurors sworn and acting as jurors in the same case on a previous trial. The duty they have discharged is the rendering a solemn judgment upon the guilt of the prisoner, and that under oath. With the same evidence, it is hard to see how any other verdict can be rendered on a second trial by an honest juror. They have done more than formed an opinion. They have rendered a judgment against the prisoner that he was guilty.

Such has been the uniform course of decisions at the common law as to jurors who had acted as such on previous trials of the same case. So long ago as the case of The King v. Titus Oates, 10 Howell's S. T. 1079, it was held that a man who had been one of the indicters could not sit on the petit jury. In the reign of Edward III., this was made a statutory provision, and the same has been incorporated in our statutes, and is now the law in this State. 3 R. S. 1029. The objection to a grand juror is by no means as strong as it is when applied to a petit juror. The grand juror has only heard one side of the testimony, and has not adjudged the prisoner guilty, but merely held that the facts proven were enough to put the prisoner on trial.

So, if a juror hath been an arbitrator in the same cause, he cannot sit on the jury. And the reason given for it is, that a man who has made up his mind, and has declared it under his name, and placed it upon the record, will not be impartial as a juror ought to be. 2 Rawle, 46.

So it was held, that if the juror had given a verdict before in the same case, albeit it be reversed by writ of error, or if judgment be arrested, he cannot serve on the second trial.

And the reason given is, that the juror had not only formed and expressed an opinion, but had given a decided judgment under the solemnities of his oath on the merits after he had heard and examined all the testimony.

Various cases might be cited where it has been held that a juror, who had formerly given a verdict in the same cause, between the same parties, could not act as such on the second trial. Co. Litt. 157; Cro. Eliz. 33, p. 13; 2 Brown, 268; Kirby, 166; 2 Rawle, 498; 16 Ind. 298; 15 Ohio St. 155; 20 Ga. 60. Not one case has been cited where such a juror has been held to be competent.

We are of the opinion that the challenge should have been sustained, that jurors who have tried and decided a cause are not qualified to sit on a second trial, if such shall be granted, and that the act of 1872, relative to the qualification of jurors, does not apply to such cases. An exception was taken by the admission of the record of the former conviction of the prisoner on another charge, and also to the jury that they could only convict for grand larceny, because there was no proof that the prisoner had been discharged and remitted of the first felony. The recorder refused so to charge, holding that the refusal of the recorder to charge the record and the sentence, which had expired some time since, was evidence that the prisoner had been discharged. This was sufficient to submit that question to the jury. The legal presumption would be, that at the expiration of the sentence the prisoner would be discharged.

We are of the opinion, that the judgment was erroneous, on account of the admission of the jurors, who were sworn on the first trial, being on the jury by which the prisoner was finally convicted, and it is unnecessary to examine the other exceptions in the case.

Judgment reversed and new trial ordered.

Legal Gazette.

REPORTS OF CASES

DECIDED IN THE

UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA; THE SUPREME COURT OF PENNSYLVANIA AT NISI PRIUS; THE DISTRICT COURT, COURTS OF COMMON PLEAS, QUARTER SESSIONS, OYER AND TERMINER AND ORPHANS' COURTS OF PHILADELPHIA; AND IN THE COURTS OF THE THIRD, EIGHTH, NINTH, ELEVENTH, TWELFTH, TWENTY-SIXTH, TWENTY-EIGHTH, AND TWENTY-NINTH JUDICIAL DISTRICTS OF PENNSYLVANIA.

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[See page 284.]

New Hampshire.

OPINION OF THE JUSTICES OF THE SUPREME COURT.

1. When an act is found lodged in the office of the secretary of State, with other public acts passed at the same session, signed by the speaker of the House of Representatives, and the president of the Senate; and approved and signed by the governor, and published by authority as one of the public statutes of the State; that constitutes *prima facie* evidence, that said act received the assent of the two branches of the Legislature, and the approval of the governor, in the manner required by the constitution to make it a valid statute of this State.
2. But the journals of each branch of the Legislature, are to be considered and treated as authentic records of the proceedings of the Legislature, and they may be resorted to, in such cases to ascertain whether the two houses in fact, concurred in the passage of any specified act; and if it appears by the journals that both houses did not thus concur, the *prima facie* evidence derived from an examination of the act itself will be overcome, and the act will be held to be invalid, and of no effect as a law.
3. The opinion of the justices, 35 N. H. 579, confirmed.
4. *Held:* That chapter 33 of the Pamphlet Laws of 1872, entitled "an act in amendment of chapter 49, section 2 of the general statute relating to persons and property liable to taxation," by which act, parsonages were exempted from taxation, is not a valid law of this State, as it appears never to have received the assent of the House of Representatives, though it had all the forms of a valid law.

To His Excellency Ezekiel A. Straw, Governor of New Hampshire, and the Honorable Council.

The undersigned justices of the Supreme Judicial Court, have considered the question raised by the joint resolution of the Legislature as stated in your communication of August 9th, 1873.

That question is, "whether chapter 33 of the Pamphlet Laws of 1872, entitled an act in amendment of chapter 49, section 2 of the general statutes, relating to persons and property liable to taxation, is a law of the State?" and it is represented that said chapter 33 of said Pamphlet Laws, never passed both branches of the Legislature, as was required by the constitution of this State. By said act parsonages were exempted from taxation.

A similar question arose in this State in 1858, in relation to an act, entitled "An act in amendment of an act prescribing the duties of cashiers of banks," in which case an opinion of this court was given, which was published in the 35th vol. N. H. Reports, 579, in which it was held that when an act is found lodged in the office of the secretary of State, with other public acts passed at the same session, signed by the speaker of the House of Representatives and the president of the Senate, and approved and signed by the governor, and published by authority as one of the public statutes; that constitutes *prima facie* evidence, that said act received the assent of the two branches of the Legislature, and the approval of the governor in the manner required by the constitution, to make it a valid statute of this State.

But that the journals of each branch of the Legislature, are to be considered and treated as authentic records of the proceedings, and that they may be resorted to in such cases, to ascertain whether the two houses in fact concurred in the passage of any specified act; and that if it appears by the journals that they did not thus concur, the *prima facie* evidence derived from an examination of the act itself will be overcome, and the act will be held invalid, and of no effect as a law.

The act here in question has all the requirements necessary to make it *prima facie*, a valid public statute. Let us examine the records in the case as found in the journals of the two houses of our Legislature, and see if in fact, it did receive the necessary assent of both branches of that body.

The journal of the Senate for June session, 1872, shows on pages 27 and 28, that on the 19th of June notice was given of an intention to introduce the bill in question, and on page 31, that on the 20th of June it was accordingly introduced, read twice, and referred to the committee on the judiciary; and on page 44, that on the 25th of June it was reported from said committee without amendment, and ordered to a third reading; and on page 51, that on the 26th of June it was read a third time and passed; and on page 70, that on the 28th of June, it was reported to the Senate as correctly engrossed. We have also examined the bill itself, on file in the office of the secretary of State, and find entries upon the back of said bill corresponding with the above entries in the journal of the Senate; and in addition, a memorandum, that the bill was engrossed June 27th, 1872. But there is no entry or memorandum on said bill tending to show that it was ever sent to, or acted upon by the House of Representatives.

An examination of the journal of the House of Representatives shows on page 49, that on June 12th, notice was given of a bill "in amendment of chapter 49 of the General Statutes relating to persons and property liable to taxation," and on page 55, that on June 13th, said bill was introduced, read twice, and referred to the committee on finance; and on pages 171 and 172, that on June 27th, the bill was reported back to the House, with a resolution that it was inexpedient to legislate upon the subject, which resolution was adopted. Upon examining the original bill on file, we find that said bill related to the taxation of money at interest, alone, and had no reference to parsonages or church property.

The journal also shows on page 99, that notice was given of the introduction of a bill "to exempt parsonage and church property from taxation." Also, on page 133, notice of a bill entitled, "an act exempting parsonage houses from taxation." But there is no record in said journal that either of said bills was ever introduced or read, or referred to any committee. But it appears on page 158, that on June 26th, a bill entitled "an act to exempt parsonages and church property from taxation," was reported from the committee on finance in a new draft, which was read a first time, and ordered to a second reading; and on page 161, that on the same day, the bill entitled "an act to exempt parsonages from taxation," was read a second time, and ordered to a third reading, when it was laid upon the table; and on page 262, that on July 3d, this bill was taken from the table and indefinitely postponed. It also appears on page 189, that on June 28th, the joint committee on engrossed bills, reported to the House (as they did to the Senate), that "an act in amendment of chapter 49, section 2 of the General Statutes" was found to be correctly engrossed; and also on page 207, that a message was received in the House from the Senate, announcing that the Senate concurred with the House of Representatives in the passage (among others) of "an act in amendment of chapter 49, section 2 of the General Statutes, relating to persons and property liable to taxation."

The above are all the entries that we find in the journals of either House relating to chapter 49, section 2 of the General Statutes, or in relation to the taxation of parsonages or church property.

From all the evidence thus before us, it appears that the bill in question, after its passage in the Senate June 26th, was sent directly to the engrossing clerk; was by him engrossed June 27th; and was reported to both branches by the joint committee on engrossed bills, on June 28th, as correctly engrossed; but that the bill was never sent to the House of Representatives for their concurrence; and that said House never took any action whatever upon said bill.

We find, therefore, that said bill was not erected in the form prescribed by the constitution, and did not become a valid statute of the State.

Our opinion is, that the act entitled "An act in amendment of chapter forty-nine, section two, of the general statute, relating to persons and property liable to taxation," purporting to have been passed at the session of the Legislature of this State, held in June, 1872, is not legally valid and binding as a law of the State.

J. EVERETT SARGENT,
WM. L. FOSTER,
E. A. HIBBARD,
C. DOE,
W. S. LADD,
JEREMIAH SMITH.

August 20, 1873.

Supreme Court of N. H.

[We are indebted to John M. Shirley, Esq., for advanced sheets of 52 New Hampshire Reports, from which we select the following.]

BLODGETT et al. v. THE BERLIN MILLS CO.

1. In an action to recover for work and labor, the plaintiff claimed that, by the original contract of hiring, he was to work "so long, and so long only, as he chose." The defendants claimed that the hiring was for a specified time; and it appeared that the suit was commenced before the expiration of that time. *Held*, that evidence to show the extent of damage occasioned the defendants by the plaintiff's leaving their employ before the expiration of the term of service claimed by them, was properly excluded.
2. A breach or failure of performance by the employe of the original contract of hiring may be shown by the employer in defence, *pro tanto*, to an action against him for the wages, under the general issue.

Opinion by LADD, J.

The first exception was to the exclusion of evidence tending to show that the defendants were damaged by the plaintiffs' leaving the work to an extent equal to the contract price of the labor done. To ascertain whether this ruling was right, it is necessary to see what was the exact position of the case, and what was the question for the jury on the writ and pleadings as they stood.

The suit was commenced before the logging season expired. It was therefore apparent that, unless the plaintiffs could satisfy the jury that the contract was as they claimed, and not for service during the whole logging season as claimed by the defendants, they must fail, for the reason that in such case the action would have been prematurely brought. No other legal conclusion was possible if that fact were found against them. Thompson v. Phelan, 22 N. H. 339; Davis v. Barrington, 30 N. H. 517, 530; Hartwell v. Jewett, 9 N. H. 249; Bailey v. Woods, 17 N. H. 365. On the other hand, if the contract was found by the jury to be as claimed by the plaintiffs, that is that they might work so long, and so long only, as they pleased, the defendants would be entitled to no deduction, for the very obvious reason that then there would be no fault or breach of contract by the plaintiffs, their right to leave as they did being expressly allowed by the terms of the agreement under which the labor was performed.

The question, therefore, how much the defendants were damaged by the plaintiffs' leaving when they did, was not in the case,

and could not have been tried without leading to a very manifest absurdity; for, suppose that question had been sent to the jury, and the jury had thereupon found the defendants' damages on account of the leaving to be $200, while at the same time they found that the plaintiffs were entitled to be paid $250 for their labor; deducting the one sum from the other, it would follow that they must return a verdict for the plaintiffs for $50. This clearly involves the inconsistency of finding the contract to be as claimed by both plaintiffs and defendants at the same time, when those claims are utterly incompatible and repugnant. We are clearly of opinion that the evidence offered on this point was not admissible, and was properly excluded.

The defendants complain of the instructions given to the jury, principally, as it seems, because the jury were told that if the defendants' version of the contract be sustained, they cannot recover by way of set-off or in reduction of the plaintiffs' claim; because, in the first place, the plaintiffs cannot recover at all upon their declaration, and, in the second place, the defendants cannot recover damages under the general issue and set-off in this case.

If this instruction had been entirely wrong, and both the reasons given for it entirely erroneous, it is not easy to see how the defendants could have been injured by it, or what ground it would furnish for setting aside the verdict; for the jury did not find the defendants' version of the contract to be sustained; what would have happened, or what their verdict must have been in case they had so found, was of no consequence. They never had occasion to apply the rule laid down for their guidance in such a contingency, because the contingency never arose. Whether a rule is right or wrong can hardly be very material, when it is certain that it has not been used.

This would seem to be a sufficient answer to the objection, even if the instruction on this point was wrong; but we think it was right. It is sufficiently settled in this State, that where the defendant, in a case like the present, elects to have the damages which he has suffered from the plaintiff's breach of contract under which the service was performed, considered and allowed in the action brought against him to recover pay for such service, he must be understood as conceding that they are not to be extended beyond the amount of what he has received. Britton v. Turner, 6 N. H. 481. The doctrine is clearly stated by Bronson, J., in Batterman v. Pierce, 3 Hill, 171. He says: "The defendant has the election whether he will set up his claim in answer to the plaintiff's demand, or resort to a cross action; and whatever may be the amount of his damages, he can only set them up by way of abatement, either in whole or in part, of the plaintiff's demand. He cannot, as in case of set-off, go beyond that, and have a balance certified in his favor."

And see an elaborate and valuable discussion of the whole subject by Martin, J., in Ward v. Fellers, 3 Mich. 281. A different practice prevails under those systems of pleading which authorize the court, in any action which requires it, to grant the defendant affirmative relief. But where the common law rules of pleading are in use, and the defendant is allowed to recoup his damages by way of defence only, he can do no more than reduce, or, at most, wholly cancel and defeat the plaintiff's claim.

If the defendant thinks his damages are more than the plaintiff's whole demand, his proper course is to waive that defence and bring a cross action to recover them. Merriam v. Woodcock, 104 Mass. 326. The instruction complained of amounts to no more than this: If the plaintiffs, by reason of their own breach of the contract, are not entitled to recover at all in this suit, which was commenced before the end of the logging season, then the defendants cannot have the damages they have suffered, by reason of the breach, deducted or recouped from the plaintiff's damages; and the reason is quite obvious, that in such case the plaintiffs would have no damages to be reduced, and an independent judgment for damages in favor of the defendants could not be rendered on the pleadings as they stood. The instruction was therefore right, and, one, at least, of the reasons given for it was correct. Whether the other reason, namely, that the defendants cannot recover damages under the general issue and set-off, was correct or not, would therefore be immaterial, even if the correctness of the instruction were material. A wrong reason given for a right ruling, when it appears that the jury were not misled thereby, furnishes no ground of exception. Gibson v. Stevens, 7 N. H. 352, 360; Carpenter v. Pierce, 13 N. H. 403. To avoid any misapprehension, however, it may be well to add a few observations on this point.

Instructions to the jury are to be considered with reference to the facts and situation of the case in which they are given. In this case we have seen that the defendants could not recoup their damages, whichever way the jury found the contract; for in one event the plaintiffs were entitled to recover without reduction, and in the other, there would be nothing from which the defendants' damages could be deducted; to say, therefore, that the defendants could not recover damages under the general issue, really added nothing to what had been already said, or to the plain law governing the case. Whether, in a case where the damage suffered by the defendant, by reason of the plaintiff's failure to fully perform the contract on his part, is relied on as a defence *pro tanto*, the facts upon which the defendant's right to the deduction depends can be shown under the general issue, has not, perhaps, been raised and settled by a distinct adjudication in this State, while in other jurisdictions the cases seem to be somewhat conflicting. For example, in Runyan v. Nichols, 11 Johns. 547, which was an action by an attorney for his fees, it was held that the defendant could not show negligence of the attorney in conducting the business as a defence under the general issue; and Van Ness, J., in delivering the judgment of the court, says: "In such a case as this, it is peculiarly fit and proper that the plaintiff should be appraised that such a defence as this was intended to be insisted on." And he further remarks, that "to allow the reputation of an attorney to be assailed by a defence involving such serious consequences, without any previous notice, would, I think, be unreasonably and unnecessarily harsh and rigorous." But in Hill v. Allen, 2 M. & W. 283, it was held that a special plea to an attorney's bill, which sets up as a defence that the plaintiff conducted the business so negligently and unskilfully as to be useless to the defendant, is bad on special demurrer, as amounting to the general issue; and in Grounsell v. Lamb, 1 M. & W. 352, which was assumpsit for a cutting machine sold and delivered, it was held that the defendant might show, under the general issue, that the machine was manufactured by the plaintiff for the defendant under a condition that if it did not work, nothing should be paid for it; that it could not be made to work, and that it was useless to the defendant. See, also, to the same effect, Cousins v. Paddon, 2 C. M. & R. 547; Jones v. Nanney, 1 M. & W. 333; Jones v. Reade, 1 N. & P. 18. And again, in New York, in Hopping v. Quin, 12 Wend. 517, it was held, without reference to the question of notice, that an attorney could not recover in an action of assumpsit for his fees, where the suit which he had been retained to bring, had been so negligently managed that his services were worth nothing. But these cases are generally put upon the ground that the plaintiff's breach of his contract, which the defendant sets up to defeat the claim, is of such a character that it goes to the whole consideration; in other words, that the service, being improperly performed, is not at all the thing contracted for, and therefore furnishes no ground of action.

Where the defence shows only a partial failure of consideration, a different rule has been applied. The People v. Niagara, C. P., 12 Wend. 246; Burton v. Stewart, 3 Wend. 238; Reab v. McAlister, 8 Wend. 109.

But the doctrine of Britton v. Turner has not been generally received in other jurisdictions; and the rule of pleading in such cases must be settled with reference to the grounds upon which that decision is put, and the practice established by it in this State, rather than by authorities which indicate the practice where a different rule exists.

In Britton v. Turner, the plaintiff had broken his original contract, and, of course, could not recover on it at all; hence there was no question of a partial or total failure of the consideration upon which that contract stood. The court, however, held that the plaintiff's labor, received and enjoyed by the defendant from day to day, furnished a new consideration for a new contract, whereupon the law would raise a promise to pay what the services were worth over and above the damage occasioned by the plaintiff's breach of the original agreement. The plaintiff's position in this class of cases is, that upon such new consideration, he is entitled to recover such portion of the actual value of his services as may be left after deducting the defendant's damage occasioned by the breach. A special count, setting forth accurately and fully the ground of the defendant's liability on the new contract, would show a promise by him, in consideration of services rendered (the benefit of which he has enjoyed, and cannot reject), to pay, not what such services are worth, but only what remains of their value after deducting the damage resulting from the plaintiff's breach of the original contract. Page v. Marsh, 30 N. H. 305; Horn v. Batchelder, 41 N. H. 86; Smith v. Newcastle, 48 N. H. 70.

If this be so, there would seem to be no reason for requiring this defence to be specially pleaded. It is quite significant, also, that none of our cases, where the doctrine of Britton v. Turner has been recognized and reaffirmed, show that notice of the defence was given, by plea or otherwise; while in Elliott v. Heath, 14 N. H. 131, it appears that the defence was received under the general issue. Such has probably been the usual practice in this State, and we are disposed to think it is well enough. The question, however, is not involved in the decision of this case, for the reasons given; and these observations have been made, to prevent any misapprehension that might arise from the form in which the instructions to the jury were put.

The memorandum introduced by the defendants was not a writen contract; it was not signed by the parties. If, however, it was agreed to by the plaintiffs as containing the whole contract, without any condition or qualification, it would be extremely good evidence of what the contract was. Whether there was such assent, or whether the assent was qualified or limited, and, if so, in what way, were purely questions of fact for the jury. There was no legal presumption that the words "well enough as far as it went," had reference to one any more than another of the matters embraced in the parol contract just concluded. It was clearly for the jury to say, upon the whole evidence, what the understanding or contract of the parties was. We think the instructions on this point were entirely correct.

Judgment on the verdict.

[We are indebted to J. Warren Coulston, Esq., counsel for the accused, for a copy of the proceedings in the following case, from which we make the report.]

EASTERN DIST. OF PENNSYLV'A.

District Court, United States.

In re BENJAMIN PALMER.

1. The lowest grade of inexcusable homicide is within the *generic* term murder, as used in the treaty of extradition, of 1842, between the United States and Great Britain. Cadwalader, J.
2. The extradition of a fugitive being demanded under this treaty, the tribunal where he is found will not inquire as to the grade of guilt, and not being competent to acquit or convict the warrant must issue. Id.
3. Where a judge had ordered a warrant of extradition to issue, the secretary of State, upon a review of the case, refused to issue the warrant, and the accused was discharged.

This was a petition by the British consul at Philadelphia, for the extradition of Benjamin Palmer, upon the charge of murder. By the depositions taken in the cause it appeared that Benjamin Palmer shipped on the barque "J. B. Duffus," on April 15th, 1873, as boatswain or second mate. That on June 8th, 1873, whilst the barque was at sea, the morning being squally, and the ship not steering well, the master ordered Palmer to lower the spanker. At the time this order was given it was Palmer's watch on deck. In his watch, among others, was John McDon-

nough, who when the order was given, went to the throat halyards. The sail was lowered about half way down, when it jammed upon the mizzen mast. Palmer got on the spanker boom to clear the sail, when suddenly the gaff, weighing about five hundred pounds, got clear and was coming down by the run, he being immediately under it. The master seeing the danger, quickly called to him "look out Mr. Palmer the gaff is coming on you." Palmer instantly jumped from the boom on to the starboard side of the ship. McDonnough had left his position at the throat halyards, and was standing abreast of the mizzen rigging in the alleyway between the rail and the after house, on the starboard side of the ship. As Palmer jumped, he and McDonnough came together, one of Palmer's feet struck McDonnough in the stomach, and so injured him that shortly thereafter he died. As to whether or not Palmer kicked McDonnough, the depositions were somewhat contradictory. The master testified that as Palmer jumped "to save himself from going overboard, he caught the mizzen rigging with his hands, that brought his feet about opposite the stomach of McDonnough; the boatswain's feet came in contact with McDonnough about his stomach." Four of the crew however agreed that the distance between where Palmer struck the ship when he jumped, and where McDonnough stood, was several feet, that the toe of Palmer's boot struck McDonnough, but whether it was accidental or purposely done, they could not say, except one man who said it was "accidental out of passion;" all of the witnesses agreed that Palmer had no quarrel with McDonnough, that he always acted kindly towards all the men, and that after McDonnough was hurt, he endeavored to restore him.

The depositions being reported to the court, Silas W. Petit, Esq., and John R. Read Esq., as counsel, appeared for the government of Great Britain, but made no argument, as the court did not desire to hear any, except on behalf of the accused.

J. Warren Coulston Esq., counsel for Palmer, argued,

1. The proof in all cases under a treaty of extradition should be not only competent, but full and satisfactory, that the offence has been committed in the foreign jurisdiction, sufficiently so to warrant a conviction, in the judgment of the magistrate, of the offence, with which he is charged, if sitting upon the final trial and hearing of the case, No magistrate should order the surrender short of such proof. Exparte Kaine, 3 Black, C. C. 10.

2. The court must pass upon the weight as well as the competency of the testimony, and a fugitive is to be surrendered upon such evidence only, as, being submitted to the jury, would properly secure his conviction, of the offence alleged. In re Henrich, 5 Bl. C. C. 414. In re McDonnell, 5 Leg. Gaz. 236.

No judge would sustain a verdict of guilty of any offence under the testimony in this case.

3. The treaty requires the specific application of the definitions to be conformable in particular cases to the jurisprudence and legislation of the respective places were the parties may be arrested; and likewise require the application of local rules of decision, as to the sufficiency of the evidence. Muller's Case, 5 Phil'a, p. 292, &c.

4. The evidence is not sufficient to sustain the charge of murder. In the worst aspect of the case, it could only be manslaughter, which under the laws of Pennsylvania, may be either voluntary or involuntary. Manslaughter is voluntary when it happens upon a sudden heat, involuntary when it takes place in the commission of some unlawful act.

5. It is clear that the extradition treaty between the United States and Great Britain (8 Stat. at Large, p. 576) does not apply to manslaughter. If this be doubtful, the court should follow the analogy of the act of Congress of 3d March, 1825, (4 Stat. 115), providing for the punishment of the crime of murder on the high seas, on board of an American vessel. It has been held that this act does not include the offence of manslaughter. U. S. v. Armstrong, 2 Cart. C. C. 451.

After argument, CADWALADER, J., said.

The homicide in question having occurred upon the high seas, in a British vessel, was committed within British jurisdiction. Whether it was an excusable homicide, and if not, what was the grade of guilt, are questions for the decision of a British tribunal. This does not preclude the observation that if a crime has been committed, it was of the lowest grade of inexcusable homicide. The offence in question was, nevertheless, if punishable at all, within the generic description of murder, as the word is used in the treaty of 1842. And, as no tribunal in the United States can exercise jurisdiction to convict or acquit, the warrant of extradition must be granted, if the application for it shall be insisted on.

It may not be improper to add that, if the offence had been cognizable here, I would have admitted the accused party to bail, during the hearing, because the peculiar circumstances of the charge would have justified such an exception from the ordinary course of procedure, in cases of homicide.

I consider the application for extradition as made by Sir Edward Thornton, the diplomatic representative of the British government, though it is made in the name of the consul. It occurs to me that the consul may perhaps desire to communicate with Sir Edward Thornton, before deciding whether to insist on the application for a warrant. The case may therefore stand over until Wednesday next, unless the accused party objects to the delay.

"And afterwards, on Wednesday the twenty-fifth day of June, A. D. 1873, the said consul praying that a warrant of extradition issue, it is issued accordingly, and is hereto subjoined.

"And all the said depositions, examinations, warrants, orders and other documents, are therewith returned and certified by the said judge, at Philadelphia, in the said district, on the day last aforesaid."

UNITED STATES OF AMERICA.
EAST. DISTRICT OF PENNSYLVANIA, } ss.:

To the marshal of the United States:

In the matter of Benjamin Palmer charged with murder, on the British barque J. B. Duffus, on the high seas.

This case having been heard before me, on petition of George Crump, Esquire, acting consul for her Britannic Majesty at the port of Philadelphia, that the said Benjamin Palmer be committed for the purpose of being delivered up to justice, under the provisions of the treaty made between the United States and Great Britain, on the ninth day of August, A. D. 1842. I find and judge that the evidence produced against the said Benjamin Palmer, is sufficient in law to justify his commitment on the charge of murder, had the crime been committed within the United States.

Wherefor I order that the said Benjamin Palmer be committed pursuant to the provisions of said treaty, to abide the order of the President of the United States in the premises. Given under my hand and the seal of said court, at Philadelphia, this twenty-fifth day of June A. D. 1873.

(Signed,) JOHN CADWALADER,
[SEAL.] Judge.

[After the evidence in the case had been certified to the secretary of State, the case was reargued before him, by the counsel for the prisoner. The secretary of State finally refused to issue the warrant of extradition, and Benjamin Palmer was released from imprisonment. While the case was pending in Washington, the British minister, Sir Edward Thornton, raised the question whether the secretary of State has the right to refuse a warrant of extradition, after a judicial tribunal had certified, under the treaty, that the evidence was sufficient to sustain the charge made against the accused, and has called the attention of his government to the matter, for the purpose of obviating the difficulty in the future, if possible. ED.]

TWENTY-FIRST JUDICIAL DIST.

Court of Common Pleas of Schuylkill County.

SAMUEL LONG v. JOHN SHELLY.

1. A judgment of a justice of the peace affirmed or reversed on certiorari is final, and execution can issue out of the Court of Common Pleas for the debt, interest and costs when affirmed, and for the costs when reversed, under the act of 1810.
2. The record need not be remitted to the justice except where the proceedings are non-prossed.

Motion to set aside the execution.

Opinion by WALKER, J.

This suit, brought before a justice of the peace, was removed into the Common Pleas by the defendant upon a writ of certiorari. After argument, the judgment of the justice was reversed by the court, and the defendant issued execution for the costs. A motion was made by the plaintiff to set aside the writ, on the ground that no execution can be issued under the 25th section of the act of 20th of March, 1810 (Purdon's Dig. vol. 1, page 608, pl. 29), until the final disposition of the case upon a second trial before the justice. This is the sole poi

On the affirmance or rever l of a judgment removed into the Comm n Pleas by certiorari, the record is not remitted to the justice (as in cases of writs of error to inferior courts), but execution issues at once from the Common Pleas for the debt, interest and costs, when it is affirmed; and when the judgment is reversed, for costs only, without referring the cause again to the justice. Troubat & Haly's Prac. vol. 1 part 2, p. 716; Robbins v. Whiteman, 1 Dallas, 410; Silvergood v. Storrick, 1 Watts, 532.

This is the invariable rule, with the exception where the certiorari is non-prossed. in which case the record must be remitted to the justice to be proceeded in, for the non-pros. is not final. In this respect there is no difference between certiorari and writs of error. Welker v. Welker, 3 Pa. Rep. 24. The reversal here, however, is a final determination of this suit. See act 20th March, 1810, section 22, Purdon's Digest, vol. 1, p. 608, pl. 27, and no writ of error can issue thereon, Purd. Dig. 608 pl. 27; 7 Wright, 111. And it is in the nature of a judgment for defendant for the amount of the costs. See British Statutes, Rob. Dig. 129, and Troubat & Haly, vol. 1, part 2, p. 734. The act of Parliament passed in the 4th year of James I., chapter 3, gives costs to the defendant in all actions brought in any court, if non-prossed, or judgment be entered for defendant, where the plaintiff, if successful, would be entitled to costs. Roberts' Dig. of British Statutes, 129 and 130. A judgment affirmed on certiorari, becomes a judgment of the Common Pleas, and there it can be enforced. Essler v. Johnson, 1 Casey, 350, After this, if the plaintiff desires to institute another suit before the same or another justice of the peace, under that section of the act of 1810 above referred to, and shall obtain a judgment equal to or greater than the present judgment, then he will be entitled to costs under the act, and these costs may be recovered before a justice of the peace in the same manner as sums of a similar amount are recoverable. Motion discharged.

F. W. Bechtel, Esq., for plaintiff.

George D. Haughawout, Esq., for defendant.

COMMON PLEAS.

NOTICE.—Judgments for want of affidavits of defence may be entered in this Court on Monday September 15th, 1873, on all writs returnable to the first Mondays of July and August, 1873.

NOTICE TO THE MEMBERS OF THE BAR.—The Circuit Court of the United States, direct the Clerk to announce that no cases will be entered upon the Trial or Argument Lists of Said Court for October Sessions, 1873, unless specially ordered by counsel on or before MONDAY, the 22d of September.

SAMUEL BELL,
Clerk of Circuit Court of United States,
sep 5-3t Eastern District of Pennsylvania.

LEGAL GAZETTE.

Friday, September 5, 1873.

JOHN H. CAMPBELL,
EDITOR.

THEODORE F. JENKINS,
ASSOCIATE EDITOR.

We call the special attention of our readers to the very important decision of Judge Cadwalader, in the extradition case of Benjamin Palmer, in this city, coming so close after the celebrated MacDonald and Vogt cases, it possesses special interest. It will be found on page 282.

FRAUDULENT LAWS.

It seems that Pennsylvania is not the only State in which complaints have been made of the passage of acts of Assembly by fraudulent means. In New York it has been charged that laws, in some instances, which had only passed one branch of the Legislature, were officially promulgated as valid, and many have been the hints and insinuations that such scandalous occurrences were not rare. In Pennsylvania there have been instances of laws appearing upon our statute books that either never passed the Legislature, or passed it in a different shape from that in which they were published. And now New Hampshire is troubled with the same complaint, although there the courts have taken a step that will startle some of their judicial brethren in this and other States. On our first page will be found the opinion of the judges of the Supreme Court of New Hampshire rendered a few days ago, declaring an act, which was duly signed and authenticated by the proper legislative and State officers, to be invalid, because it was shown that the act had never passed but one branch of the Legislature.

The State reporter, who, by the way, is one of the most enterprising in the country, sends us the following letter accompanying the decision:

ANDOVER, N. H., Aug. 30, 1873.

EDS. LEGAL GAZETTE,

DEAR SIRS:—I herewith send you an opinion of the judges of our Supreme Court furnished me to-day. If my memory is not at fault, the highest court of New Jersey, a few years ago, following what was supposed to be the rule laid down in The King v. Arundel, 1 Hob. 109, held, upon a case somewhat akin to this in principle, that the court would not go behind the great seal. In this day of tricky legislation, there should be a power lodged somewhere to determine what acts have really passed, and what have not. The question has been very carefully considered here, both in this case and in the opinion in 35 N. H. 579, in which Chief Justice Perley ransacked all the judicial history of the world upon this point.

The court were unanimous in both cases.

Very truly,
JOHN M. SHIRLEY.

In this connection our attention has been called to an article which appeared in "The Press" of this city on Wednesday last, opposing the section of "the proposed constitution, as passed second reading," which endeavors to provide a remedy for the evil of corrupt legislation. Among other things the writer makes the rather extraordinary statement that "the proposition is not entirely novel, but it has been uniformly spurned from every court as most mischievous and unsound." The decision we have referred to, coming right upon the heels of this statement, will no doubt cause the writer to qualify his language a little. It is certainly deserving of a careful perusal, especially in view of the passage in the Constitutional Convention of this State of the section so distasteful to the editor of "The Press." As many of our readers may have not had the reasons for its passage set before them at length, we take the occasion to print in this issue the speech of Hon. Wm. H. Armstrong, chairman of the judiciary committee, and that of Hon. Chas. R. Buckalew, both delivered in the convention upon the 2d of July last. As these gentlemen are of opposite political views, and are both well known throughout the State, their words will be of interest.

The section as passed on second reading (it has yet to go through a third reading) is as follows:

SECTION 21. Whenever, within six months after the official publication of any act of Assembly in the pamphlet laws, and not thereafter, it shall be alleged before the attorney general by affidavit, showing probable cause to believe that the passage or approval of such law was procured by bribery, fraud, or other corrupt means, it shall be the duty of the attorney general forthwith to apply to the Supreme Court, or one of the judges thereof, for process in an appropriate proceeding, which shall be ordered, if there appear to the said court or to such judge to be such probable cause, and in which the commonwealth, upon relation of the attorney general, shall be plaintiff, and such party as the Supreme Court or the judge who shall grant such issue shall direct, shall be defendant, to try the validity of such act of Assembly, whereupon the court shall direct publication of the same, and any party in interest may appear, and upon petition be made a party plaintiff or defendant thereto; the said issue shall be framed and tried before a jury, by one of the judges of the Supreme Court, in whatever form and in such county as the Supreme Court may direct, and if it shall appear to the court and jury, upon such trial, that the passage or approval of the same was procured by bribery, fraud, or other corrupt means, such act of Assembly shall be adjudged null and void, and such judgment shall be conclusive, and the governor shall thereupon issue his proclamation declaring such judgment; either party shall be entitled within three months, and not thereafter, to a writ of error as in other cases; no officer of the commonwealth, nor any officer or member of the Legislature shall be exempt from testifying when required in such case, but the testimony of any such witness shall not be used against him in any criminal prosecution except for perjury therein.

The speech of Mr. Armstrong, the author of the section, is as follows:

Mr. President:—I desire as briefly as possible to present this question. I am admonished by the manifest impatience of debate which generally prevails, that it would not be wise to detain the convention by anything like an elaborate discussion.

This subject has been more or less in the minds of members of the convention. It has been printed and laid on the desks of members, and some of them have doubtless examined it.

The proposition as a constitutional provision is novel, and chiefly so from the difficulty of devising a plan which shall not too greatly interfere with legislative freedom. The necessity for some such provision has long been felt and acknowledged. It has heretofore been held by the courts with great unanimity that whatever may be the fraud which has been perpetrated by or upon the Legislature, or by whatever means of corruption or otherwise an act of Assembly has been procured, when it has once passed the forms of legislation, it is, as held by the courts, to be sacred, and cannot be declared to be void by reason of any fraud, bribery or corruption which may have entered into its passage, however outrageous and clear.

The leading case upon this point is Fletcher v. Peck, 6 Cranch, which was decided in the Supreme Court of the United States in 1810. I do not mean to discuss this subject elaborately, but I desire that the true bearings of this celebrated case shall be understood. In 1795, the Legislature of Georgia passed an act by which, in consideration of $500,000, they transferred five hundred thousand acres of extremely valuable land, lying upon the Mississippi, and then belonging to the State, to a company of adventurers. By the terms of this law, $50,000 was to be paid in cash to the treasurer and a mortgage for $450 000 was to be taken for the balance. It was admitted as clear beyond all dispute, that the parties interested in the procurement of the law had executed deeds for portions of the land, and laid them upon the desks of the various members of the Legislature willing to take them, until by the most open, flagrant, unblushing fraud they procured the passage of the act referred to. I need not trace its history. The Legislature subsequently repealed the act, with every possible effort on their part to put their seal of condemnation upon it, and so far as lay within their power, prevent its operation. The question came before the judges of the Supreme Court in the case already cited, and was exhaustively discussed. It was held in substance, that the validity of a law cannot be questioned because undue influence may have been used in obtaining it. However improper it may be, and however severely the offenders may be punished, if guilty of bribery, yet the grossest corruption will not authorize a judicial tribunal to disregard the law."

This decision, whether based upon sound principles or not, and I have often doubted its soundness, has become the rule of decision, and the courts of the various States and of the United States have uniformly accepted this doctrine. It has been so held in Pennsylvania and in the State of New York, and in other States. In short, wherever the question has arisen, under the effect of the holding of the court, which thus cuts off all possible inquiry into the corrupt modes of legislation, has happened that Legislatures have felt themselves to be wholly beyond the power of the courts or of any power to intercept the operation of fraudulent legislation. Under the impunity guaranteed by the decision to which I have referred, corruption has grown in every tate of the Union until it has become the commonest of all things for legislation to be procured by means conspicuously and admittedly corrupt. To such an extent has this pernicious practice grown, that the people are fast coming to regard it as inseparable from republican institutions. It is bringing discredit upon our institutions and threatens their perpetuity. The impunity which attends corrupt legislation derives nearly all its strength from the conviction that there are no means by which the guilty perpetrator of the fraud can be deprived of the profits of his corruption. The want of judicial power to investigate and set aside such legislation is a lamentable deficiency in our system. The want of it has promoted the growth of this enormous wrong until our institutions are strained to their utmost extent, for it must be borne in mind, that a republican government rests essentially upon the integrity of its law-making power.

Acts of Assembly, public or private, depend upon the judgment and will of the Legislature. If we perpetuate this disastrous impunity to corrupt legislation we unsettle the foundations of our government—we tolerate corruption at its very fountain, and we can have no assurance that our legislation will be wise or such as the public interests require. It will inevitably in the future as in the past, be largely influenced, and in many instances controlled by the particular and corrupt motives brought to bear upon members of the Legislature. The evil has become enormous, and it is attracting attention in all the States. In Ohio, their convention now in session are considering the subject. What has been their precise action I do not know.

The gentleman from York (Judge Black) told me yesterday that he had a letter from Mr. Charles O'Conor, of New York, calling attention to the subject, and stating his conviction that the purity of republican institutions depends largely upon the power of arresting corruption in the Legislature. In our own State we have had numerous instances of it. I will refer to only one. The act approved the nineteenth of June, 1871, entitled "an act relative to legal proceedings by or against corporations" was approved by the governor, and stands to-day as a valid law in the statute books of the State. I do not know whether the bill was passed or not, but I do know that it was alleged that the act was not passed through either house of the Legislature, and I have now before me a letter from a gentleman of high standing and reputation in the State, urging the necessity of a provision like this now proposed, in which he states to me that he has the letters of twenty-two members of the Senate of 1871, who state over their own hands that they did not vote for the act, and that it never passed the Senate of the State. The question was submitted to a committee of the Senate of which the gentleman from Indiana

(Mr. Harry White) was chairman. That committee, through pressure of other duties, were not able to make an exhaustive examination into the facts, as I am informed; but they did make a report to the Senate, in which they stated that the bill, although approved by the governor, never passed the Senate. It was openly stated by Senators on the floor, that the bill had never passed the Senate, and it was also stated that it had never passed the House, and so far as I know this was not contradicted. Mr. Buckalew and Mr. Purman were both in the Senate at the time. Mr. Buckalew states now, and Mr. Purman also, that it never did pass the Senate.

What was the consequence? An act of Assembly of exceeding great importance is thus foisted upon the statute books, and becomes a law of the State of Pennsylvania, without the vote of either the Senate or the House! Now trace its further history. When this act of Assembly in a litigation which subsequently ensued at Nisi Prius in this city was cited by the learned counsel of one of the parties, the opposite party alleged before the court that the act had never been passed. The court, following the lead of Fletcher v. Peck, and the line of decisions which had shut them up to this inevitable course, held that it was not competent for the court to inquire into the mode of its passage or into the fact whether it had been passed at all. The villainous fraud was under the cover of the broad seal of the commonwealth, and no power on earth could withdraw it from this protection.

My friend (Mr. Cuyler) suggests that the judge added that it was so salutary. that it ought to have passed. Perhaps it was, but the other party to the suit would hold a very different opinion. But you will observe that we are not inquiring into the value of the act itself, but into the mode of its passage; and no matter whether it were or were not a good law, it was a law which should not have been upon the statute books until it had been clearly and honestly passed through the forms of law, and with the concurrence of both the Senate and the House.

Mr. Funck. Will the gentleman state what the character of that legislation was?

Mr. Armstrong. I have it before me.

The act of Assembly referred to is entitled "An act relating to legal proceedings by or against corporations," and will be found on page 1360 of the laws of Pennsylvania for the year 1871. I do not think it important now to read the act; but I will send it to the desk and have it read if the gentleman from Lebanon desires; but I presume it is not necessary It is composed of two sections, and vitally affected important litigations pending between two great railroad corporations of the State. The parties adversely interested in the legislation referred to were the Pennsylvania Railroad Company and the Catawissa Railroad Company, the latter of which desired to establish the fraud by which the act became a law, and by which they alleged their rights were fraudulently and most injuriously affected.

Notwithstanding the earnest and persistent efforts of counsel, the court steadily refused to enter into any inquiry upon the subject. Thus bound by established precedents, the court, in the existing state of the law, could afford no relief, and with irresistible conviction forced upon them that the rights of legislation, the rights of private property, and the sovereignty of the people were flagrantly outraged and trampled under foot, they proceed to complete the fraud by solemn adjudication upon a law which they knew was an unholy fraud upon every right which courts of justice are established to protect Shall these things be? Shall we continue to grasp at the shadow and let the substance go? Shall we be told that the sovereignty of the legislative department must not be invaded by judicial inquiry, when it stands to-day debased by frauds like these? Shall the punctillio of respect stand in the way of substantial justice? I have no indiscriminate invective to launch against members of the Legislature. The lack of personal integrity in the members has no doubt been greatly exaggerated, but we are not blind, and we dare not close our eyes to the corrupting influences which every intelligent man knows so largely controls our legislation. Every man on this floor, and throughout the commonwealth, who has closely observed the course of legislation, knows there are now upon our statute books laws, and their name is legion, which never could have been there if the right of investigation had existed even to the limited and cautious extent which this section proposes. The progress of events has brought our State in common with others face to face with this enormous wrong. Could the Supreme Court in 1810 have foreseen the consequences which have grown from the rule they established, I cannot doubt they would have paused long before they would have handed over legislation to stand conspicuous and alone as the only fraud which judicial inquiry cannot reach. By a rule of law as universal as it is necessary and salutary, fraud vitiates everything into which it enters but legislation. Corrupt decisions are reversed. Corrupt judges are impeached or removed by the Legislature. A corrupt executive would be impeached or removed. Corrupt elections are set aside. The sovereignty of the people in its original exercise by election has always been open to judicial inquiry, and elections are reversed without hesitation when it is manifest that fraud has affected its results. Yet, with an inconsistency which is without parallel, we accord to the act of the agent an impunity we deny to the people in the exercise of the highest sovereignty they can exercise. Corrupt legislation and the rights it confers even upon the *particeps criminis* are protected and enforced by every department of the government. This inconsistency is monstrous; this injustice is too grievous to be borne.

Standing then in the presence of a corrupt influence and a corrupt power so enormous as I have indicated, what shall we do? To look to the Legislature for any remedy, even if they have the constitutional power to confer it, which some doubt, is delusive and wholly inadequate. The extraneous influences which procure corrupt legislation would be quite sufficient to prevent the passage of any law which would be sufficient to prevent such legislation, or to inquire into it when accomplished. And if by any chance such law were passed, it could not long remain. For I do verily believe that nothing we have done or can do will be so great a terror to evil doers as the consciousness that for all these things they shall come to the bar of a court where judgment will be without fear and without favor.

There is necessity that this remedy shall be embodied in the fundamental law. It may well be doubted whether the Legislature under the influences which have heretofore controlled them, and which we cannot wholly exclude, would give any efficient remedy if they could. And certainly it would be always subject to repeal. Without a constitutional provision the line of decisions will follow on, *ad infinitum*, in the direction which it now tends, and these corruptions will be wholly without remedy.

In view of these facts, and I might extend these illustrations indefinitely, some remedial provision is imperatively needed. Besides the procurement of laws which have never passed either branch of the Legislature, it is known that bills which have passed have been surreptitiously abstracted from the file and have not been permitted to go before the governor at all, put particularly in the last days of the session have been mysteriously lost or mislaid; and thus legislation has been thwarted in that direction. So, also, bills have been passed and when engrossed for executive approval, important words, lines, and whole sentences and paragraphs have been omitted. In such cases, if discovery ensues, it is always laid to the mischance of unintentional error, or to emission or mistake. In other instances words and sentences have been substituted or added, by which the purpose and effect of the act have been totally changed. In other instances bills fraudulently procured to be engrossed have been, in the hurry incident to final adjournment, fraudulently slipped into the bundle of bills prepared for signature by the speakers of the Senate and the House. I am saying that which men on this floor know to be true. These are but a few of the many devices known to the ingenious manipulators of fraud, by which the will of the people is thwarted under the confident belief, I may say the confident knowledge, that if the law has once assumed authentic form it has passed beyond the power of investigation. Now, in view of these facts, what is the proper remedy?

It is manifest that a law which is upon its face regular is to be taken *prima facie* to be valid. It is also manifest that any unwarrantable suspension of its operation might be, and in some cases would be, injurious to some extent. There should, therefore, be a limit of time beyond which no inquiry into its validity by reason of any fraud in its procurement should be permitted.

So also it is clear that an inquiry of this kind ought not to be in the power of parties in merely private litigation. It concerns the credit of a department of the government, and ought not to be brought in question except under such fixed and solemn forms of judicial investigation as will at once clothe the proceedings with the highest dignity, and give assurance that the investigation shall be not only thorough but impartial. An inquiry so important ought not to be collateral but direct, and should be the immediate and only subject under consideration. Again, if it were open to question in merely private litigation it might be under investigation at different times in different courts, and subject to diverse decision. Nor could such objection be obviated, for if the decision were to be final where the jurisdiction first attached, it would be open to collusive action by interested parties, and tried with intent to establish its validity, and with no power to permit other parties to interplead, who, whatever their interest in the question, might have no interest in the subject matter of the suit. And if such decision were not conclusive, inconsistency of decision would necessarily sometimes occur.

It would follow that the act of Assembly which would be controverted in one county to-day and decided to be void, might in the next decision and in another jurisdiction be held to be valid, and if perchance in the first litigation it were held to be valid, rights might become vested under it and a second decision which would declare it to be void must either unsettle the first with the rights vested under it, or be wholly nugatory. The latter I would presume to be the correct holding, for I suppose that under a void law no rights could vest. It would not, therefore, be well to frame the section in a way which would allow the validity of the law upon the grounds designated to be the subject of merely private controversy.

In view of these difficulties it was important in framing the amendment to consider in what manner they could be surmounted to preserve its efficiency without imparing any rights of the citizen.

With this purpose in view, allow me to call the attention of the convention to the provisions of the section in detail.

The first clause provides that "whenever within one year after the official publication of any act of Assembly in the pamphlet laws," &c. I have said one year because there must be a time when an act of Assembly, whatever it may be, must have the force and effect of positive law; and if the time be too greatly extended the operation of the law would be too long suspended, six months, in my judgment might be sufficient, but of this the convention will judge. I have said the official publication in the pamphlet laws, because the year might expire before the public would have notice that the act had passed at all. It is therefore made one year after public notice that the act has passed, and this is the more necessary —as under our laws private acts are not published in the pamphlet laws until the enrollment tax is paid.

"It shall be alleged before the attorney general by affidavit, showing probable cause to believe that any fraud, bribery, or undue means were employed to procure the passage or approval of such law."

The attorney general is the recognised official head of the law in the State. It is appropriate that the application should be made to him. But it would not do to allow to the attorney general an unlim-

ited discretion, for if by chance he should himself be interested in any of these widely extended and profitable speculations which in a thousand forms, are so frequently the subject of fraudulent legislation, he would be reluctant to institute the proceeding. Therefore it is provided that when probable cause is shown in the affidavit:

"It shall be the duty of the attorney general forthwith to apply to the Supreme Court, or one of the judges thereof, for process in an appropriate proceeding."

It was not proper to limit the discretion of the Supreme Court as to the mode of proceeding.

In the first place, I had drawn it "by *scire facias*." Afterwards it occurred to me it would be better to try the case in a feigned issue; but then after all it might happen that a bill in equity would be the very best process. So it resulted that I thought it best to leave it open for the Supreme Court, and attorney general to, devise the most efficient mode. It is therefore simply provided that an "appropriate proceeding" shall be had which may be by bill in equity, or by feigned issue, or by *scire facias*, or by whatever mode might, under the exigencies of the particular case, be deemed most appropriate and efficient.

But then it is provided that the process "shall be ordered of course." But perhaps it would be as well or better that the Supreme Court, or the judge applied to, should have the right to pass upon the question of probable cause, leaving it in their discretion to withhold process if the grounds alleged appeared to be either frivolous or unfounded

The party plaintiff shall be the "commonwealth at the relation of the attorney general." This is eminently proper. It is a well known mode of procedure, and befits the dignity and importance of the case to be tried.

There was more difficulty in designating the defendant. It would not always be easy or possible to designate the party in interest, but it is not of paramount importance under the safeguard provided. The court might raise a party—*pendente lite*—might make a nominal party—or name some officer of the government or Legislature. It is therefore declared that the defendant shall be "such party as the Supreme Court or the judge who shall grant such issue shall direct." If it were imposed upon the attorney general to designate the defendant, he might not be able to do so because the whole of the facts might not be sufficiently developed to enable him to determine who ought to be the defendant.

But to afford the fullest opportunity to all persons having any interest in the question to protect their interests, it is further provided that when the process is thus ordered, "the court shall direct publication of the same, and any party in interest may appear and upon petition be made a party plaintiff or defendant thereto." The purpose of this is manifest. If the action is instituted by the commonwealth at the relation of the attorney general, he would have no especial and particular interest in ordinary cases to press this investigation with sufficient ardor; but when it is permitted to any party having an interest under the act of Assembly to be made co-plaintiff with him and thus introduce the vigor and force of personal interest, efficient investigation will be insured, at the same time that the power and the process is kept wholly under the control of the commonwealth as represented by the attorney general.

But, again, parties in interest have the right to appear as defendants, because, perchance, the charges might be unfounded. It might be that upon proper showing it would appear that the act of Assembly was sufficiently and properly passed, and therefore it is that the parties in interest claiming under an act of Assembly ought to have the right as parties defendant to show, upon proper pleading, that the act of Assembly was properly passed without bribery, fraud or other corrupt means.

Thus providing for the parties who shall first make up the record and the mode of giving notice and bringing other parties in interest before the court, the question next occurs as the trial. "The said issue shall be tried upon proper pleadings;" that is, pleadings properly adapted to the particular proceeding which may be instituted. It is to be tried "by one of the judges of the Supreme Court." The question is one of extreme importance, involving not only the dignity but the reputation of the Legislature, involving also the validity of the act, and possibly the reputation and the fidelity of the executive of the State. In such an event the dignity and importance of the question demand that the highest tribunal of the State should supervise the trial. It may be tried "in whatever county the Supreme Court may direct" If the act were such that it affected, advantageously or adversely, the interests of a particular section of the State, there would be a manifest impropriety in trying the cause before a jury of such a county. Local and private interests and prejudices shall be excluded as far as possible. It is therefore left to the discretion of the Supreme Court to say in what county the action shall be tried, trusting to the high tribunal before which the parties must appear for the assurance that the question at issue will be justly, fairly and impartially adjudicated.

Having thus provided for the institution of the proceeding and for the mode of trial, it is next provided that if the court and jury, that is, the jury under the direction of the court, guiding them in their deliberations, as they do in other cases, and under the established forms and principles of law, shall declare that the act of Assembly is void, or if they shall declare that it is a valid law, in either event, the litigation upon that question having been once impartially had, and a through investigation made, shall be conclusive. The law thus investigated shall stand upon the footing of every other right of the commonwealth, that, once adjudicated, the judgment of the court shall be final and conclusive. The question thus raised is important in the highest degree, but it rises no higher than other questions which engage the attention of the court from time to time. The tribunal which passes upon life and liberty and every right of person and of property is surely competent to guard with impartiality, and to decide with justice to all parties in interest any question which such investigation could possibly involve. It seems wholly inconsistent with every principle of sound morality that whilst every other fraud which men can perpetrate shall be brought to the light of truth and justice, this crime against the State, against the liberty, against the dearest rights involved in the exercise of government, shall be protected by a sort of high sounding sentimentalism which professes to regard the legislative department of the government as too sacred to be touched even where it reeks with corruption—I confess, sir, I have no sympathy with such grasping at shadows—such disregard of substance.

But, sir, as we are dealing with an act of Assembly appearing in the pamphlet laws of the State, and liable to mislead those who depend upon the act of Assembly as published, it is further provided that "the governor shall thereupon issue his proclamation declaring such judgment," so that if the law be found valid the litigation that has ensued respecting it shall be ended by a public proclamation which shall restore confidence to the law. If it be declared null and void, the public proclamation puts all the commonwealth upon notice that that act is inoperative and void. The proclamation is therefore a proper part of the process to give notice to the people of the judgment of the court.

But the finding of the jury might be wrong in law; there might be error; and hence it is eminently proper that there should be a provision for revision in the Supreme Court. Hence it is provided that "either party shall be entitled within six months, and not thereafter, to a writ of errors as in other cases." The writ of error is made a writ of right, because it is eminently just that a question of this magnitude should be passed upon by the highest judicatory of the State. But if the right to a writ of error were unduly extended, it would suspend the operation of this law to a very indefinite period. Six months I thought was quite sufficient. The gentleman from Columbia (Mr. Buckalew) suggests to me that three months would be quite sufficient. I would prefer myself three months, and I had so written it, and struck it out, and put in six in deference to what I supposed might be the view of the convention; but three months, in my judgment, is ample time for the parties to take a writ of error in such a proceeding if either party feels aggrieved by the decision.

There is another provision of the section to which I call the attention of the convention. The concluding paragraph of the section provides that—

"No officer of the commonwealth"——

Which includes of course the executive and all inferior officers——

—"nor any officer or member of the Legislature shall be exempt from testifying when required in such case, but the testimony of any such witness shall not be used against him in any criminal prosecution unless for perjury therein."

It is desirable that every means of information shall be in the possession of the commonwealth in this investigation. Not even the executive himself shoul be exempt from testifying, nor any mem ber of the Legislature, nor the clerks an officers of the Legislature, by whom it i possible, if not probable, that a very larg amount of the corrupt manipulation c the Legislature is conducted. It ough therefore, to be placed in the constitutio that they shall not be exempt from test fying. Otherwise, we would have an ac of Assembly passed, probably the firs year, exempting members of the Legisla ture and officers of the government fror giving testimony in such cases. They ar sufficiently protected when it is provide that the testimony of any such witnes shall not be used against him in any crim inal prosecution except for perjury in suc case. The effect of this will be that ever officer of the commonwealth, from th executive down, and every member an officer of either House of the Legislatur will be admonished that there is a powe above him to investigate his infidelity t public trust and to open the way to th infliction of the penalties incurred by th breach of his oath of office and of corrup tion under the constitution which w have framed. I do not believe that unde the operation of this section we would b often called upon to investigate the que tions which fall within it. I have an abic ing confidence that the very existence c the power would so admonish the Legi lature and the executive that it would b among the surest of the methods by whic pure and honest legislation would be se cured.

One other thing I desire to notice. I occurred to my mind, as doubtless it wi to the minds of many here, that ther ought to be some saving of vested right under an act of Assembly which shoul subsequently be declared void for th reasons defined. I will state the objec tions which occurred to me, and I gav it very full consideration. Of course th convention will not understand me a undertaking to say that the result of m deliberations is necessarily right, or a expressing any dogmatic opinions on th question. I am only endeavoring to giv the convention as fairly as I can the re sult of my investigations and deliber tions, and the reasons for the conclusion I have reached. I inserted such a provi ion originally, but struck it out for thi reason: If a saving clause is inserte saving the vested rights in an individu which may have accrued under the law you afford the readiest mode of evasio and instantly when the law is passed i will become the interest of the partie who expect to be benefited by it to s manipulate its operation as to bring i third parties in interest. By this eas and common expedient the whole pu pose of the investigation might be de feated. But it would even reach furthe The law would be so constructed that i could be thus manipulated, thus putting i in the power of the parties, who corrupt procure this act, to manipulate it in way which would create vested rights, an secure indirectly the very thing whic this measure is intended to prevent.

But no hardship can come from th omission of such a saving clause. I would seem to be certain that no righ could become vested under a *void law*

But be this as it may, the section requires that application for process in the proceeding contemplated shall be made within one year, and I should have no objection to making it six months, and then the provision of the constitution would stand as public notice to every citizen of the commonwealth that he can take no right under an act of Assembly which shall become a vested right in less than six months. I believe it is sufficiently guarded, and I know of no vested right which would occur under it which it would be important to protect. The utmost inconvenience that could arise would be the suspension of the operation of a law for six months, and this could be, unless in very exceptional cases, of very little moment, especially as compared with the importance of providing any guarantee which will aid in securing honest legislation. So little is such inconvenience to be regarded that in some of the States no statue is allowed to take effect until six months after its passage. It could not of coure apply to any act of Assembly which has already become a law; but as to all future laws such provision in the constitution would be notice of record to all parties that within six months there is a power to inquire into the validity of the law upon the grounds which are here asserted. In all ordinary cases no such question could arise, and parties would take their rights under the act of Assembly without hesitation, knowing that the six months would soon pass away, and that there being no suspicion of unfairness in the act their rights vested would remain intact and every interest be protected. But where we are attempting to deal with fraudulent and corrupt legislation, grown expert by the experience of years, and strong in its confidence of impunity, and to wholly prevent it if possible, it is not going to far to say that for six months such an act thus tainted with suspicion shall stand under notice to the people of the commonwealth, and to all others, that within that time investigation may be instituted under which the law may be pronounced to be invalid for the reasons which are set forth.

Sir, the instincts of the people point unerringly to the acts which fall under suspicion of fraudulent procurement. The great body of the law will be received and acted upon with undiminished confidence, but those acts which in the past have so discredited the State, or others like them in the future, could not, under a section like this, pass successfully the ordeal of judicial inquiry before an impartial court and jury. The evils to be remedied are frightful in their enormity, the inconveniences to be incurred, taken in their largest aspect, are inconsiderable and trifling as compared with the results which I believe would flow from this provision.

Entertaining these views, Mr. President, and having given this subject as thoughtful attention as I am capable of bestowing upon it, I have come to the deliberate conviction that this section is right. It may be amended. Far be it from me to suppose that it is not capable of amendment; but, in my judgment, it is a step in the right direction. It protects all interests which ought to be protected. It is an admonition to the Legislature, and to the executive, that any corrupt practice which touches the foundation of the honesty of our legislation shall be open to judicial investigation; and under such a constitutional provision, and with the other safeguards which have been placed around legislation by this constitution, I believe we shall have done a vast deal towards stemming the tide of corruption which now threatens to destroy the liberties of the people.

The speech of Mr. Buckalew is as follows:

This is a proposition offered by the gentleman from Lycoming (Mr. Armstrong) that an additional requirement shall be placed in the constitution regarding acts of Assembly. He proposes that we shall provide that an act of Assembly shall be honestly passed, that it shall not be passed by bribery or by fraud, or by any form of corruption; that if the passage of a law be tainted with fraud or corruption, the question may be judicially investigated, and the fact being ascertained, the law shall be pronounced unconstitutional and void. The courts now pronounce, as the gentleman from Philadelphia (Mr. Dallas) has so well argued, any act of Assembly void for unconstitutionality, but not because it has been passed by corrupt influence, for there is no constitutional requirement at present that laws shall be honestly passed.

The only difference that I discover in classifying this proposition with other propositions, covered by the power of the courts to pronounce acts void for want of conformity to the constitution—the only difference that I can discover in making this classification is that in cases under this amendment the court will call to its assistance a jury in order to ascertain how the fact may be. Ordinarily the elements of judgment for a court appear upon the face of the statute itself as compared with the constitution. In these cases, as a fact is to be ascertained, the intervention of a jury becomes necessary. Therefore a jury is to be empanelled, who, under the direction of the court, will determine the fact in controversy—was or was not the statute passed honestly through the two houses of the Legislature, and honestly signed by the governor of the commonwealth?

I do not see anything very novel, extraordinary or alarming in this proposition. But the question remains, and it is a proper one for consideration: Is it expedient to place such a provision as this in the constitution? I observe that there is a great difference of opinion among my colleagues on this floor, and for that reason I speak at this time.

These general charges of corruption upon the Legislature, or rather upon a small part of the members, for it is not intended ever to corrupt them all, but only so many as are necessary to constitute a majority to pass a bill—this general cry of legislative corruption is an evil in itself. It may be a necessary evil under some circumstances, but it is unquestionably a great evil; its effect upon the public life of the State and upon the morals of the people of the State is in the highest degree pernicious.

My idea in reference to an evil of this sort is that it shall not be talked about unless the discussion is accompanied with a blow—with something that tends to check or mitigate or destroy the evil. I grant you it is perfectly legitimate, here and now, to discuss this question, because we have before us a practical proposition to abate this evil. Ordinarily indiscreet discussion of this subject is pernicious Discourses of this sort go out over the State, and I have no doubt that they cause many men in different parts of the State to come forward as candidates for the Legislature who otherwise would never think of it. There are plenty of men seeking nominations for seats in the Legislature who are brought forward by these very denunciations of legislative corruption; men who think it would be a good thing to get there themselves and participate in the enjoyment of those favors, which, according to the public rumor, the third house distributes to the first and second houses. I am entirely in favor of arming the courts, or a proper court, in this State, with power to say that an act of Assembly shall be void, and be pronounced unconstitutional when it is fraudulent. I see no objection to that. As I said before, the only point for discussion is the question of expediency, as to the instrumentality by which to reach our object.

There is one thing material to observe, however, here, in connection with the remarks made by sundry gentlemen, particularly by the member from Indiana (Mr. Harry White) that is, that these regulations, which you have provided in the article on legislation, do not reach this evil of corruption in the passage of laws. At all events the effect of any of these regulations, as a check on corruption, must be indirect and but of small account. Corrupt legislation almost invariably, though not always, goes through all the forms required by the constitution. Corrupt legislation is carefully formed by its authors. They "make clean the outside of the cup and the platter." The corruption and the evil is within and hidden, and the simple question is whether you will arm the judicial power of this State with authority to penetrate beneath the fair outside and detect and repress one of the capital evils of our political system. Well, the attorney general is to be called upon. Now, there is objection in a case of this kind to allowing anybody in the State who may desire to challenge an act of Assembly to go into a court and call in question the constitutionality of a statute for fraud. That is not to be thought of. Therefore, you have here provided a single hearing of such question, a hearing within a brief time after the act is passed—three or six months—a hearing only upon the information of the attorney general—a hearing by the highest court of the State or by one of its selected judges—a hearing under all the forms and guarantees even of the common law—trial by jury under the instruction of a court. What additional guarantees can you have that an investigation of this kind will be fair, thorough, intelligent and effectual; yes, and as a gentleman before me reminds me, in case of error from any cause, a prompt hearing by the full bench of the Supreme Court promptly afterwards.

Now, sir, I say, here in my place, that no citizen of the State, no corporation of the State, no municipality of the State, interested in your laws, can object to this requirement that your laws shall be honestly passed, not merely through constitutional forms, but with the baptismal blessings upon them of that justice which, in the language of Hooker, "constitutes the very foundation of the Eternal Throne."

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE AMERICAN EXCHANGE BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to three million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled the INDEPENDENCE HALL BANK, to be located in Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE DRY GOODS BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE ARTISANS' BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE MARKET BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE DELAWARE RIVER BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE GROCERS' BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the conferring of the powers of a Bank of Deposit, Discount and Issue upon the Philadelphia Banking Company, incorporated in accordance with the Act of Assembly approved March 11th, 1870, and an increase of capital to five million dollars. jul 4-6m

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1873.

July 25, Charles M. Wagner, Administrator of RICHARD MANDRY, dec'd.
" 25, Enoch G. Hopkins, executor of GRACE BLAND, dec'd.
" 25, Geo. W. Sheppard, et al., Executors of BAYARD ROBINSON, dec'd.
" 29, Amanda T. Bodder et al., Administrators of LYCURGUS S. BODDER, dec'd.
" 30, Jos. Jones et al., surviving Executors and Trustees under the will of MARY BAKER, dec'd.
Aug. 1, Franklin Johnson et al., Executors of JACOB JOHNSON, dec'd.
" 1, James Bradley et al., Administrators of PATRICK BRADLEY, dec'd.
" 4, Wm. G. Macdowell, one of the Executors of LEVI KENTON, dec'd.
" 7, Jane C. Lyle, Administratrix of MARY THORNTON, dec'd.
" 11, William Overington, Trustee under the will of SAMUEL PILLING, dec'd.
" 11, P. P. Morris, Guardian of RICHARD WISTAR HOPKINSON, late a minor.
" 12, Samuel Fernberger et al., Executors, &c., of WILLIAM T. GORMAN, dec'd,
" 12, James Doak, Guardian of MARY A. HUGHES (now HELPIN), late minor.
" 13, Henry S. Lauber, Executor of DAVID R. SERGEANT, dec'd.
" 14, James Devir, Guardian of EDWARD A. LYNCH, minor.
" 19, David Teller, Executor of NATHAN KATZENBERG, dec'd.
" 20, William B. Chambers, Guardian of AMOS GEORGE CHAMBERS, late minor.
" 21, William Duane et al., Executors of THOMAS SULLY, dec'd.
" 22, Hortense Isaacs, Administratrix of JACOB E. ISAACS, dec'd.
" 23, William Darrach, M. D., Administrator d. b. n. c. t. a. of SUSAN E. MONRO, dec'd.
" 23, James J. Barclay et al., Executors of SAMUEL MOSELEY, dec'd.
" 25, John Harper, Executor of MARY RUSSELL, dec'd.
" 26, Edward Hopper, Executor and Trustee under the will of EMILY MAY, dec'd.
" 26, Mary G. Ruth, Trustee of ANN MARGARET WALTER, dec'd.
" 27, P. J. Wildberger, Administrator of JACOB STEINEGGER, dec'd.
" 28, Pennsylvania Company for Insurance on Lives, &c., Executors of HARRIET BELL, dec'd.
" 28, Pennsylvania Company for Insurance on Lives, &c., Executors and Trustees of JOHN EISENBREY, Jr., dec'd.
" 28, Alfred Taylor, Administrator c. t. a. of HANNAH ENOCHS, dec'd.

WILLIAM M. BUNN.
sep 5-4t Register.

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VOL. V. PHILADELPHIA, FRIDAY, SEPTEMBER 12, 1873. No. 37.

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[From 21 Ohio St. Reports.]

Supreme Court of Ohio.

SCHNEIDER v. HOSIER.

1. An action for injuries sustained by a wife, in her person or property or means of support, under (original) section 7 of the act of May 1st, 1854 (S. & C. 1432), entitled "An act to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio," may be commenced after the death of the husband.
2. The phrase "means of support," used in said section, is not too vague and uncertain to receive judicial construction.
3. A wife has an interest in her husband's capacity to perform labor as a means of support, and she may prosecute an action for damages resulting to her from the deprivation of such means of support, in consequence of the intoxication of her husband, against any person who caused such intoxication by selling to him intoxicating liquors in violation of said statute.
4. The omission of a court, in its charge to the jury, to define or explain doubtful words or phrases contained in a statute upon which the action is founded, does not constitute a ground of reversal, unless such definition or explanation was requested by the party claiming to have been prejudiced thereby.
5. In actions under said section, in which the plaintiff shows a right to recover damages actually sustained, the jury may also assess exemplary damages without proof of actual malice or other special circumstances of aggravation.
6. The verdict in such cases should not be set aside on the ground that the damages are excessive, unless the court is satisfied that the jury abused its discretion.
7. Nor will the verdict be disturbed because the court in its charge stated general propositions of law not involved in the issue, if it appears from the whole charge that the jury could not have been misled thereby.

Error to the Court of Common Pleas of Preble county. Reserved in District Court.

Sarah Hosier, plaintiff below, filed second amended petition against John Schneider, the defendant below, as follows:

"The plaintiff, during the three years immediately preceding and including the 18th of March, A. D. 1865, was the wife of one Zimri Hosier, on whose good conduct, frugality and personal labor she was dependent for the support of herself and their seven minor children; for the proper culture and moral training of the latter; and, to a good extent, for her own position in society."

"The said Zimri Hosier, when not intoxicated or laboring under the effects of intoxication, was an industrious laboring man, and regularly earned and received for his labor $1.50 a day, applicable to the support of themselves and their said family, *and which said sum was so applied by him accordingly.* (The italicized words were interlined by way of amendment.) But the said Zimri Hosier was in the habit of getting intoxicated, and the defendant, well knowing the same, at divers and sundry times, on divers days and nights, throughout and during the said entire term of three years, up to and on or about the 12th day of the said month of March, 1865, at the village of Lewisburgh, in the county of Preble, unlawfully, wilfully and maliciously sold to the said Zimri Hosier, intoxicating liquors, thereby causing him thus frequently to get intoxicated, in consequence of which, he as often became and was, in addition thereto, infirm and diseased, and for times varying from and to several days, and aggregating within the said term of three years, not less than nine months, or the average of one-fourth part of his whold time, incapable of laboring; by reason whereof, she, as his wife, was compelled to and did take charge of and provide for him, for and during the said aggregate time of nine months, until and on the said 18th day of March, A. D. 1865, when said series of intoxications and their said effects culminated in his death; leaving her wearied with the labor of providing him with necessary food and medicine, the attention and care bestowed upon him; and burdened with the further expense of his funeral rites and burial, and of the rearing, maintenance and education of their said minor children, by her own unaided labor; whereby she was and is injured in her person, her property, and her means of support, to the damage of the plaintiff, five thousand dollars, for which she prays judgment."

The defendant moved the court to compel the plaintiff to make her second amended petition more specific and certain in the following particulars: 1. By stating the nature of the injuries upon which the plaintiff seeks to recover; whether it be to her person or her property, or means of support. If to her person, in what manner, and by what means. If to her property, what property, and how injured. If to her means of support, the amount thereof, and in what particulars her means of support were injured, and the special damage sustained by each. If any damage is claimed for causing the death of said Zimri Hosier, let such claim be distinctly made, and the damages claimed on account thereof. 2. By stating the time of the sales of liquor, and the quantity sold at each, and the damages resulting to her person, her property, or means of support by reason of any such sales.

On the hearing of this motion, the court found the petition to be uncertain in not stating that the money earned by said Zimri Hosier was applied to the support of his wife, and in that particular sustained the motion; and as to the remainder of the petition, overruled the motion, and defendant excepted.

Thereupon the plaintiff obtained leave of the court to amend her petition at bar, by inserting the following words at the end of the second paragraph of the petition, to wit: "and which said sum was by him so applied accordingly." To this the defendant excepted. All which appears in a journal entry.

Thereupon the defendant demurred to the second amended petition for the following causes:

1. There are several causes of action improperly joined in the petition.
2. The plaintiff has not legal capacity to sue.
3. The petition does not state facts sufficient to constitute a cause of action.

This demurrer was overruled, and exception was taken by the defendant.

Thereupon he filed an answer, which

1. Denies that on or about the 12th of March, 1865, or at any other time, he unlawfully, wilfully and maliciously sold to said Zimri Hosier intoxicating liquors, thereby causing him to get intoxicated.

2. Denies that the plaintiff's husband was at any time prevented or hindered from following his usual avocation, or laboring, by reason of any sales of liquors made to him by the defendant.

3. Denies that the plaintiff was injured in her person, her means of support, or in her property, by reason of any sale or sales of liquor by the defendant to the plaintiff's husband.

The cause was tried by a jury. The opinion of the court contains a statement of what the testimony tended to prove. At the trial the plaintiff disclaimed to the jury the right to recover anything on the ground of the death of the husband, or for any injury to her person or property.

The court charged the jury as follows:

"If the defendant, by the sale of liquor to Zimri Hosier, produced his intoxication, and if Zimri Hosier was a man in the habit of getting intoxicated, and the defendant knew the fact that Hosier was in the habit of becoming intoxicated, and if the plaintiff was, by such intoxication of her husband, so produced by the defendant, injured in her means of support, she is entitled to compensation for the injury she has sustained.

"You are to look at all the testimony, and determine what would have probably been the means of support which the plaintiff would have had in the event that no sale of liquor had been made to Zimri Hosier by the defendant, and to the extent that she has suffered in her means of support by intoxication produced by the defendant. If that intoxication was produced by liquor sold in violation of law, alleged in the petition, you are to allow her damages.

If the deceased, Zimri Hosier, was in such circumstances that his wife and children required the proceeds, or part of the proceeds, of his daily labor for their support, they were entitled to this support out of his daily labor; and the person who, by selling liquor to the deceased, and thereby producing his intoxication, deprived them of the means of support, in whole or in part, would be liable to respond in damages to the amount of support he deprived them of.

"Every man who has a wife owes her maintenance. If he has not other means at command to afford that support and maintenance, he must necessarily provide such means in some comfortable manner. If his only means of affording such support is out of his daily labor, then the person who, by producing his intoxication in violation of law, renders him unfit for labor, and prevents him from pursuing his only means for the sustenance of his wife, is liable. But if the party alleged to have neglected his business from intoxication would not have pursued his business if sober, or if, before the sale of liquors to him, as alleged, he was unfit for any occupation, in that event his wife would suffer no damage from his intoxication. But if he would have pursued his regular occupation if sober, and by intoxication produced by another, by the sale of liquor in violation of law, failed to pursue such occupation, and his wife is thereby deprived of the means of support, she is entitled to recover to the amount which she may have been deprived of the means of support. And if the other facts appear, it is for you to say, from the testimony in the case, in the light of surrounding circumstances, what injury the plaintiff has sustained in her means of support, and to allow her accordingly.

"And you may go beyond this, and not only allow her the actual damages sustained, but allow damages by way of punishing the defendant, and of serving as an example to others. This is a matter within your sound discretion, as to whether you will allow these vindictive or exemplary damages or not, or, if you allow them, what amount you will allow.

"If there were aggravating circumstances surrounding the selling, such circumstances may be considered in assessing the amount of damages. If the defendant knew the family of Hosier needed the assistance of his labor for their support, and that, by his intoxication, he neglected to provide for their support; and if he was requested by the wife or other persons of the family to desist from selling liquor to the husband, and still persisted, these would be circumstances in aggravation of damages. What circumstances are or are not shown by the testimony to exist in this case, whether aggravated or mitigated, is for you to determine. You are to look to the testimony, and the whole testimony, and render such verdict as you may think, under your oaths, is justified.

"You should not be influenced by your personal views of the propriety or impropriety of the law. Whether the law was properly or improperly passed, is not for you or me to determine. It is the duty of courts and juries to enforce the laws in proper cases, as they may find them, until they are repealed, or by some proper tribunal declared unconstitutional.

"If the party was far gone in the habits of intoxication, and had become diseased

bodily or mentally, and the defendant knew this fact, the selling to him, under these circumstances, would be more aggravating than selling to one not so badly addicted to intemperance, and who had more vigor of mind and body.

"On the other hand, if the defendant at times, in good faith, refused to furnish liquor to the deceased when requested, this would be a circumstance that might be considered in mitigation of damages. If such refusal was not in good faith, but merely to deceive persons present as to his course towards the deceased, his refusal would not be in good faith, and would not go in mitigation. It is not intended by these remarks to intimate to the jury any opinion as to what the facts were in this case; what the facts were is entirely for the jury."

The defendant excepted to the charge of the court, and after it was concluded, requested the court to charge the jury, that before they could find the defendant's liability fixed under the law, a preponderance of evidence must show:

"*First.* That the defendant sold intoxicating liquors to the plaintiff's late husband, in violation of law, whereby her said husband was made to become intoxicated."

"*Second.* That while thus intoxicated, from the defendant's unlawful act, and as the probable result of such intoxication, the said husband did some act or some thing resulting in immediate and actual injury to the plaintiff, in her *person*, her *property* or her *means* of *support* actually in existence."

"*Third.* That the said husband's omissions to labor while intoxicated, by the unlawful act of the defendant, cannot be made the ground of recovery in this action."

"*Fourth.* That the wages of the said husband, for labor never performed by him, did not constitute the *means* of *support* of the plaintiff within the meaning of the law, even if the jury should believe from the evidence that the said husband would probably have labored and made wages, had it not been for his intoxication, produced by the unlawful act of the defendant."

The second, third and fourth of these propositions the court refused to give in charge to the jury, and defendant excepted.

The verdict was for the plaintiff, assessing the damages at $200. The defendant moved to set aside this verdict, and for a new trial, on the following grounds:

1. The verdict is against the weight of the evidence.

2. The verdict is against the law of the case.

3. The court erred in its charge to the jury.

4. The court erred in refusing to charge as requested by the defendant.

5. The damages are excessive, and were given under the influence of passion, prejudice and misapprehension of the law and evidence.

This motion was overruled and exception taken, and judgment entered on the verdict.

To reverse the judgment the defendant filed his petition in the District Court, claiming that the Common Pleas erred:

1. In overruling his motion to make the second amended petition more definite and certain, and in permitting the plaintiff below to amend her petition at bar, without verification of the amendment.

2. In overruling the demurrer to the petition as amended.

3. In the charge to the jury, and in refusing to charge as requested by the defendant below.

4. In overruling the motion to set aside the verdict, and for a new trial.

The cause was reserved in the District Court for decision in this court.

Gilmore & Campbell (with *Hubbard & Freeman*), for plaintiff in error.

1. The statement of facts and averments of the second amended petition are such as to leave it uncertain whether the plaintiff below placed her right to recover on the sixth or on the seventh section of the "liquor law" (S. & C. 1432), or on the act allowing damages for unlawfully causing the death of her husband. S. & C. 1139.

2. The demurrer to the petition was improperly overruled:

(1.) The plaintiff improperly joined causes of action which should be separately stated and numbered. Code, §§ 85, 86.

(2.) The plaintiff had not legal capacity to sue in the action. The original petition was filed after her husband's death. The right of action against the defendant, which she had as a *wife*, under the seventh section of the liquor law, did not survive to her as a *widow*.

The liquor statute is penal in its character, and should be strictly construed. Hall v. The State, 20 Ohio, 7; U. S. v. Wilson, Baldw. C. C. 78. The *widow* is not within the definition of the seventh section, taking the word in its ordinary acceptation. The statute does not provide that the right of action—a purely statutory right—given to the wife shall survive to her as a widow. Where one claims a statutory right against another, he shall bring himself clearly within the terms which confer that right. Rolcliff v. Beck, 10 West L. J. 72, and cases there cited.

The statute does not vest in the wife any interest or property, but simply a naked right of action. The plaintiff, as *wife*, had no *claim or title whatsoever*, till after suit commenced, to the damages for which the seventh section gives her a *naked right of action only*.

3. The court erred in refusing to set aside the verdict, and grant a new trial.

(1.) The verdict is against the weight of the evidence, and the damages are excessive.

(2.) The verdict is contrary to law. The plaintiff rested her right to recover on the grounds of injury to her "*means of support.*" The phrase is too loose, vague and uncertain to found upon it an action at law to recover a penalty. The phrase cannot be used by the wife for the recovery of damages for an injury to a thing so intangible as the uncontracted, unperformed future labor of the husband.

(3.) The court erred in its charge to the jury and in refusing to charge as requested. The charge was inapplicable and legally unsound. The court fails to give a legal definition to the vague phrase "means of support." Each juror was left to guess its meaning.

It was error to unite the children with the wife. Each of them had a right of action under the statute. She had sued for herself alone, and could not recover for them or on account of them. The language of the statute is "that *every* wife, child," &c., shall have a right of action, &c.

It was stating the case too strongly and erroneously, and in a way calculated to mislead the jury, for the court to say that every husband "*must necessarily* procure" means of support for his wife, &c.

As to exemplary damages, the charge was erroneous and calculated to mislead the jury, and prejudice them against the defendant. The term "exemplary damages" is used without qualification in the seventh section. It must be presumed, therefore, that it is used in the sense in which it is understood at law, and it cannot be expanded or contracted from this. "Exemplary damages are given in cases where the aggressor is animated by a fraudulent, a malicious, or an oppressive intention." Sedgw. on Dam. 35. And the defendant must have acted with these, or some of these, *toward the plaintiff*. The testimony shows no legal ground upon which exemplary damages could be allowed; and the court should either have said so to the jury or have said nothing on the subject of exemplary damages. The court failed to indicate or define the legal grounds upon which such damages are allowable, but gave the jury erroneous impressions on the subject, and turned them in upon the defendant with no rule to guide them but their "*sound discretion.*"

Throughout the charge, matters of fact which should have been left to the jury, are charged as matters of law. Kober v. The State, 10 Ohio St. 444.

J. H. Foos, for defendant in error.

1. The second amended petition contains but one cause of action. All the averments in the petition, respecting the death of the husband, are simply descriptive of the injury to the plaintiff's means of support, and do not profess to be a substantive ground of recovery.

2. The plaintiff had legal capacity to sue. The action is by her as a person, Sarah Hosier, not as a widow. The injury was done to *her* while she was the *wife* of Zimri Hosier, and his death did not work a forfeiture or abatement of this right. It was not necessary to the continuance of the right of action that the suit should have been brought in the lifetime of the husband. This is not a case where the principles of survivorship obtain. The husband had no interest in the subject matter of the suit. His death did not affect the right of the wife. If she had died before suit brought, the question of survivorship might have been raised. But in the present case, no one has died who had any interest in the controversy; both parties are living. If the plaintiff does not come under the description of "wife," she surely does come within the description of "other persons," as used in the statute.

The civil action given by the statute is not a penal action. It is like actions for a malicious prosecution, injury to personal property, or slander; in all of which exemplary damages may be given as a punishment for the malice. And yet these actions are not termed or known as penal actions, nor are the rules governing them construed strictly.

2. The motion for a new trial was properly overruled:

(1.) The verdict is not against the weight of the evidence, and the damages are not excessive.

(2.) The verdict is not contrary to law. By virtue of the statute giving the right of action, the plaintiff was entitled, on the facts stated in the petition, to recover for the injury to her "means of support," resulting from her husband's inability, in consequence of intoxication, to perform labor and earn wages necessary and applicable to her support. Duroy v. Blinn & Letcher, 11 Ohio St. 331. The wife has the right to be supported by the husband (2 Kent's Com. p. 146), and by his daily labor, if necessary.

(3.) The charge of the court, when taken as a whole, will be found to be a correct exposition of the law of the case.

McElvaine, J. 1. We find no error in the overruling of the motion to make the second amended petition definite and certain. The nature of the charge contained therein is sufficiently apparent. The petition contains, no doubt, much irrelevant matter that might have been stricken out, but no objection was made by motion to strike out, which is the only way of reaching such matter.

2. It is also assigned for error, that on the hearing of the motion to make the second amended petition definite and certain, the plaintiff below was permitted by the court, against the objection of the defendant, to amend, by inserting in the petition an allegation that the proceeds of her husband's labor had formerly been applied to her support, without subsequent verification.

The petition containing the averment referred to appears in the record properly verified. It is true, the clerk entered upon the journal of the court the fact as claimed by plaintiff in error, but the only proper mode of saving such rulings upon the record is by bill of exceptions.

The practice of mutilating pleadings by striking out or inserting new matter, by way of amendment, must be condemned; but, in this case, even if the question had been properly saved, it would not afford ground for reversal, as it is clear the defendant was not prejudiced by the alteration, for the reason that the amendment was immaterial and unnecessary. Before the alteration the petition contained a statement that the plaintiff was dependent upon the labor of her husband for her support, which certainly was a sufficient predicate for an averment of injury by being deprived of such means of support.

But *quære*—whether it was necessary to aver that she was *dependent* upon his labor for her support?

3. The overruling of the demurrer to the second amended petition is also assigned for error.

The demurrer specifies these grounds of objection:

1st. That several causes of action are improperly joined;

2d. That the plaintiff has no legal capacity to sue; and,

3d. That the petition does not state facts sufficient to constitute a cause of action.

As to the first objection. There is, in fact, but one cause of action stated in the petition. The action is brought under the

seventh section (original) of the act of May 1st, 1854 (S. & C. 1432), entitled "An act to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio," to recover damages for injuries sustained by the plaintiff, as the wife of Zimri Hosier, in consequence of his intoxication caused by the defendant.

Said section reads as follows: "That every wife, child, parent, guardian, employer or other person, who shall be injured in person or property or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, such wife, child, parent, guardian, employer or other person shall have a right of action, in his or her own name, against any person who shall, by selling intoxicating liquors contrary to this act, have caused the intoxication of such person, for all damages actually sustained, as well as exemplary damages," &c.

As to the second objection taken by the demurrer, it is claimed that the plaintiff below had no legal capacity to sue: "1st. Because the statute does not provide that the right of action given to a 'wife' shall survive to her as a widow. And 2d. Because the statute does not vest in the wife any interest or property, but simply a naked right of action."

It may be conceded that this statute, being in its nature penal, and providing a remedy unknown to the common law, must be strictly construed; and, therefore, no person can maintain an action under its provisions, to whom a right of action is not given by its terms.

The term "wife" is used to designate a class of persons to whom the right of action is given. The plaintiff was the wife of Zimri Hosier at the time the defendant caused his intoxication, and at the time the injuries complained of were sustained. The right of action *then* vested in her, and having vested, the statute did not divest it upon the death of her husband; nor does it abate upon common-law principles. The husband had no interest in it, and no control over it. The right of action vested in her, to be prosecuted in her own name, and for her sole use. She did not lose her identity by the death of her husband. True, the relation of wife closed, but that relation, although essential, by the terms of the statute, to the inception of the right of action, is not necessary in the prosecution of the remedy. The plaintiff does not sue because she is the widow of Zimri Hosier, but because she was his wife at the time she was injured. The term "employer" is used to designate another class of persons to whom a right of action is given by the terms of this statute. If the right of action vested in a wife abates upon the death of her husband, because the relation of wife no longer exists, I take it, that an employer cannot sue under this statute, after the relation of master and servant has ceased. Strict construction does not lead to such conclusions.

Nor is the right of action given by this statute a mere naked right, as in popular or *qui tam* actions. But it is a right to a remedy for a real injury; a means of recovering actual, personal damages.

In popular actions the right to sue is given to any person who may first prosecute, not for a personal injury, but for a penalty to which the prosecutor has no claim until suit is commenced. Under this statute the right of action is confined to the persons named, and they cannot recover unless they prove actual injury to their persons or property, or means of support.

As to the third objection stated in the demurrer. It is sufficient to say, that the statutory grounds of action are all sufficiently stated in the petition.

4. The defendant below moved the court to set aside the verdict and for a new trial, upon the ground that the verdict was contrary to the law and evidence. The overruling this motion is claimed to be error.

The testimony tended to prove (and it is sufficient for that purpose) that the plaintiff's husband, for some time previous to his death, was habitually intoxicated; that the defendant sold him intoxicating liquors in violation of the act of May 1st, 1864, and thereby caused his intoxication; that by reason of such intoxication he (the husband) was rendered incapable of performing his ordinary labor; that the plaintiff was dependent on his labor for support; that the proceeds of his labor had previously been applied for that purpose; that in consequence of such intoxication the plaintiff was compelled to resort to other resources for the supply of her wants; that plaintiff was reduced to a state of want, although the husband continued to furnish a portion of her means of living, from money received on the sale of his property.

The plaintiff on the trial disclaimed any damage resulting to her from the death of her husband, and also for any injury to her person or her property, and relied solely upon the claim that she had been injured in her means of support.

Upon this state of facts two objections are made by plaintiff in error: 1st. That the phrase "means of support," as used in this statute, is too vague to receive judicial construction; and 2d. That if the meaning of this phrase can be ascertained, still the plaintiff was not injured in *her* means of support.

This phrase was in common use at the time and long before the passage of this statute. It then was and still is as well understood as most words and phrases in the English language. It is commonly used in the plural form, but often in a singular sense. In its general sense it embraces all those resources from which the necessaries and comforts of living are, or may be, supplied, such as lands, goods, salaries, wages or other sources of income. In its limited sense it signifies any resource from which the wants of life may be supplied.

We are not called upon in this case to determine the full extent and scope of its meaning, but only to ascertain whether the wages or proceeds of ordinary labor is a "means of support" within the meaning of the statute. And of this proposition we entertain no doubt. See Duroy v. Blinn, 11 Ohio St. 331.

Ordinary labor being a means of support, the next question is, whether the labor of the husband, or its proceeds, can be regarded as the *wife's* means of support.

A husband is morally and legally bound to supply his wife with the necessaries and comforts of life. If he has no other resource, it is his duty to contribute his labor and its proceeds to her support. And the wife has a corresponding right to be maintained and supplied, and to that end she has an interest in all her husband's resources. It is upon this principle that alimony is decreed to a wife out of her husband's estate, or charged upon him personally. A wife, then, has an interest in the labor of her husband, and in its proceeds, and especially when that labor is *necessary* for her support. If she has an interest in her husband's labor and its proceeds as a means of support, she has an interest also in his capacity to labor. Capacity to labor is a means of support; and any deprivation of her rights or interest in the proceeds of his labor, or his capacity to labor, is an injury to her in *her* means of support. This must be so, especially if she is dependent upon such labor for her living in whole or in part.

Nor is it an answer to say, that because the common law gave her no remedy for the wrongful deprivation of her rights in such case, that, therefore, she was not injured. Her injury was none the less without than it would have been with a remedy. It is not true that the common law gave a remedy for every wrong or injury.

5. It is further objected that the court erred in the charge as given to the jury, and in refusing to charge as requested.

Without referring specially to the charge as given, or to the requests refused, it will suffice to state the rules by which the objections urged must be determined against the plaintiff in error:

1st. The omission of a court, in its charge to the jury, to define and explain doubtful words or phrases contained in a statute upon which the action is founded, does not constitute a ground for reversal, unless such definition or explanation was requested by the party claiming to have been prejudiced thereby.

2d. Nor will a verdict be disturbed because the court charged the jury upon general propositions of law not involved in the issue, if it appear from the whole charge that the jury could not have been misled thereby.

3d. Whatever may be the rules of the common law as to the state of facts necessary to justify the assessment of exemplary damages, it is clear to our minds that exemplary damages may be recovered in any action brought under this section, in which the evidence shows a right to recover actual damages. The amount of such damages is left to the sound discretion of the jury, subject to be controlled by the court when such discretion is abused. In actions under this statute the jury, in the exercise of its discretion as to exemplary damages, ought to consider all the circumstances properly before them tending to aggravate or mitigate the conduct of the wrong-doer.

We find no error in the charges given, or in refusing the charges requested.

The whole amount of damages awarded in this case was $200. We cannot say that this amount was excessive. Judgment affirmed.

Scott, C. J., and Welch White and Day, JJ., concurred.

[By courtesy of John M. Shirley, Esq., State Reporter.]

Supreme Court of New Hampshire.

GREENVILLE v. MASON et al.

Abstract of the opinion of the court. Delivered by LADD, J., August 15th, 1873.

In 1856, the town of Mason received of John Boynton, $10,000 upon the the following conditions: "That the same should be forever kept upon interest, and should forever be known as the Boynton Common School Fund, and that the interest or income thereof should annually forever be applied by said town of Mason, to the support of district or public schools in said town, in proportion to the number of scholars in such districts or schools, between the ages of five and fifteen years; and that, whenever said town should fail so to apply the interest or income of said money annually, in addition to the sum that shall be required to be raised by law by said town for the support of district or public schools, the said town should repay the same sum of $10,000 to the said John Boynton, his executors, administrators, or assigns."

Subsequently the Legislature passed an act authorizing the town of Mason to elect a board of trustees of said fund, giving them the entire control and management of the same, and requiring them to invest it, and apply the income according to the conditions of the gift; and the gift was accepted and received.

In 1872 the town of Greenville was constituted from a part of the territory and inhabitants of Mason, by an act of the Legislature, wherein it was provided among other things, that "all school and other funds" belonging to Mason, should be divided between said towns; that is the town of Mason, and the newly erected town of Greenville, in the proportion of six dollars and fifty cents to Greenville, and three dollars and fifty cents to Mason.

On a bill in equity brought by the new town of Greenville against Mason and the trustees of the fund, to compel a division of the fund or the income thereof, it was held:

1. That a division and distribution of the fund or income, in accordance with the provisions of the act, constituting Greenville, would be inconsistent and incompatible with the condition of the gift, and would work a forfeiture according to the plain terms of that condition.

2. That if the act is to be construed as prescribing a ratio and mode of division, it is so far repugnant to the constitution of New Hampshire, as well as the Constitution of the United States, inasmuch as it would annul and defeat the intention of the donor in devoting it to a charitable use in a particular way; while it at the same time destroys a vested right in the beneficiaries resting upon contract; and that it is, therefore, so far void.

3. That no legal provision being made in the act for a division of the fund or the income of it (even were such a thing possible), the property remains unchanged in the original town of Mason, and the trustees are right in paying over the income to the treasurer of that town, the same since the division as before.

LEGAL GAZETTE.

Friday, September 12, 1873.

JOHN H. CAMPBELL,
EDITOR.

THEODORE F. JENKINS,
ASSOCIATE EDITOR.

THE PHILADELPHIA COURTS.

The provisions of the proposed new constitution, in reference to the Philadelphia courts, have attracted much attention from the bench and bar of this city, and warm discussions have arisen as to the expediency of adopting the system of courts proposed by them. How best to remedy the numerous evils arising out of the insufficient number of courts and judges, is a question that sore perplexes the legal mind at the present time, and whether the system proposed by the convention is calculated to afford the needed remedy, is a subject that has not yet been settled. Whatever its demerits, *it is decidedly superior to the one now in force.* It cannot be denied, even by the judges themselves, that it is physically impossible to dispose of the great number of cases brought in the "District Court." The number actually disposed of in a given time falls far below the number of new cases actually prepared for trial in the same period, and with such a state of affairs staring them in the face, disappointed suitors, neglected witnesses, wearied attornies, indignant taxpayers, all ask, if something cannot be devised to expedite causes, and give to the people "simple justice." The convention have grappled with the subject, and after much anxious thought; have put forth the following provisions (above referred to).

SECT. 5. In the city of Philadelphia and in the county of Allegheny, all the jurisdiction and powers now invested in the District Courts and the courts of Common Pleas, or either of them, in said city and county, subject to such changes as may be made by this constitution or by law, shall be in the city of Philadelphia vested in four, and in the county of Allegheny in two distinct and separate courts of equal and co-ordinate jurisdiction, composed of three judges each, and in such additional courts of the same number of judges and of like jurisdiction as may, from time to time, be by law added thereto. The said courts in the city of Philadelphia shall be designated respectively as the Court of Common Pleas number one, number two, number three and number four, and in the county of Allegheny, as the Court of Common Pleas number one and number two, but the number of said courts may be by law increased, from time to time, and shall be in like manner designated by successive numbers; the number of judges in any of said courts, or in any county where the establishment of an additional court may be authorized by law, may be increased from time to time; and whenever such increase shall amount in the whole to three, such three judges shall compose a distinct and separate court as aforesaid, which shall be numbered as aforesaid.

SECT. 6. Each court shall have exclusive jurisdiction of all proceedings at law and in equity commenced therein, subject to change of venue as may be provided by law.

SECT. 7. For the city of Philadelphia there shall be one prothonotary's office, and one prothonotary for all said courts, to be appointed by the judges of said courts, and to hold office for three years, subject to removal by a majority of the said judges; the said prothonotary shall appoint such assistants as may be necessary and authorized by said courts; and he and his assistants shall receive fixed salaries, to be determined by law and paid by said city; and all fees collected in said office, except such as may be by law due to the commonwealth, shall be paid by such prothonotary into the city treasury; each court shall have its separate dockets, except the judgment docket, which shall contain the judgments and liens of all the said courts, as are or may be directed by law.

SECT. 8. The said courts in the city of Philadelphia and county of Allegheny, respectively, shall, from time to time in turn, detail one or more of its judges to hold the courts of oyer and terminer and the courts of quarter sessions of said district, in such manner as may be directed by law.

SECT. 23. A register's office for the probate of wills and granting letters of administration, and an office for recording of deeds shall be kept in each county; the Register's Court is hereby abolished, and the jurisdiction and powers thereof are vested in the Orphans' Court; in every city and county wherein the population shall exceed one hundred and fifty thousand, the Legislature shall, and in any other city or county may establish a separate Orphans' Court, to consist of one or more judges, who shall be learned in the law, and which court shall exercise all the jurisdiction and powers now vested in, or which may hereafter be conferred upon the Orphans' Court, and thereupon the jurisdiction of the judges of the Court of Common Pleas within such city or county in Orphans' Court proceedings, shall cease and determine; the register of wills shall be compensated by a fixed salary, to be paid as may be provided by law; he shall be clerk of the Orphans' Court, and subject to the direction of said court in all matters pertaining to his office; assistant clerks may be appointed by the register, but only with the consent and approval of the court; all accounts filed in the register's office and in the Orphans' Courts shall be audited by the court without expense to parties, except where all parties in interest in a pending proceeding shall nominate an auditor whom the court may, in its discretion, appoint.

As the above provisions affect to a certain extent the bar of the whole State, though more particularly that of this city, it may be of interest to our readers to give some extracts from the debates which took place in the convention, upon the adoption of the sections pertaining to Courts of Common Pleas. Upon June 30th last, section 5 came before the convention, whereupon Mr. Dallas moved as an amendment to strike it out, and insert in lieu thereof a proposition which substantially let the District and Common Pleas Courts remain as they are, the only difference being that the District Court should have no equity jurisdiction, and the Common Pleas Courts jurisdiction over the trial of common law cases and upon certiorari and appeal from magistrates, was transferred to the District Court.

Mr. Geo. W. Biddle, of Philadelphia, in advocacy of the section, spoke as follows:

"Mr. President: I cannot understand why, after the very full discussion upon this section heretofore, in which all the advantages and disadvantages were thoroughly weighed, this opposition to it should spring up now. I propose to answer as briefly as I can the objections which are made to the section.

In 1810, the Court of Common Pleas then being unduly pressed by business, a branch court of the Common Pleas was established, which certainly worked satisfactorily for a time. It was confined to the trial of civil issues.

After a while, some fifteen years ago, probably more, in order to bring it in harmony with the other court in which the equity practice was beginning to be considerable, it had equity powers conferred upon it, to the very great advantage of the suitors. Some six years ago, the equity powers were taken from this branch court, and recently, within two or three months, they have been re-conferred upon it.

We are told here by a number of gentlemen professing to represent the entire legal interests of the city of Philadelphia, that any change by which this branch court shall be compelled to discharge all the judicial duties of the parent court from which it springs, will be regarded as an infliction upon the community, and something which the bar and the bench of Philadelphia are alike opposed to. So far as I know the sentiment of the people, I do not believe any such thing. I believe it will be regarded as no infliction, but on the contrary will be held an improvement in accordance with the original design of the court, and with the desires of the people. The design of that branch court was to give it co-extensive jurisdiction with the Common Pleas. Now, if you take from the District Court all criminal jurisdiction, all equity powers, you leave it a very limited and a very lame affair.

Why, Mr. President, just think of what the convention is asked to do in relegating this District Court to its original narrow jurisdiction. Abroad the sentiment of the whole profession is in favor of blending the equity powers of the courts of chancery with the powers of the courts of common law; and a bill elaborated with a great deal of care and suggested during the past winter by the chancellor of Great Britain looks in that direction, while we should be stripping our District Court of that which it already possesses; and for what? For what it is difficult to understand; either to gratify the mere private wishes of some of the judges in that court, or because it is supposed that it is unadvisable to disturb that which has heretofore performed its part tolerably well.

Now, I, for one, am emphatically for bringing the judicial power of the county of Philadelphia in accord with the judicial power of the rest of the State. No good reason can be pointed out, except that it has so happened during the last fifty years, for keeping those two courts distinct. The narrower the jurisdiction, the narrower the intellectual processes of the court—you really maim and put at a disadvantage a tribunal by depriving it of that which is possessed by other tribunals sitting alongside of it.

And in regard to the administration of criminal justice in the county of Philadelphia, I say unhesitatingly, as the result of a considerable examination into the subject, that it will be an enormous advantage—I use the word advisedly; I do not over-state it when I say and enormous advantage—both to citizen and court to have every judge of the county of Philadelphia, for at least one month in the year, go into that court and discharge its duties, sitting there long enough to acquire competent knowledge of the business, but not too long to be affected, and I may say infected, by the atmosphere which always hangs over a criminal court, and which sooner or later becomes injurious both to him who practices constantly, and to him who presides constantly in such a jurisdiction.

Do gentlemen recollect that the highest judge in the Kingdom of Great Britain considers it no derogation from his office to mingle in the administration of criminal justice, and to try criminal offenders? For my part I cannot imagine any spectacle more calculated to endear the judiciary to a people than to see its chief heads participating in the administration of that justice which goes home to the meanest individual in the community. The moment you put a man above and beyond that, you really declare, so far from affixing a dignity to his position, that he is unfitted for the business which he is selected to discharge. Why should six judges or five judges in the District Court undertake to say that they are only to try the civil issues, when the highest judges abroad, and the highest judges of the land in this country, from the chief justice of the United States and every associate of his court, mingles with advantage to himself and to the whole community in the administration of criminal justice? Let gentlemen reflect upon the result of their actions here. The principle of the amendment is not in accordance with the universal sentiment of the city of Philadelphia, in accordance with the universal sentiment of the delegates who are supposed to represent specially that community here—for I see before me and around me gentlemen who differ entirely with the views of the two gentlemen from Philadelphia who have spoken to-day. Why should this question be discussed in the narrow view in which it seems to me to be presented, instead of being looked at in the shape in which it becomes important to gentlemen representing every section of this broad commonwealth to regard it? Why should we be deprived of this enlarged experience, these broader views which the administration of equity and which the administration of criminal justice gives to a judge in the rest of the State, by being told that in Philadelphia you shall have one court to try all the civil issues, that is the common law part, and then by a most extraordinary perversion of terms, have the Court of Common Pleas, which, according to the amendment of the gentleman who

spoke first to-day, is not to try a single common plea between man and man in the city of Philadelphia? I cannot imagine a greater anomaly. What is its advantage? It is that it is always to be supposed that because men are doing the same thing all the time they will do it a great deal better. There never was a greater mistake than that. They do acquire a little mechanical expertness in the business which they are doing every day; but they lose that breadth, they lose that larger experience, they lose that wider view which the administration of equity has given, and is continuing to give judges who administer the common law exclusively.

Wha does this section propose? I am not at all tenacious about the form in which it is presented by the committee, although I believe after having looked at it with some care, and after having had more than one conference, much to my own advantage, with the members of the committee, that the plan proposed by them is the best one, of having four branches co-equal in jurisdiction, with three judges each, because I believe that three is a better number than six. I am not at all tenacious about this, however. What I am tenacious about is the great principle enunciated in this section, by which all the judges in the county of Philadelphia, are made to discharge precisely the same functions as they are in the rest of the State, because I believe in that way they will be better judges, and the interests of the suitors will be better subserved. But I am authorized now and here to say that if this convention adopts the principle of the section as reported from the committee on the judiciary, that is to say, the section conferring criminal and equity jurisdiction alike upon all the courts of Philadelphia county, the judges of the District Court prefer it in the shape in which it comes from the committee to-day, rather than in any other shape. Why do I say this? There is no objection to repeating what occurred in the interval of the sessions of the convention. One of the judges of the District Court called upon me, and while he told me frankly that the judges of his court would prefer the District Court remaining just as it is (which I do not find fault with them at all for preferring, because change is distasteful to most people), yet if there was to be a change, if it was the sense of this house that criminal jurisdiction should be conferred upon them, that the equity powers recently re-conferred upon them should remain, that they should become, as they ought to become, a constitutional court in the sense of the constitution, and not a mere legislative court, deriving its power from the Legislature alone, and which might be extinguished in a moment, they prefer very much the section in the shape in which it is presented by the committee on the judiciary.

I do trust, therefore, Mr. President, that the convention will not—and I address on this point rather the members outside of the county of Philadelphia than those in it—that the members from the country districts, from the other portions of the State, will not, in the belief that the amendment offered by my colleague who spoke first, is in entire harmony with the wants and wishes of the city of Philadelphia, and that the section is not in harmony with those wishes, vote for the amendment rather than the section. If they do, they will inflict, in my judgment, a very grievous wound, not only upon the symmetry, which perhaps is a small matter, but upon the efficiency of the administration of justice throughout the State.

No possible good reason, except the old reason of keeping things exactly as they are, can be urged in favor of the amendment, while every philosophic view, every reason taken from the broader ground which should be occupied by this question, every reason by which it is sought to elevate the judiciary by giving them that refreshing contact with all sorts of business, is strongly in favor of the report of the committee in the shape in which the section now stands.

I hope, therefore, very warmly, Mr. President, that the amendment will be voted down and that the report as presented will be adopted."

After some further discussion less than a majority of a quorum voted in favor of the amendment offered by Mr. Dallas, and it was accordingly lost. Mr. Dallas then offered a lengthy amendment, providing for one court in the city of Philadelphia in lieu of the present District and Common Pleas Courts, composed of twelve judges, and divided into four divisions of three judges each. This amendment was almost unanimously rejected, the following extracts showing the feeling in the convention on the subject.

"Mr. Dallas. * * * For I desire to say to this convention that I believe I represent what the bar and people of Philadelphia want, and they are making a mistake against 150,000 voters in refusing to hear this proposition.

Mr. Armstrong. I only desire to make a single remark. This proposition was in print, and was considered by the judiciary committee. If it was not submitted in committee of the whole, which I cannot now state, it was unfortunate. But it is a plan which proposes to make one court with subordinate committees. That is about the smallest interpretation of it I do not propose to enter into any discussion upon it.

Mr. Biddle. I have only a single remark to make in regard to this subject. It can hardly be supposed that this convention will believe that the amendmens offered in the morning session by the gentleman from Philadelphia (Mr. Dallas), who has just taken his seat, had the almost unanimous recommendation of the bench and of the bar of this city, and that the present project has the same recommendation, for they are as wide asunder as the poles. The present project gives criminal jurisdiction, gives equity jurisdiction, gives road jurisdiction, gives every jurisdiction known to our joint systems of law and equity, to all the courts; and if the unanimous desire of the bench and the bar is to keep the courts separate, how my distinguished friend can get up and say, in behalf of the citizens of Philadelphia, that this present project meets their views exactly, I cannot understand.

The President *pro tem.* The question is on the amendment of the delegate from Philadelphia (Mr. Dallas)."

The amendment was rejected.

The original section was then passed by a vote of 44 to 34.

We would commend to our readers, especially those of the Philadelphia bar to carefully consider the arguments contained in the speech of Mr. Biddle in favor of the system of courts for this city, proposed by the convention.

CONSTITUTIONAL RESTRAINTS UPON R. R. CORPORATIONS.

We have received an official pamphlet, containing the "proposed constitution of Pennsylvania, as passed second reading." The object of the publication of this document at the present time, is to bring the subject of the new constitution before the people in an accessible shape, thus enabling them to judge in an intelligent manner, of the merits and demerits of the work, as far as completed. Some of the provisions, those contained in the judiciary article, for instance, we have already laid before our readers, and others we intend to present from time to time, for their consideration. To-day we print the most important article of all, viz.: that upon railroads and canals. The subject is full of difficulties, as it involves one of the great problems of the day, to wit, How far to restrain the powers of corporations, so as to place them under proper control, and at the same time permit them to develop the resources of the State?

The convention has proceeded upon the assumption that the people of Pennsylvania are suffering manifold evils from the almost unlimited power of her gigantic railroad corporations, and that unless something is done to check this power and restrict the corporations within legitimate bounds, the people will become almost as slaves, compelled to do the bidding of a few great railroad kings. They have therefore endeavored to mould an article, strong enough to control these giants. As to how far they have succeeded, our readers can themselves determine. For our own part, we do not consider the railroad article as at all perfect, but on the whole it is the best that could be obtained under the circumstances. It remedies to a great extent the evils complained of by the people. We hardly think it is strong enough, but even as it is, it is something that is highly needed. Much clamor has been raised against it, but such clamor almost invariably comes from those pecuniarily interested in corporations. To the people at large it is a boon, and as such we should most heartily desire to see it a part of the new constitution.

The article is as follows:

ARTICLE —

Of Railroads and Canals.

SECTION 1. Any individual, partnership or corporation, organized for the purpose, shall have the right to construct and operate a railroad or canal between any two points in this State; any railroad may intersect and connect with any other railroad, and may pass its cars, empty or loaded, over such other railroad, and no discrimination shall be made in passenger or freight tolls, and tariffs on persons or property, passing from one railroad to another, and no unnecessary delay interposed in the forwarding of such passengers and property to their destination; the Legislature shall, by general law prescribing reasonable regulations, give full effect to these powers and rights.

SECT. 2. Every railroad or canal corporation organized or doing business in this State shall maintain an office therein where transfers of its stock shall be made, and books kept for inspection by any stock or bondholder, or any other person having any pecuniary interest in such corporation, in which shall be recorded the amount of capital stock subscribed or paid in, and by whom, the names of the owners of its stock and the amounts owned by them, respectively, the transfers of said stock, and the names and places of residence of its officers.

SECT. 3. The property of railroad and canal corporations, or other corporations of a similar character doing business in this State, and other joint stock companies now existing or hereafter created, shall forever be subject to taxation, and the power to tax the same shall not be surrendered or suspended by any contract or grant to which the State shall be a party.

SECT. 4. No railroad, canal or other corporation, nor the lessees, purchasers or managers of any railroad or canal corporation, shall consolidate the stock, property or franchises of such corporation with, nor lease, purchase, or in any way control any other railroad or canal corporation, owning or having under its control a parallel or competing line, nor shall any of the officers of such railroad or canal corporation act as an officer of any other railroad or canal corporation owning or having the control of a parallel or competing line; and whether railroads or canals are parallel and competent lines, shall always be decided by a jury in a trial according to the course of the common law.

SECT. 5. No incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over the works of said company; nor shall such company, directly or indirectly, engage in any other business than that of common carriers, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the products of its mines and manufactories on its railroad or canal not exceeding fifty miles in length.

SECT. 6. Presidents, directors, officers, agents and other employees of railroad and canal companies, shall not engage or be interested, directly or indirectly, otherwise than as stockholders in such railroad or canal companies, in the transportation of freight or passengers, as common carriers, over the works of any company of which they are presidents, directors, officers, agents or employees, and they shall not so engage or be interested in the transportation of freight or passengers over the works of any other such company, except as stockholders in such company which may be leased, or the majority of the capital stock of which may be owned or controlled by the company of which they are presidents, directors, officers, agents or employees.

SECT. 7. No corporation engaged in the transportation of freight or passengers in or through this State shall make any discriminations in charges for the carriage of either freight or passengers, between or against the people thereof, nor make a higher charge for a shorter distance than for a longer distance, including such shorter distance, and no special rates or drawbacks shall, either directly or indirectly, be allowed, excepting excursion and commutation tickets. Reasonable extra rates within the limits of the charter of a company may be made in charges for any distance not exceeding fifty miles.

SECT. 8. All railroads and canals are declared public highways, and all individuals, partnerships and corporations shall have equal right to have persons and property transported thereon, except as above excepted, and all regulations adopted by the companies owning, controlling or managing such railroads or canals, having the effect of hindering or discriminating against individuals, partnerships or corporations, except as above excepted, in the transportation of property on such railroads and canals shall be void, and no railroad corporation, nor any lessee or manager of the works thereof, shall make any preference in their own favor or between individuals, partnerships and companies shipping and transporting thereon, in furnishing cars or motive power.

SECT. 9. All discriminations made by railroad companies, being common carriers, in their rates of freights, or passage over their roads, in favor of transportation companies or others engaged in transportation, by abatement, drawback or otherwise, are hereby prohibited; and all contracts made with any transportation company or others engaged in the business of transportation, for carrying freights or passengers over any railroad within the State, at higher rates than those agreed upon by and between said railroad companies and transporters are hereby declared void.

SECT. 10. No railroad company shall grant free passes or passes at a discount, to any person except officers or employees of the company.

SECT. 11. No corporation shall issue stocks or bonds except for money, labor or property actually received; and all fictitious increase of stock or indebtedness shall be void; the stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained, at a meeting to be held after sixty days' notice given in pursuance of law.

SECT. 12. Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction.

SECT. 13. No street passenger railway shall be constructed within the limits of any city, borough or township, without the consent of its local authorities.

SECT. 14. No railroad, canal or other transportation company, in existence at the time of the adoption of this article, shall have any beneficial legislation by general or special laws, except on condition of complete acceptance of all the provisions of this article.

SECT. 15. The existing powers and duties of the Auditor General in regard to railroads, canals and other transportation companies, are hereby transferred to the Secretary of Internal Affairs, who shall have a general supervision over them, subject to such regulations and alterations as shall be provided by law; and in addition to the annual reports now required to be made, said Secretary may require special reports at any time upon any subject relating to the business of said companies from any officer or officers thereof.

TWENTY-FIRST JUDICIAL DIST.
Court of Common Pleas of Schuylkill County.

THE CO. OF SCHUYLKILL v. FREDERICK BUCKHOLTZ.

Judgment for want of an affidavit of defence may be taken against a surety for the payment of rent on a lease.

Motion for judgment for want of an affidavit of defence.

Opinion delivered by WALKER, J.

This was an action of debt, brought to recover $200 rent due on a written lease, dated —— March, 1872, given by the plaintiff to Jacob Griesel, of a house and lot in Pottsville, and on which the defendant, Frederick Buckholtz, was the security. The writing is attached to the lease, and is in these words:

"For a valuable consideration, I hereby become security for the payment of the above rent to the said lessor or assignees, as often as the same shall come due.

FREDERICK BUCKHOLTZ." [SEAL.]

Copies of the lease and the contract of the security were duly filed of record. There was no affidavit of defence made. The point here raised is, whether this is such an instrument of writing for the payment of money, upon which judgment may be taken for want of an affidavit of defence, under the act of 1851, P. L. p. 625, sec. 14. See Purdon's Dig., vol. 1, p. 495, pl. 13, and notes. There is a distinction in Pennsylvania between a surety and a guaranty, and the intent of the parties drawn from the language of the instrument must establish this. In this case we should construe the defendant to be surety. Monberger et al. v. Pott, 4 Harris, 9; Allen v. Hubert, 13 Wr. 259; see also Gilbert v. Henck, 6 C. 205.

The contract of the defendant is an absolute undertaking to pay the rent as it shall fall due, and the instrument is within the terms of the act of Assembly. Blackburn v. Boker, 1 P. L. J. Rep. 15–30. So, a guarantee of rent was held to be within the provision of the act. Girard Ins. Co. v. Finly, Troubat & Haly's Prac., vol. 1, part 1, p. 369 to 372. So also in forfeited recognizances. Harris v. Commonwealth, 11 C. 416. And it is only necessary to file a copy of the lease without statement or declaration, to entitle the plaintiff to judgment for want of an affidavit of defence. Frank v. Maguire, 6 Wright, 77; Dewey v. Dupuy, 2 W. & S. 553. We would also refer to the following as within the meaning of the words, "instruments of writing for the payment of money." Lukenbach v. Anderson, 11 Wr. 123; 6 Barr, 476; Bayard v. Gilaspy, 1 Miles, 256; Moore v. Fields, 6 Wr. 467; Hogg v. Charlton, 1 C. 200; Johnston v. Cowan, 9 P. F. S. 275. But the defendant has filed no affidavit, and it is in his power to deny or explain the claim. But he has done neither.

Judge Sargent, in Dewey v. Dupuy, 2 W. & S. 556, speaking of act of Assembly relative to affidavits of defence, says, "It would seem as if the Legislature intended that the propriety of entering judgment was to be tested, not so much on the plaintiff's claim, as by the defendant's affidavit." See also Sleeper v. Dougherty, 2 Wharton, 177; McConeghy v. Kirk, 18 P. F. S. 200. We are clearly of the opinion that the plaintiff is entitled to his judgment. Motion granted.

F. W. Bechtel, Esq., for plaintiff.

A. W. Schalck, Esq., for defendant.

NORTHERN DISTRICT OF ILL.
United States Circuit Court.

AUGUST, 1873.

In re WILSON.—IN BANKRUPTCY.

SUSPENSION OF PAYMENT.

1. **Single note sufficient.—The non-payment by a merchant for fourteen days, without legal excuse, of a single piece of commercial paper, is an act of bankruptcy, without reference to whether he is actually insolvent.**
2. **Solvency is no answer.—It is no answer to a petition in bankruptcy that the respondent is solvent, and the only justification for non-payment of commercial paper is a legal one, as that he was not liable upon it.**
3. **One of the objects of the bankrupt law was to compel merchants to pay their commercial paper as it fell due, under penalty of being adjudged bankrupts, if non-payment was continued without legal excuse for fourteen days.**
4. **Prima facie case sufficient.—In an involuntary petition it is not necessary to negative all the circumstances which might excuse the non-payment. For a rule to show cause, it is sufficient that a *prima facie* case be made. And where the petition alleged that the debtor had suspended payment on his commercial paper for more than fourteen days, and had not yet paid the same, that he was a merchant, and that the petitioners knew of no reason for the non-payment except the neglect or inability of the debtor: *Held*, it was *prima facie* an act of bankruptcy.—*Legal News.***

Petition for review under the 2d section of the bankrupt act.

The original proceeding was a petition in bankruptcy filed by P. Vanvalkenburg & Co., against Guy Wilson, a merchant doing business in Chicago, alleging as an act of bankruptcy, that on the 2d of June, 1873, he suspended payment of his commercial paper, and had not resumed payment of the same within a period of fourteen days thereafter, nor at any time since. The commercial paper referred to was a promissory note for $509.79, due June 2d, 1873, and held by petitioners. The petition stated that they knew of no cause for the non-payment of this note except neglect or inability of the said Wilson. The affidavit accompanying the petition did not show any other act of bankruptcy, or that the respondent was actually insolvent.

On this petition the district judge made the following order:

"There being no sufficient evidence of actual insolvency, I do not deem it proper to enter a rule to show cause on this petition. I hold that suspension of payment for fourteen days on a single piece of paper, does not alone show insolvency. Petition dismissed."

The petitioners thereupon filed this petition for review.

McClellan & Hodges, for petitioners.

The application for the rule is *ex parte*, and the only question for the court to pass upon is, are the petition and accompanying depositions in due form, and do they properly allege an act of bankruptcy.

All matters of defence or in explanation can only be offered by the debtor in response to the rule, and any possible excuse the debtor may have, need not be anticipated and negatived by petitioner, and the suspension of a single piece of commercial paper by a merchant, and non-resumption for a period of fourteen days, is *prima facie* an act of bankruptcy. In re Lowenstein, 2 Bankrupt Register, 99; In re Weikert et al., 3 Id. 5; In re Shea, 3 Id. 46; In re Hollis, 3 Id. 82; In re Nickodemus, 3 Id. 5[illegible]; In re Thompson & McClellan, 3 Id. 45; In re Wells, B. R. Supt. 37; In re Chandler, 4 Id. 66; In re Chappel, Id. 176; In re Shafer & Fritchery, Id. 179; In re McLean & Brown, Id. 188; In re Shelley, 5 Id. 214; In re Slemers, Id. 112; In re Baldwin v. Wilder, 6 Id. 85; In re Kenyon & Fenton, Id. 238; In re Carter, Id. 299; In re Hercules Ins. Co., Id. 338; In re Ess & Clarendon, 7 Id. 133; In re Manheim, Id. 342; In re Munn, Id. 468; In re Rayner, Id. 526; In re Gazam, 175-178, not reported.

Opinion by DRUMMOND, J.

The 39th section of the bankrupt law as amended by the act of July 14th, 1870, declares that any one who "being a banker, broker, merchant, trader, manufacturer or miner, has fraudulently stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days," has committed an act of bankruptcy, and might be adjudged a bankrupt on the petition of one or more of his creditors.

The 39th section sets forth various acts which constitute bankruptcy, one clause of which has just been cited. There was a difference among judges as to the true construction of the original clause of the 39th section, and to remove this doubt it was amended by the act of 1870, and the question is now presented whether the petition does not bring the parties, both creditor and debtor, within this amended clause of the 39th section.

It has in several cases been stated that there may be a suspension of payment of commercial paper for a period of fourteen days, which does not of itself constitute an act of bankruptcy. For instance, the paper may not be valid, or there may be a set-off against it; or, from some cause, the party may not be legally bound to pay it. In such cases the courts have held that the suspension of payment does not constitute an act of bankruptcy, because in point of fact there is actually no indebtedness, or if there is, it is offset by an indebtedness on the other side, so that there is no legal obligation to pay.

The ground upon which the district judge decided the case was that the fact of one piece of commercial paper being

unpaid was no sufficient proof of insolvency. The question then arises, whether on that ground can be based the refusal of a rule to show cause.

The point, it will be observed, is, whether a party has, *prima facie* upon the papers as they appear, committed an act of bankruptcy within the meaning of the 39th section, and whether insolvency is an indispensable element entering into and constituting the act of bankruptcy. I think it is not.

The real question is, whether, being a merchant or trader, he has suspended payment of his commercial paper for fourteen days, within the meaning of the law. Of the various acts which the 39th section declares to constitute acts of bankruptcy, most of them do not refer to insolvency at all. For instance, the departure from the State, district or territory of which the debtor is an inhabitant, with intent to defraud his creditors, is an act of bankruptcy. Where a debtor conceals himself to avoid the service of [illegible] process in an action for the recovery [illegible] a debt or demand provable under the bankrupt act, he commits an act of bankruptcy. The concealing or removing any of his property to avoid its being attached, taken, or sequestered on legal process, is an act of bankruptcy. So with many other acts declared to constitute bankruptcy, as where the debtor has been actually imprisoned for more than seven days in a civil action founded on a contract for the sum of one hundred dollars or upward. In all these cases insolvency is not an element.

Then comes the further definition which the district judge has apparently applied by analogy to the particular circumstances of this case: "Or who being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency shall make any gift, grant, sale, conveyance," &c., &c.

Some of the courts have intimated that "suspension of payment" means a general suspension of payment, and not the suspension of payment of a single piece of commercial paper; and it is in carrying out that view that the district judge has held there must be an allegation of insolvency. But the question is, whether it is competent for a man, being a merchant, to suspend payment of any of his commercial paper, and bid a creditor defiance, and then to turn round and allege in answer to an application to declare him a bankrupt, that he is solvent and therefore a proceeding in bankruptcy cannot be instituted against him.

I hold that allegation to be no answer to a petition in bankruptcy under such circumstances. It is not enough for him to show as a reason why a decree in bankruptcy should not go against him, that he is solvent, and because of spite or caprice, or some other similar causes he does not choose to pay his commercial paper. The reason which alone can prevent the non-payment of commercial paper and its continuance for fourteen days, from constituting an act of bankruptcy, must be a legal reason, such as to enable a court to say that it is not within the scope and meaning of the bankrupt law, because the debtor was legally justified in not making payment.

Upon the face of this petition no legal reason appears for the non-payment of this commercial paper within fourteen days after maturity, and the petitioners say they know of none. If there is any legal reason, it is for the debtor to show it before the bankrupt court. *prima facie* a case is made out against the respondent, and the question of solvency or insolvency is not material.

A solvent merchant cannot, therefore, refuse to pay his commercial paper, and then defend himself from a petition in bankruptcy, on the ground that he is solvent. One of the very objects of the bankrupt law was to compel merchants to pay their commercial paper as it fell due, by holding over them the consequences of its non-payment, if continued for fourteen days.

I admit that I should prefer to have the rule different, because if a man is solvent he can be proceeded against in the ordinary way, but the bankrupt law has not so provided. Insolvency does not constitute an element of the act of bankruptcy in this case, as it does not in most of the cases set forth in the 39th section.

If it be said that we can suppose a suspension of payment of commercial paper for fourteen days, which does not constitute an act of bankruptcy, the answer is that it is not possible for the petitioner to recapitulate all the various circumstances which might negative any supposed case, and thereby exclude it from the operation of the bankrupt law.

The district judge has required an allegation of insolvency. Something else might be required to be negatively set forth in the petition, which, if it existed in point of fact, would show that the act was not one of bankruptcy.

We cannot, therefore, require that the petitioner should set forth by negative allegations, all the particular circumstances which by possibility might show the non-payment to be within the meaning of this clause of the bankrupt law. It is sufficient that a *prima facie* case is made upon the petition.

It is for the debtor to make explanation or defence.

Again, if it be said that the non-payment for the given period must be a "general" suspension, where is the line to be drawn? On how many pieces of commercial paper must payment be suspended in order to constitute an act of bankruptcy? The statute has not declared that suspension of payment on any particular number of notes or bills of exchange shall constitute an act of bankruptcy, but the language is, "commercial paper," and it will be found impracticable to adopt a rule which limits the non-payment to some certain number of notes or bills of exchange in order to constitute an act of bankruptcy.

For these reasons I think the order of the district judge was erroneous, and must be reversed; and that the petitioners are entitled to a rule to show cause.

NOTE.—For such cases, consult In re Thompson, 3 Bankrupt Register, 45; In re Chandler, 4 Id. 66; Bank v. Iron Co., 5 Id. 491; In re Munn, decided by Hopkins, J., in the Northern District of Illinois, January, 1873, and to appear in subsequent volume of these reports.—REPORTER.

REGISTER'S NOTICE. To all Legatees, Creditors, and other persons interested: Notice is hereby given that the following named persons did, on the dates affixed to their names, file the accounts of their Administration to the estates of those persons deceased and Guardians' and Trustees' accounts, whose names are undermentioned, in the office of the Register for the Probate of Wills and granting Letters of Administration, in and for the City and County of Philadelphia: and that the same will be presented to the Orphans' Court of said City and County for confirmation and allowance, on the third FRIDAY in September, A. D. 1873, at 10 o'clock in the morning, at the County Court House in said city.

1873.

July 25, Charles M. Wagner, Administrator of RICHARD MANDRY, dec'd.
" 25, Enoch G. Hopkins, executor of GRACE BLAND, dec'd.
" 25, Geo. W. Sheppard, et al., Executors of BAYARD ROBINSON, dec'd.
" 29, Amanda T. Bodder et al., Administrators of LYCURGUS S. BODDER, dec'd.
" 30, Jos. Jones et al., surviving Executors and Trustees under the will of MARY BAKER, dec'd.
Aug. 1, Franklin Johnson et al., Executors of JACOB JOHNSON, dec'd.
" 1, James Bradley et al., Administrators of PATRICK BRADLEY, dec'd.
" 4, Wm. G. Macdowell, one of the Executors of LEVI KENTON, dec'd.
" 7, Jane C. Lyle, Administratrix of MARY THORNTON, dec'd.
" 11, William Overington, Trustee under the will of SAMUEL PILLING, dec'd.
" 11, P. P. Morris, Guardian of RICHARD WISTAR HOPKINSON, late a minor.
" 12, Samuel Fenberger et al., Executors, &c., of WILLIAM T. GORMAN, dec'd,
" 12, James Doak, Guardian of MARY A. HUGHES (now HELPIN), late minor.
" 13, Henry S. Lauber, Executor of DAVID R. SERGEANT, dec'd.
" 14, James Devir, Guardian of EDWARD A. LYNCH, minor.
" 19, David Teller, Executor of NATHAN KATZENBERG, dec'd.
" 20, William B. Chambers, Guardian of AMOS GEORGE CHAMBERS, late minor.
" 21, William Duane et al., Executors of THOMAS SULLY, dec'd.
" 22, Hortense Isaacs, Administratrix of JACOB E. ISAACS, dec'd.
" 23, William Darrach, M. D., Administrator d. b. n. c. t. a. of SUSAN E. MONRO, dec'd.
" 23, James J. Barclay et al., Executors of SAMUEL MOSELEY, dec'd.
" 25, John Harper, Executor of MARY RUSSELL, dec'd.
" 26, Edward Hopper, Executor and Trustee under the will of EMILY MAY, dec'd.
" 26, Mary G. Ruth, Trustee of ANN MARGARET WALTER, dec'd.
" 27, P. J. Wildberger, Administrator of JACOB STEINEGGER, dec'd.
" 28, Pennsylvania Company for Insurance on Lives, &c., Executors of HARRIET BELL, dec'd.
" 28, Pennsylvania Company for Insurance on Lives, &c., Executors and Trustees of JOHN EISENBREY, Jr., dec'd.
" 28, Alfred Taylor, Administrator c. t. a. of HANNAH ENOCHS, dec'd.

WILLIAM M. BUNN.
sep 5-4t Register.

NOTICE TO THE MEMBERS OF THE BAR.—The Circuit Court of the United States, direct the Clerk to announce that no cases will be entered upon the Trial or Argument Lists of Said Court for October Sessions, 1873, unless specially ordered by counsel on or before MONDAY, the 22d of September.

SAMUEL BELL,
Clerk of Circuit Court of United States,
sep 5-3t Eastern District of Pennsylvania.

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624 S. Twelfth st.—Substantially built Three-story Brick Store and Dwelling, above Bainbridge street. Lot 16½ x 65 feet. Sale positive.

720 and 722 S. Fifteenth st.—Brick Houses and Building Lot and House, 735 Wyoming street, above Fitzwater street, 34 x 80 feet. Orphans' Court Sale. Estate of Moses McMahon, dec'd.

1522 American st.—Three-story Dwelling and Frame Buildings in rear on Bodine street. Lot 34 x 129 feet. $68 ground rent. Sale by Order of Heirs. Estate of Patrick Hickey, dec'd.

Sale on the premises, Germantown.—Store and Dwelling, 5176 Main street. On Thursday afternoon, September 18th, at 4 o'clock, will be sold on the premises, a Three-story Stone Store and Dwelling, with back buildings, has 9 rooms, gas and water introduced. Lot 23 x 235 feet, being 40 feet wide on the rear. Immediate possession. $3,000 may remain.

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VOL. V. PHILADELPHIA, FRIDAY, SEPTEMBER 19, 1873. No. 38.

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Supreme Court of Pennsylv'a.

THE FARMERS' MUTUAL INSURANCE COMPANY OF LANCASTER CO. v. FORNEY.

1. Loss having occurred between the sale and its confirmation by the Orphans' Court the legal title was in the heirs of A.—and the action on the policy was rightly brought in the name of the administrator to the use of the vendee.
2. The effect of an agreement to "only claim three-fourths of the actual loss," construed.

Error to the Court of Common Pleas of Lancaster county.

Opinion by SHARSWOOD, J. Delivered July 2d, 1873

It is clear both upon principle and authority, that by sale of the premises insured under the proceedings in the Orphans' Court, there was no such alienation before confirmation as avoided the policy; and the loss having occurred between the sale and the confirmation, the legal title was then in the heirs of Forney, and the action on the policy was rightly brought in the name of the administrator to the use of the vendee. Insurance Company v. Updegraff, 9 Harris, 548; Reed v. Lukens, 8 Wright, 200; Hill v. Cumberland Valley Mutual Protection Co., 9 P. F. Smith, 474.

It is equally clear that the vendee had sufficient interest to entitle him to give notice to the company of the loss. As was well remarked by the learned judge below, if the clause be literally taken, in case the member insured was dead at the time of the fire, no one could give notice.

His personal representative, succeeding to his legal right as covenantee, is a trustee for the heirs of the vendee, and either the trustee or the *cestui que* trust sufficiently represent the party for that purpose. In the case before us, it appeared that both joined in the notice, which was received by the secretary of the company without objection.

It must be conceded that there is some difficulty as to the legal construction of the agreement given in evidence, signed among others, by the insured member, Graybill B. Forney. This paper was drawn up in pursuance of certain resolutions of the directors of the insurance company, to a copy of which it is attached. The whole must be considered as one instrument, and be construed together. The principle intended to be adopted by the company, was that every member insured should stand his own insurer to the extent of one-fourth of any loss which should occur. This was for the safety of the company, to induce care as well as honesty on the part of the insured, as he must himself be a loser by every fire, and could not throw his entire loss upon the insurers. The sixteenth section of the by-laws had declared, that not more than three-fourths of the actual cash value of any building or property should be insured. In all cases of total loss, this accomplished the purpose. But it is evident, that when the loss was only a partial one, the insured might still claim his entire loss, provided it did not exceed the sum insured This was not their meaning, and it did not secure the result at which they aimed. The directors, therefore, adopted a resolution that, in all policies thereafter issued, it should be plainly stipulated and expressed that only three-fourths of the actual loss should be paid by the company, and also resolved that the assent of the holders of existing policies should be procured to this as the true construction of their contracts. The agreement, however, which was to carry out this last resolution, was not confined to the exact words of the directors, but added a clause which has given rise to the question here. By it the subscribers "agree that (to avoid all doubt and difficulty) in case any loss should occur to our respective properties by fire, we will only claim and receive three-fourths of the amount of the actual loss, provided three-fourths of the amount, as aforesaid, does not amount to more than three-fourths of the sum insured." It is plain that the insertion of this proviso was altogether unwarranted by the resolutions, and had the directors been so inclined, they might have repudiated the entire agreement in consequence of it. But they have approved it, and now insist that it is to be construed as if it had read, "provided, and it is further agreed, that in no case shall any more than three-fourths of the sum insured be paid." That is, if a person having *exempli gratia*, a property, the cash value of which is $4,000, has insured it according to the sixteenth by-law for $3.000, if the entire property is consumed by fire, he shall be entitled to receive, not three-fourths of his actual loss, namely, $3,000, but only $2,250. Yet if he suffers only a partial loss of $3,000, he shall still be entitled to recover the same sum of $2,250. Instead, then, of the insured being limited to three-fourths of his actual loss when his loss is total, on the construction now contended for, he is entitled only to three-fourths of three-fourths or nine-sixteenths, little more than one-half. This could not have been the intention of the parties, and it is not the proper grammatical construction, of the writing. A simple proviso, without other words extending its operation, so as to make it a distinct and independent covenant, is a condition on the performance of which the validity of the deed or writing depends. Wharton's Law Lexicon, adverbum. The agreement was not, therefore, to apply where three-fourths of the amount of the actual loss shall exceed three-fourths of the sum insured. In the case before us, three-fourths of the actual loss does amount to more than three-fourths of the sum insured. The agreement then is inapplicable. The insured is entitled to recover the whole sum insured, but as, by the sixteenth by-law, this is only three-fourths of the actual value, the spirit of the agreement is maintained. This must be so in every total loss, the sum insured being only three-fourths of the actual cash value, the loss must of necessity be more than three-fourths of the sum insured. We hold the agreement not to have been intended to reach the case of a total loss, already provided for sufficiently by the sixteenth by-law. It is to be observed also, that the agreement was executed to give a construction to the existing contracts, not to make an entirely new rule. It declares that it is "to avoid doubt or difficulty." Now, the construction of the contract in connection with the by-laws, was without doubt or difficulty, in case of total loss. The insured bore one-fourth of it, which upon a fair interpretation of the whole paper, resolutions and agreement, was what we think was intended. What the effect of the proviso may be in case of partial loss, is not now before us for determination. We express no opinion upon the subject. It is not easy to understand what the penman meant; it is certainly obscurely and unhappily expressed so as to convey any clear meaning. If I might hazard a conjecture (which, however, is entirely my own), it would be that by "sum insured," was meant the sum which was the basis of the insurance, in other words, the valuation of the premises in the policy, a change of phraseology which makes the whole simple and just. It perhaps occurred to the writer, that the broad words, "three-fourths of the actual loss," might entitle the insured to demand more than three-fourths of the valuation.

There can be no question that the offers of parol evidence to explain the writing were rightly rejected.

Judgment affirmed.

Supreme Court of Illinois.

JAMES E. TYLER, JOHN H. ULLMAN v. THE WESTERN UNION TELEGRAPH COMPANY.

1. Admitting the blank of the company upon which the message sued by the plaintiffs was sent, with the usual provision printed in it in regard to repeating messages was a contract, *held*, that it did not and could not exonerate the company from the use of ordinary care and diligence, both as to their instruments and the care and skill of their operators.
2. That a telegraph company cannot purchase exemption from gross negligence.
3. That it was the duty of the receiver of the message to telegraph to ascertain the correctness of the message; that the company was bound to send the message correctly in the first instance.
4. It is a sham and a delusion, and an imposition upon the public, who are compelled to resort to this agency in the transaction of their business. If it be a contract, the sender entering into it was under a species of moral duress—by a necessities compelled him to resort to the telegraph as the only means through which he could speedily transact the business in hand, and was compelled to submit to such conditions as the company in their corporate greed might impose, and sign such a paper as the company might present.
5. That as a party repeating a message and paying fifty per cent. additional therefor, cannot recover of the company to the extent of his loss, we are free to say such a contract, forced, as we have shown it is, upon the sender, is unjust, unconscionable, without consideration, and utterly void.
6. That the doctrine to benefit the public must be to establish that a mistake in transmission is *prima facie* evidence of negligence, and the burden is on the company to show the contrary; that if these companies rely upon a contract as restricting their liability, it is incumbent on them to show a valid contract, freely entered into by the sender of the message, and for a valuable consideration paid by the company or acknowledged by the sender; that even such contract will not relieve the company from gross negligence.

Appeal from the Superior Court of Chicago.

Opinion by BREESE, J. Delivered February 7th, 1873.

This was an action of assumpsit to recover damages of the Western Union Telegraph Company for alleged carelessness in transmitting a dispatch for appellants from Chicago to the city of New York. The delivery of the message at the company's office in Chicago to the operator there, by one of the plaintiffs, is alleged, and proper averments of negligence and carelessness on the part of the company are found in the declaration, and proper averments of damage.

The defendant pleaded non-assumpsit, with notice of special matter.

It appears the message was written on one of the blanks prepared by the company, which contained the following stipulations:

"In order to guard against, and correct, as much as possible, some of the errors arising from atmospheric and other causes appertaining to telegraphy, every important message should be repeated by being sent back from the station at which it is to be received, to the station from which it is originally sent. Half the usual price will be charged for repeating the message, and the companies will not hold themselves responsible for errors or delays in the transmission or delivery, nor for the non-delivery of repeated messages beyond two hundred times the sum paid for sending the message, unless a special agreement for insurance be made in writing, and the amount of risk specified on this agreement, and paid at the time of sending the message. Nor will these companies be responsible for any error or delay in the transmission or delivery, or for the non-delivery of any unrepeated message, beyond the amount paid for sending the same, unless, in like manner, specially insured, and amount of risks stated hereon, and paid for at the time.

"No liability is assumed for errors in cypher or obscure messages, nor for any error or neglect by any other company over whose lines this message may be sent to reach its destination, and these companies are hereby made the agents of the sender of this message to forward it over the lines extending beyond those of these companies. No agent or employee is allowed to vary these terms, or make any other verbal agreement, nor any promise as to the time of performance, and no one but a superintendent is authorized to make a special agreement for insurance. These terms apply through the whole course of this message on all lines by which it may be transmitted.

The message, when written, and as delivered to the operator at Chicago, read as follows: "Dated Chicago, October 29th, 1866. To J. H. Wrenn, or at A. T. Brown. Sell one hundred (100) Western Union. Answer price. T., U. & Co." As delivered to Wrenn in New York, the message read as follows: "Dated Chicago, Illinois, to J. H. Wrenn, care Gilman, Son & Co. Sell one thousand (1,000) Western Union. Answer price. T., U. & Co."

It is averred in the declaration that Wrenn understood the words "one hundred Western Union," to mean one hundred shares in the Western Union Telegraph Company, which number of shares, it appears the banking house of plaintiffs was then carrying for a customer.

On receipt of the message, Wrenn sold one thousand shares of this stock, and to do so, was obliged to go into the market and purchase nine hundred shares, to replace which he had to buy on a rising market the same number of shares, so that the difference in the selling and buying price amounted to seven hundred and twenty-nine dollars and seventy-seven cents, which amount was wholly lost to the plaintiffs.

The court, on its own motion, having refused instructions asked by plaintiffs, charged the jury as follows:

"The dispatch in question in this case being sent upon one of the printed blanks of defendants, the printed heading of that blank constitutes a contract between the parties, by the terms of which both parties are bound, and as one of these terms is, that the defendants are not liable for any error in the transmission of an unrepeated message beyond the amount paid for sending the same, the plaintiff can only recover that amount, with interest on the same from the time it was paid to this time, in this suit. Transmission means all that happens between the receipt of the dispatch here from the plaintiffs and its delivery to them in New York."

It was admitted the message in question was not repeated. The jury found for the plaintiffs, assessing their damages at two dollars and sixty cents, being the cost of the message, with interest. A motion for a new trial was overruled, and judgment rendered on the verdict, to reverse which the plaintiffs appeal, and make several points, one of which is, the refusal of the instructions asked by them on the trial of the cause.

Those instructions are as follows:

"If the jury believe from the evidence, that the dispatch sent by Tyler, Ullman & Co., to John H. Wrenn, on the 29th day of October, 1866, was erroneously and negligently read by the operator in Chicago, and that said dispatch was transmitted to said Wrenn in the words as received by him, on account, and as the result of such erroneous and negligent reading by the operator in Chicago, then the verdict must be for the plaintiffs, if they suffered pecuniary loss by such error and negligence.

"If they believe from the evidence, that the dispatch sent by Tyler, Ullman & Co. to John H. Wrenn, on the 29th day of October, 1866, was correctly transmitted from Chicago to New York, and was correctly received in New York, at the office of the said defendants, yet if they believe from the evidence that said dispatch, although correctly received by defendants, was erroneously and negligently transcribed by their agents in New York, and was delivered by said agents to said Wrenn, so erroneously and negligently transcribed, and that such error caused any pecuniary loss and damage to the plaintiffs, then the verdict must be for the plaintiffs.

"If they believe from the evidence, that a mistake was made in transmitting the message, through the gross negligence of defendants or their servants, and that plaintiffs suffered damage by reason of such mistake in transmitting said message, the defendants are responsible for such damage, although the jury may believe from the evidence, that plaintiffs used one of the forms of defendants, having the terms printed at the top, as shown by the form copied in the notice accompanying defendant's plea, and that said plaintiffs asserted and agreed to such terms and did not require said message to be repeated, or its correct transmission insured.

"The plaintiffs were not bound by the terms printed at the top of the forms commonly used by defendants, as set out in the form copied in defendants' notice accompanying their plea, if they delivered their message to defendants for transmission by telegraph, and defendants accepted it for that purpose without plaintiffs' consent or agreement to be bound by such terms."

These instructions, in connection with that given by the court, open up the merits of this controversy, and we have given to the question raised by them full consideration. It is a case of the first impression in this court, requiring us to examine all the authorities cited, and such others as are within our reach, and we find them not entirely harmonious.

It is contended by appellants that telegraph companies are common carriers, and under the same common law liabilities.

In the earlier cases reported, they were so held. McAndrew v. The Electric Telegraph Company, 33 Eng., L. & E. R., decided in 1855. It was also held they could restrict their liability by contract, and that the paper containing the message, signed by the plaintiff, which was identical with the one in this case, was such contract. They were also held to be common carriers in Parks v. Alta Cal. Telegraph Co., 13 Cal. 422, decided in 1859. The counsel for the company argued against this proposition, and contended that the rules of the common law governing common carriers did not apply to telegraph companies. He insisted they could not be regarded as insurers, for the reason that a message is without value.

The court said there was no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. The breach of contract in one case or the other is, or may be, attended with the same consequences, and the obligation to perform the stipulated duty is the same in both cases. The importance of the discharge of it in both respects is the same. In both cases the contract is binding, and the responsibility of the parties for the breach of duty is governed by the same general rules.

Strong reasons might be urged in favor of holding these companies to the severe liability of common carriers, but the current of authority, at this time, is not, as admitted by appellants, in that direction. While their liability is held to be analogous to that of common carriers, who are insurers of the safe delivery of the articles intrusted to them, it is considered, in view of the means employed by telegraph companies to transmit messages, and their liability to sudden accidents which cannot be foreseen and provided against, to hold them as insurers of the safe delivery of every message intrusted to them, would be too rigid a rule. Cases so holding, hold, nevertheless, that they are liable for a failure to exercise the highest degree of diligence and skill in the performance of their duty. The case of Rittenhouse v. The Independent Line of Telegraph, 44 New York, 263, is one of this description. There it was held, the failure to transmit a message in the form in which it was received by the operator, was *prima facie* negligence, for which the company is liable, and the *onus* is on the company to show the mistake occurred by no fault of their own. This case came up from the Court of Common Pleas, and is reported in 1 Daly, 474, and was an unrepeated message. To the same effect is New York and Washington Printing Telegraph Company v. Dryburg, 35 Penn. 298. This action was in tort, and brought by the receiver of the message. The court say, the wrong of which the plaintiff complained consisted in sending him a message different from that which they had contracted with Le Roy to send. That it was a wrong, is as certain as that it was their duty to transmit the message for which they were paid. Though telegraph companies are not, like carriers, insurers for the safe delivery of what is intrusted to them, their obligations, as far as they reach, spring from the same sources, the public nature of their employment, and the contract under which the particular duty is assumed. One of the plainest of their obligations is, to transmit the very message received. They further say, the company claimed that their operator was a skilful and careful one. Then his negligence in this instance was the more apparent and inexcusable. In Elwood et al. v. The Western Union Telegraph Company, 45 New York, 549, the court said, the agent was placed in the office and in the control of the instruments to use them in transmitting messages for a compensation. If the agent performed the duty in a negligent manner, whereby the plaintiff was injured, the principal is clearly liable. Transactions of the most important character are daily carried on by means of telegraphic communication, and the confidence which the public is invited to and does repose in the care with which the proprietors of these lines conduct the business, is a source of large remuneration to such proprietors. They have a corresponding degree of responsibility, and must be held to the exercise of such care and caution as it is in their power to employ, in order to avoid being made the instrument of deception and fraud.

Another class of cases holds these companies are bound to the exercise of reasonable diligence and skill. Washington and New Orleans Telegraph Company v. Hobson & Son, 15 Grattan, 122. In this case the declaration did not allege negligence on the part of the company, and one instruction, that the defendants were not responsible as common carriers, but only as general agents, for such gross negligence as in law amounts to fraud, was not authorized by the pleadings, and was properly refused. In Ellis v. The American Telegraph Company, 13 Allen, 226, the court said, it would be manifestly unreasonable and unjust to annex to a business of such a nature the liability of a common carrier, or to require that those engaged in it should assume the risk of loss and damage arising from causes the operation of which they could neither prevent nor control. But although they ought not to be held to such a standard of diligence, they are not exempt from all responsibility for a want of fidelity and care in the exercise of the employment which they undertake to carry on. There can be no doubt that, in the ordinary employments and occupations of life, men are bound to the use of due and reasonable care, and are liable for the consequences of carelessness or negligence in the conduct of their own business to those sustaining loss or damage thereby. We can see no reason why this rule is not applicable to the business of transmitting messages by telegraph. The court then comments on the efficacy of the regulation of the company requiring a message to be repeated, and hold it is a reasonable regulation. In Western Union Telegraph Company v. Carew, 15 Mich. 525, the court say, this is not a case which calls upon us for laying down the rule which must be held to govern as to the degree of skill, care and diligence to be required in the transmission of messages. But doubtless the use of good apparatus and instruments would be required, and reasonable skill, and a high—perhaps the very highest—degree of care and diligence in their operation; and when an error has occurred in the transmission of a message, it may be found that they ought to be held *prima facie* guilty of negligence, the *onus* of proof resting upon them to show diligence, the means for doing this being peculiarly within their knowledge and power. Other cases on this point might be cited: Birney v. New York and Washington Telegraph Company, 18 Md. 341; Breese et al. v. United States Telegraph Company, 45 Barb. 275. All these cases hold, as do the following, that these companies may limit or modify their common law liability by stipulations, such as given in evidence in this case. Wann v. Western Union Telegraph Company, 37 Mo. 472; Camp v. Western Union Telegraph Company, 1 Met. (Ky.) 164. This last case holds, when a message is not repeated it will be regarded as sent at the risk of the sender, and the company will not be liable for damages resulting from a mistake not occasioned by negligence or the want of skill of the agents of the company.

An examination of the decided cases shows that the law applicable to telegraph companies is in an unsettled condition. It must, however, be conceded, that there is great harmony in the decisions that these companies can protect themselves from loss by contract, and that such a regulation as the one under which appellees defended, is a reasonable regulation, and amounts to a contract.

We are not entirely satisfied with the conclusion announced in some of these decisions. Whether the paper furnished by the company, on which a message is written and signed by the sender, is a contract or not, depends on circumstances. In an analogous case in this court, Adams Express Company v. Haynes, 42 Ill. 19, and in Ill. C. R. Co. v. Frankenberg et al., 54 Ib. 88, it was held, the simple delivery of a receipt to the shipper is not conclusive upon the latter. Whether he had knowledge of its terms, and assented to its restrictions, is for the jury to determine as a question of fact, upon evidence, *aliunde*, and all the circumstances attending the giving the receipt are admissible in evidence to enable the jury to decide that fact. The receipt given by the company in this case was declared on its face to be a contract, and was as full for such purpose in the terms employed as is the form in the case now before us. It was a question for the jury in that case, but in this case the court undertook to determine the question and decide the fact. We think this was error. We do not see why the same rule should not apply to telegraph companies as is applied to express companies and railroad companies. In regard to the latter, it is always held, whether or not such a regulation was brought to the notice of the shipper so as to fix knowledge upon him, to be a fact for the jury. Brown v. Eastern R. R. Company, 11 Cushing, 97. Slight evidence of acceptance or assent to such regulation would, no doubt, suffice, but it is for the jury to determine.

In the various and somewhat conflicting decisions of the courts on the question presented, we are inclined to hold, admitting the paper signed by the plaintiffs was a contract, it did not, and could not, exonerate the company from the use of ordinary care and diligence, both as to their instruments and the care and skill of their operators. The plaintiffs having proved the inaccuracy of the message, the defendants, to exonerate themselves, should have shown how the mistake occurred. This proof was not in the power of the plaintiffs, and was in the power of the defendants. In the absence of such proof the jury would be authorized to presume a want of ordinary care on the part of defendants. If the error was caused by atmospheric disturbances, or a momentary displacement of the wires, the defendants knew it, and ought to show it. In the absence of any proof on their part, the jury should be told the presumption was, a want of ordinary care on the part of the company. The court, however, refused to instruct the jury that the company was liable for gross negligence. It is the settled doctrine of this court that a railroad company cannot purchase exemption from gross negligence, or protect itself against such; that it would be against public policy so to contract. We see no reason why the rule should not be the same in regard to telegraph companies, for they are, like railroads, public institutions, having duties to perform to the public. On general principles, we must hold the company, notwithstanding the special conditions relied upon, is responsible for mistakes happening by its own fault, such as defective instruments, or carelessness, or unskilfulness of their operators, but not for mistakes occasioned by uncontrollable causes. Sweatland v. Ill. and Miss. Telegraph Company, 27 Iowa, 433. This company sought the patronage of the public in the exercise of their employment, and assured that public they would use at least ordinary care and diligence in their business, both as to their instruments, and as to the skill of their operators. It cannot be claimed the contract in question was designed to relieve them from that, nor should it. They assure the public they have the most approved instruments and employ skilful operators, and they further assure the public that due care and diligence shall be exercised in conducting their business. If the conditions relied upon were designed to shield the company from consequences flowing from a want of skill of operators, or insufficiency of instruments, which would be gross negligence, such a condition would be contrary to public policy, and void. The pretext for imposing the conditions in question is, "to guard against, and correct as much as possible, some of the errors arising from atmospheric and other causes appertaining to telegraphy," &c. In these "other causes," it cannot be allowed to embrace defective instruments or unskilful operators, for the company are bound by their obligations to the public to provide the

best, certainly to provide operators of sufficient skill and intelligence, and instruments of the most approved construction. "Other causes" must mean only such causes as appertain, specially, to the business of telegraphy. Defective apparatus, and unskilful operators, appertain to business and public employments, other than telegraphy.

A railroad company cannot be excused on failing to employ competent engines, and servants to manage and conduct them and the trains to which they are attached. If a loss happens by reason of insufficient engines, or by the incompetency of their employees, they are liable. We cannot hold that the printed conditions in evidence in this case protect this company from losses and damage occasioned by causes wholly within their own control. They must be confined to mistakes due to the infirmities of telegraphy, and which are unavoidable.

A point is made by appellees that the negligence of appellants materially contributed to the loss incurred. This is a question of fact for the jury, and if it is established they cannot recover.

But we fail to discover any evidence of contributory negligence on the part of the plaintiffs. And as to the receiver of the message, it was not his duty to telegraph back to ascertain the correctness of the message. The company was bound to send the message correctly in the first instance.

It is urged by appellees' counsel, in his comments on the instructions asked by plaintiffs below, that the first two were properly refused by the court, for the reason there was no evidence on which to base them. There may have been no direct testimony on this point, but a jury is permitted to infer a fact from circumstances proved to them. It was in proof by John H. Wrenn, and not attempted to be contradicted or questioned, that so soon as he received a telegram from Chicago, which he did on the 30th of October, stating that an error had been committed, and ordering him to cover the extra nine hundred shares, he went immediately to the office of the company in New York, and asked them to correct it. They told him the error had not occurred at their office but in Chicago. We think the attention of the jury was properly called by these instructions to this testimony, as it was not contradicted. It was in the power of the defendants to show the mistake did not occur at the Chicago office, by producing the original, which was in their possession. This they failed to do. If the fact was, the error occurred in the Chicago office, then the plaintiff's right to recover is unquestionable, for there is no excuse for failing to start a message correctly. That fact would show a defective instrument or an unskilful operator, and for these the company would not be exonerated.

Another point is made by appellees, not undeserving notice, and that is, the want of knowledge on the part of the company, of the importance or value of the message. It is a sufficient answer to this to say, that be a message of great or trifling importance, the company is bound to transmit it literally, at least, according to some of the authorities, to use the highest degree of skill and care in their efforts so to do. But the dispatch disclosed the nature of the business as fully as the case demanded. A similar case is reported in 55 Penn. 262, United States Telegraph Company v. Wenger. The dispatch was, "Buy fifty (50) Northwestern, fifty (50) Prairie du Chien, limit forty-five (45)." It was held, this dispatch disclosed the nature of the business to which it related, and that a loss might occur if it was delayed. In this case a great loss has occurred by incorrect transmission.

As to the point that appellees should have had an opportunity to replace the stock before Wrenn went into the market for that purpose, it is apparent from Wrenn's testimony the company had such opportunity, for he testifies he went to them in New York and requested them to correct the error. On their refusal, on the pretext that the error occurred at the Chicago office, he then purchased.

We have carefully read and considered all that has been written on the subject of the art of telegraphy which our libraries can furnish, and we are not satisfied with the grounds on which a majority of the decisions of respectable courts are placed.

In the first place, modern telegraphy is not now an infant art. It sprang into existence from the teeming brain of one now no more, who had the boldness to attempt to render subservient to the wants of man the most subtle element of nature, and by its mysterious potency convey ideas, wants and wishes to the farthest limits of civilization, and with the speed of its kindred element. In its infancy it scarcely ever failed to perform its office. Thirty years have witnessed vast improvements in the art, a higher knowledge of the subtle agent called into use, more finished instruments, and almost perfect skill in those who operate them, so that setting aside atmospheric causes, which have not yet been provided against, it may be asserted as an incontestable truth, that given a line of wire properly established, the most perfect instruments, and skilled operators, who exercise their skill with proper care, a message started at Chicago for New York, is as sure to reach its destination, exactly in the words and figures in which it was started, as the lightning is sure to strike the object which attracts it. Intelligent and skilful operators all admit this. There is no reason, the atmosphere being right, and all else right, why a message correctly started, should not be correctly transmitted along the line to the end of the line, no matter how many hundred miles asunder may be the point of its departure from the point of its reception. If this be so, then the efforts made by the courts to excuse those who undertake this business should not be imitated or encouraged by this court. Again, it is said by enlightened courts whose opinions we have quoted, that these forms furnished by the several companies, and they are all alike, when used by the sender of a message, and signed by him, become a contract between him and the company, by the terms of which he must abide. The court told the jury in so many words, that this form signed by appellants, was a contract between these parties, by which their liability must be gauged. We have, in this opinion, said something on this point—that it was for the jury to determine whether it was, or not, a contract knowingly executed by the party, with the intention to be bound by it. We now desire to say it is not a contract binding in law for these reasons. Our statute makes it the duty of telegraph companies to transmit all messages committed to them for purposes of transmission, in the order in which they are received; they are bound by law to serve all who apply; they are public institutions established by public law, and to whom is granted the right of eminent domain. Persons who unlawfully injure or molest, or destroy any of their lines, posts, piers, etc., on conviction are deemed guilty of a misdemeanor; and liable to fine, or imprisonment in the penitentiary, or both. Failing to transmit a message, or suppressing a message, or making known its contents to any one other than the party to whom it is addressed, is deemed a misdemeanor, and punished by a fine not exceeding one thousand dollars. By section 4 of the act, such companies have the power to purchase, receive and hold such real estate as may be necessary, &c., and may appoint such directors, officers and agents, and employ such servants, and make such prudential rules, regulations and by-laws, as may be necessary in the transaction of the business, not inconsistent with the laws of this State or of the United States. Laws of 1849, p. 188. This act imposes upon these companies duties to perform to the public, which they must perform, *nolens volens*. For their performance they are entitled to a reasonable compensation, the tariff of which they adjust themselves, under the power granted by the fourth section. When this tariff is paid by the sender of a message, the duty of the company begins. This payment is the consideration for the performance of its duty in each particular case. On the assumption, then, that it is the duty of the company to transmit correctly the message for which they have received compensation, where, in law, arises any obligation on the part of the sender to repeat the message? The fact is conceded that a telegraph company is the servant of the public, and bound to act whenever called upon, their charges being paid or tendered. They are in that respect like common carriers, the law imposing upon them a duty which they are bound to discharge. The extent of their liability is to transmit correctly the message as delivered. This is conceded. But it is decided by all the courts that a common carrier can by contract restrict this liability. The argument is that the condition for repeating is such a restriction, and, being in writing, and signed by the sender, is, to all intents and purposes, binding upon him as a contract. The question at once arises, where is the consideration for this contract? It does not move from the company; on the contrary, they demand of the sender of the message fifty per centum in addition for repeating—for assuring the faithfulness of their own conduct. We fail to perceive any consideration whatever on which to base this so-called contract. It is not a contract of any legal or binding force. This court said, in Illinois Central Railroad Company v. Morrison et al., 19 Ills. 136, that a common carrier might restrict his common law liability by a contract fairly made with the shipper. In that case the contract was special and under seal, and for which the railroad company paid a valuable consideration by reduction of the freight charges. That was a binding contract, for value. The one in question is not so, and does not possess one of the essential elements of a valid and binding contract, namely, a consideration. It is a sham and a delusion, and an imposition upon the public, who are compelled to resort to this agency in the transaction of their business. If it be a contract, the sender entering into it was under a species of moral duress; his necessities compelled him to resort to the telegraph as the only means through which he could speedily transact the business in hand, and was compelled to submit to such conditions as the company, in their corporate greed, might impose, and sign such a paper as the company might present. "Prudential rules and regulations," such as the company is authorized by statute to establish, cannot be understood to embrace such regulations as shall deprive a party of the use of their instrumentality, save by coming under most onerous and unjust conditions.

But it is said, a special agreement might have been made for insurance, in writing. To do this, the amount of risk must be specified in the contract, and paid at the time of sending the message, and as there is but one person in the world—a superintendent—authorized to make a contract of insurance, he must be hunted up, and the terms negotiated, all which require time, and a favorable opportunity to the sender be irretrievably lost. At Chicago, or other large cities, where a superintendent is supposed to be, there might not be much loss, but we are declaring the law for the whole State, and it is well known that at subordinate, though important, stations on telegraph lines, superintendents are not to be found. This provision is to such perfectly valueless. As a party repeating a message and paying fifty per cent. additional therefor, cannot recover of the company to the extent of his loss, we are free to say such a contract, forced, as we have shown it is, upon the sender, is, in our opinion, unjust, unconscionable, without consideration, and, utterly void.

The remaining question is, as to the damages. As this case must be tried again, it is necessary some rule should be prescribed by which the damages are to be estimated. As a general principle, every person and corporation ought to make good all damages occasioned by his or their default. But it is not always easy in cases of this kind to state a general rule. It has been said, and very properly, that the great difficulty in such cases is, to distinguish between the right to recover, and the amount to be recovered, the line, dividing these two branches of the law sometimes vanishing entirely. The best reflection we have been able to bestow on this branch of the case, prompts us to say, the rule adopted in the United States Telegraph Company v. Wenger, *supra*, in a similar case, is a reasonable rule. The message in that case ordered a purchase of stock, which advanced in price between the time the message should have arrived and the time it was purchased under another order. The advance in price was held to be the measure of damages. That message, as this, disclosed to the agent of the telegraph company the nature of the business to which it related—in this case, to sell a certain number of shares of stock.

If appellants were compelled to, and did, purchase nine hundred shares of this stock to replace the stock so sold by reason of the carelessness of this company, and that, in the interval, between the selling one thousand shares and the re-purchase by Wrenn of the nine hundred shares, to replace the extra number of shares sold, and that stock had advanced in price, this advance should be the measure of damages. It is reasonable to suppose this is what both parties had in view, when the message was committed to the care of the appellees.

In looking at these conditions prescribed by telegraph companies, this one in particular, but they do not differ essentially from those of other like companies, we are forcibly impressed with the belief that they are designed to relieve themselves from all responsibility. Content to receive the money of the sender, they design to escape all responsibility. Such conditions are unreasonable, and ought not to receive the sanction of any court. We have said, and we repeat, that there is no reason, apart from atmospheric causes, why a message should not be transmitted precisely as received. The art is reduced to a certainty. That courts should not be swift to exempt these companies from liability, is a dictate of public policy. To such perfection has the art reached, that in the last thirty years in which electric telegraphs have been operated, we have been unable to find among the reported cases in this country and in England, more than fifty instituted against these companies for losses occasioned by their negligence. The messages sent by them in this time have amounted to millions. Under these circumstances, their bold claim to exemption should meet with no favor from the courts. The doctrine, to benefit the public, must be, as we have endeavored to establish, that a mistake in transmission is *prima facie* evidence of negligence, and the burden is on the company to show the contrary. If these companies rely upon contract, as restricting their liability, it is incumbent on them to show a valid contract, freely entered into by the sender of the message, and for a valuable consideration paid by the company or acknowledged by the sender. But even such contract will not relieve the company from gross negligence. On the most mature reflection, aided by all the light shed upon this subject, we are at a loss to understand upon what principle telegraph companies should be accorded immunity for their torts, or be relieved from the liabilities voluntarily assumed by them. If they desire to restrict their liability, it must be done by a contract fairly and knowingly entered into, and for a valuable consideration.

Holding these views, the judgment of the court below must be reversed, and the cause remanded for further proceedings consistent with this opinion.—*Chicago Legal News.*

LEGAL GAZETTE.

Friday, September 19, 1873.

JOHN H. CAMPBELL,
EDITOR.

NOTICE.

Owing to press of business engagements, Mr. Jenkins, our Associate Editor, is compelled to sever his connection with this paper. In parting with him we desire to express our fullest confidence in his ability and editorial conduct, and our regret that we lose his valuable services. For some months past he has devoted much time to the preparation of the cases and other reading matter in these columns, and has contributed much to render the GAZETTE a live newspaper. We wish him every success in the profession, whose increasing demands upon him, render his withdrawal a necessity.

District Court of Phil'a.

GERETY v. READING RAILROAD COMPANY.

The plaintiff having been nonsuited in a former action, brought another action for the same cause against the same defendants; upon application, proceedings were stayed until the costs of the former action were paid.

Rule to stay proceedings.

Opinion by THAYER, J. Delivered September 15th, 1873.

The plaintiff having brought an action in this court, and failing upon the trial to make out his case, was nonsuited by the court. He then commenced another action against the same defendants for the same cause, without having paid the costs of the former action, thereupon the defendants took the present rule. The practice of courts in staying proceedings in a second action for the same cause between the same parties, where the plaintiff has failed in his first suit, until he shall have paid the costs of that suit, is a very beneficial one, and too well settled to admit of any doubt. It is founded upon the necessary control which courts of justice have over their own proceedings, and their duty to prevent them from being made the means of oppression and vexation. 3 Wilson, 149; 2 Wm. Bl. 741; 1 Tidd's Pr. 94; 2 T. R. 501, n.; Beames on Costs, 209. It is a practice which, as has been well said, is convenient and just in all the aspects in which it can be viewed. Whatever may have been its origin, it is not confined to actions of ejectment, but applies equally to *all forms* of action. Nor is it confined to cases in which there has been a trial on the merits. It is applicable also to cases of nonsuits; Nevitt v. Lade, 3 Doug. 396; and to cases of discontinuance, non pros., and judgment on demurrer. Neither will a slight variation in the names of the parties make any difference; Lamply v. Sands, 1 Tidd's Pr. 539; or the fact that the first action was in another court. All these points have, in other places, been settled in various decisions. In Pennsylvania, by a happy coincidence, they have all been determined in one, for in Flemming v. The Pennsylvania Insurance Company, 4 Barr, 475, an order for a stay of proceedings until the costs of a former action should be paid, was made in a case where the action was upon a policy of insurance, where the former action was in a different court, and was ended by a compulsory nonsuits, after the plaintiff had gone through his evidence, and where there was a slight variation in the parties to the two actions. The justice and propriety of such orders can, therefore, no longer be open to question in this State. There may be, sometimes, cases of hardship, in which this restraint would not be put upon a plaintiff. It rests in the discretion of the court, and a refusal to exercise this power is not assignable for error: Withers v. Haines, 2 Barr, 435. In the present case we see nothing to exempt the plaintiff from the operation of the usual practice.

Rule absolute.

Alexander Dallas Campbell, Esq., for defendants.

David Sellers, Esq., for plaintiff.

IMPAIRING THE OBLIGATION OF CONTRACTS.

The Constitutional Convention, now in session in this city, have in several cases, found themselves restricted by the provision of the United States Constitution (art. i., sect. 10) prohibiting a State from passing any law "impairing the obligation of contracts." The Convention found that the Legislature had conferred, by means of charters granted, immense powers and privileges, which the corporations possessing them claimed could not be taken away or restricted, by reason of their being protected by the clause of the United States Constitution referred to. These powers and privileges being in many instances highly injurious to the well-being of the people of the commonwealth, it was felt to be a serious want of power, in being unable directly to restrict them. The Convention, however, feeling that something must be done to place within the proper control of the State certain great corporations, that towered giant-like among the others, passed a section which declared as follows:

"No railroad, canal or other transportation company, in existence at the time of the adoption of this article, shall have any beneficial legislation by general or special laws, except on condition of complete acceptance of all the provisions of this article."

It was our purpose in drawing attention to this important section, to lay before our readers some of the arguments, pro and con, which were submitted in the convention. In accordance with that purpose, we print to-day some extracts from the debates which took place in that body. We invite especial attention to Mr. Biddle's argument.

"Mr. Cuyler. This section is the embodied threat of the commonwealth to her railroad companies, that if they will not give up their vested rights protected by the Constitution of the United States, they are to have no further favors from the commonwealth, for that is simply what it amounts to. It simply amounts to saying to existing corporations who have their rights by authority of law, protected by contract, "unless you give them up without compensation being made to you for the rights that are taken away, we will deny you the rights of citizens of this commonwealth." The proposition is perfectly monstrous. It is beneath the dignity of the commonwealth; it is beneath the dignity of the convention; it has no proper place in our organic law, and I trust gentlemen will consider very carefully before they vote in favor of any such proposition.

Mr. Campbell. Mr. Chairman: I think this is a very good section, and I hope it will pass. Several of the gentlemen who have spoken upon the report of the railroad committee, have stated that they opposed a number of the sections of the report, because, whilst they considered them good in themselves, especially if they could be applied to all railroad corporations now existing, or to be hereafter incorporated, yet their adoption would only be placing more power in the hands of certain large corporations of this State, by giving to those corporations a monopoly of the enormous privileges which they now possess, and preventing any future corporations from competing with them.

Now, this section proposes to say to the large corporations or monopolies referred to: "You have obtained from the Legislature certain rights and privileges that have enabled you to become great monopolies—injurious to the commonwealth—you say we cannot get from you any of the franchises which you have obtained, because you are protected by the Constitution of the United States. Now, unless you will be willing to come within the constitutional provisions that we lay down for all corporations in the future, you shall have no more legislation." This is eminently proper. It is but fair, if we can in any manner apply to them the same rule that we apply to the corporations that will hereafter come into existence; it is but fair to make them accept the provisions of this article; provisions that, by adopting, we declare to be wise and proper.

Mr. Hunsicker. Allow me to ask a question?

Mr. Campbell. Certainly.

Mr. Hunsicker. What is meant by beneficial legislation?

Mr. Campbell. The word "beneficial" may be stricken out if you wish. I, myself, prefer to say that corporations now existing shall have "no legislation whatever." The wording of the section is not mine. I am merely speaking of the general principle of the section. If the gentleman does not like the word "beneficial," strike it out, and say simply that they shall have no further legislation at all. If we can in any way make the two or three giant corporations of Pennsylvania act within the provisions of the article that we are putting forth as the fundamental law of the State, we should do so.

Mr. Gowen. One of the members of the railroad committee the other day said that this was no place to ventilate a man's legal learning on the subject of vested rights, and that the only question which a constitutional convention should take into consideration was not the right of doing a thing, but whether it was expedient or not. I take it that that sentiment has found utterance in the section which is now the subject of consideration, and upon that subject I desire to speak to this convention as the representative of a railroad company, owning from fifty to one hundred million dollars' worth of property, which they obtained by virtue of a contract with the forefathers of this convention.

Let us say, that in the year 1830, at a time when nobody could charge the Legislature of Pennsylvania with corruption; when it was not the custom to go to the Legislature corruptly to obtain a charter, and when a charter was obtained after great deliberation, and when a charter was not a matter of one or two sections, as it now is, but was a subject sufficiently important to occupy twelve or fifteen pages, many of the corporations of this State were chartered. It was thoroughly well known that that charter became a contract. The people of Pennsylvania, at that time at least, were anxious to have corporations develop their material interests. They invited men to become stockholders. They invited the citizens of this State, and the people of other States, and the people of other countries, and asked them to expend their money upon the solemn faith of the commonwealth of Pennsylvania; and had it been once intimated in those early days that such a thing, even in the wildest conception of the most infuriated reformer, would ever come to pass as that a constitutional convention should assemble in the city of Philadelphia for the purpose of taking away those vested rights, simply because it was deemed expedient to do so, I apprehend that the vast amount of money expended in the development of this State would have remained in the pockets of its owners. Every corporation created prior to 1857 holds its franchises by a title founded in contract, which contract cannot be altered, cannot be varied, cannot be impaired, unless the Constitution of the United States is changed. Every incorporated body that holds its franchises since the year 1857, holds them by exactly the same contract, only subject to this limitation, that its charter may be altered or annulled or repealed, but only in a certain way, and only so as to do no pecuniary injury to the stockholders.

Therefore, every incorporated company holds its franchises by virtue of a contract. If the incorporation dated prior to 1857, that contract is absolute, and cannot be changed; if since 1857, the Legislature has the power to alter or annul that contract, provided it is done in such a manner as not to do injury to the owners of it—the stockholders.

It is said that it is expedient to do this. Sir, it never is expedient to violate a contract. No possible good can ever come from the State of Pennsylvania violating a contract with her meanest citizen; and this attempt to violate it, not by striking it actually out of existence, but by saying it shall have no legislation hereafter, is just as bad as an attempt to violate it altogether. Corporations pay large amounts of taxes, it is well known. Many of those taxes were imposed during the war, and it might happen that the taxation of Pennsylvania would be reduced in the future, and no general law reducing taxation upon every one could be taken advantage of by an existing corporation without a surrender or a practical surrender of its franchises. The effect would

be that you tax an existing corporation where you will tax another one, and impose a penalty upon them because their charters are thirty or forty years old. But if gentlemen want to strike down contracts because questions of expediency and not a question of right should control, let me tell them that we have a burden that is borne by every citizen of this commonwealth. We have a State debt of twenty millions of dollars, I think, at present. It is very oppressive, and every man, woman and child has to labor to raise money to pay taxes. We get the money from the people, and the question of right would not prevail. It would be expedient to reduce taxation by repudiating this debt, and it seems to me that to repudiate a contract of any kind with any person is just exactly the same as to repudiate a debt; and I trust that the people of Pennsylvania will never have laid to their charge hereafter anything which savors of repudiation, either of their public debts, or of their public contracts.

Mr. Cuyler. Mr. Chairman: * * *

I have risen, Mr. Chairman, merely to say a very few words as to what I conceived to be the positive immorality of the doctrine of this section. I will not linger here to discuss the doctrine of the Dartmouth College case, which has been so often alluded to. No man, it seems to me, at this late day, can doubt that that is the law of this country. No man can doubt that what these corporations have is property, that they hold it by contract, and that when an attempt was made to take away that which is a vested right, or which is possessed by contract, without making compensation, the doctrine settled by this great and leading case is contravened. To doubt it is to doubt the plainest dictates of one's own judgment. It is to doubt the wholesome utterances of the law, pronounced after full discussion, by some of its greatest masters, through the lips of the greatest chief justice that ever presided in this country, and whose name is to be ranked as a peer with the name of any chief justice who ever presided abroad.

The Dartmouth College was a foreign charter, a charter granted by the Crown. The State of New Hampshire laid its hands upon it, in only what you or I would think almost non-essential particulars. It enlarged the number of its trustees from twelve to twenty-one; it enlarged the scope of the application of the funds which it held in trust for educational uses. Yet after solemn argument by Mr. Webster, whose greatest legal reputation is built upon this case, replied to by Mr. Wirt, then attorney general of the United States, was the law pronounced by Chief Justice Marshall, and declared to be that though its charter was granted by the Crown, it was not competent for the State of New Hampshire to modify it or change it in any degree without the consent of the corporation. And from that day to this has the most conservative doctrine been recognized by statesmen and by lawyers as part of the great constitutional law of every State of the American Union.

And if I turn to my own State, I have but to point to two or three cases familiar to every Philadelphia lawyer, one of them so closely resembling the Dartmouth College case in its doctrine, that it is almost precisely like it. I mean the case of the Western Saving Fund v. The City of Philadelphia, where the city of Philadelphia undertook to do nothing more than to add four trustees to the number of those who administered the gas works, without one single change in the trust beyond this, without an enlargement of the powers of the trustees or a modification of the trust, but simply adding four men to the number of trustees, they having themselves created that trust, and the Supreme Court of Pennsylvania, I think by a unanimous decision, said that it was unlawful, and could not be done in this commonwealth. Yet we are to be gravely told that although the $600,000,000 which have been invested in railway corporations in this State, on the faith of the law, cannot, by reason of the doctrine of those decisions, be taken away from them by any direct application of the power of the commonwealth, the State may take them by the throat and extort it from them as a matter of actual and positive force, for that is the doctrine of this section.

Now, sir, I will not consume the time of the convention ["go on! go on!"] by any further discussion of such a doctrine as that. I want to say a word or two on one or two other points, but so far as that particular thing is concerned, I scorn to utter another word to this convention. If the dignity of character, if the moral sense, if the sense of common honesty of this convention does not rise high enough to trample upon and spit upon such a doctrine as that, then we are unworthy of the seats we hold here. But I want to say a word or two, though not entirely, perhaps, germane to the particular question which is before the committee, with regard to one or two other matters which have been alluded to here, and which are presumed to affect interests that I am supposed peculiarly to represent.

Sir, suffer me to say as to those interests, that I am supposed peculiarly to represent, that if I know my own heart, I am incapable of standing upon this floor to advocate that which I believe to be wrong; that I am incapable of defending the Pennsylvania Railroad Company, or any other corporation, or any other client (for I am not an officer of the company), in that which I believe to be wrong. It has never occurred to me yet to do so. I am but simply the general counsel of that company, its defender and advocate in courts of justice, and its advisor to endeavor to keep it rightly and duly observant of its duties and its obligations to the law.

Now, I have to say with regard to this corporation, that when I hold up that sizeable book in the eyes of my brethren of the convention (holding up an octavo volume of about eight hundred pages), they will join me in saying this is a law-abiding corporation, for I think the size of the volume indicates a great deal on that subject. This little volume embodies the laws which affect that company down to 1864, inclusive. I suppose that about one-third might be added to its dimensions for those which have been passed since. But I want to say with regard to that company, which on a former occasion I have endeavored to show has done large service to this commonwealth, that in the year 1861, an act of Assembly was passed, which is commonly known as the commutation tonnage act, and without taking up time by reading at any length from that act, I desire to read a few of its provisions, in order that I may bring them to bear upon the minds of gentlemen who have spoken here with regard to certain discriminations which are alleged to have been made.

The recitals of this act confess that it was the right of the company to have the tonnage tax taken off—its right by contract with the State; and then they proceed to say that if the company will make a certain contract, which I will read, with the State, the arrears of that tax, amounting to some $800,000, shall be not released, as in justice they should have been, but be paid over in development of the resources of the commonwealth, by aiding various struggling railroad companies. True, these companies were generally companies that would be feeders of the line of the Pennsylvania Railroad Company, but, nevertheless, though feeders of the line of the Pennsylvania Railroad Company, they were developers, if I may use such a word, of the wealth and resources of the State. The act says:

"That from and after the passage of this act, all railroad, canal and slackwater navigation companies, incorporated by this State, and liable for the payment of taxes or duties on tonnage, imposed by any laws heretofore enacted, shall make a reduction of their charges for transportation on their local freight, as fixed by their respective toll-sheets, on the first day of February, 1861, equal to the full amount of the tax or duty chargeable upon such freight or tonnage by the laws aforesaid; the present winter rates, between the first day of December and the first day of May, shall be considered as fixed at ninety cents per one hundred pounds for first class; seventy-five cents per one hundred pounds for second class; sixty cents per one hundred pounds for third class, and forty cents per one hundred pounds for fourth class; summer rates, between the first day of May and first day of December in each year, shall be seventy-five cents per one hundred pounds for first class; sixty cents per one hundred pounds for second class; fifty cents per one hundred pounds for third class; and forty cents per one hundred pounds for fourth class, on all trade carried between Philadelphia and Pittsburg; and a failure on the part of either of said companies to make such reduction shall render the company so neglecting liable to the commonwealth for double the amount of the tonnage tax heretofore chargeable against them upon such trade; and every such company shall, within thirty days after the passage of this act, under a like penalty, file in the office of the auditor general, under the oath of the president, or other proper officer, a toll-sheet," &c.

And then it proceeds, and this is what I wish to invite the attention of gentlemen to:

"*Further*, The Pennsylvania Railroad Company shall not, at any time, charge or collect rates, on any description of freights, from any eastern or seaboard cities to Pittsburg, higher than the gross rates charged or collected by the same route from same points to any point west of Pittsburg; nor shall the said Pennsylvania Railroad Company, at any time, charge or collect rates on any description of freights from Pittsburg to Philadelphia, Baltimore, New York or other sea-board cities, higher than the gross rates that may be charged by the same route from any point west of Pittsburg to the same points on the same description of property. The local rates from Pittsburg or Philadelphia to stations on the line of the Pennsylvania railroad shall at no time exceed the gross rates charged through between Philadelphia and Pittsburg; nor shall local rates between any two stations on the road between Philadelphia and Pittsburg exceed the through rates, as made from time to time under the provision of this act; nor shall the rates charged to any local points exceed those charged to any point of greater distance in the same direction from the place of shipment."

And then follows a provision as to the rights of those who ship to or from Pittsburg by way of the river.

Now, I am here to say, and say by authority, that a solitary instance cannot be produced of a violation of the requirements of that section. I am not unaware that gentlemen on this floor have said, and many have said out of doors, that a contrary state of affairs existed; but I am here by authority to say that any and every charge of that sort is without foundation in fact, and if the facts are presented, and the cases are investigated, it will be found not to have its basis in truth.

It is not more than five years ago that a great litigation occurred in this commonwealth, in which my friend, Mr. Gowen, was one of the counsel on the other side, and with eminent colleagues represented the Pennsylvania Railroad Company, in which these charges were made, and in which this question was the subject of thorough judicial investigation. Mr. Thompson, Mr. Scott, and every gentleman connected with the transportation department of the Pennsylvania Railroad, was subjected, under oath, to a most thorough and sifting scrutiny, and there was a failure to substantiate a solitary instance of the violation of these provisions.

I heard a gentleman on this floor, I think it was my friend from Pittsburg (Mr. S. A. Purviance), allude to a merchant in Pittsburg, and others said that numbers of other cases of the same sort had occurred, who could send his goods to Alliance, and then have them brought from Alliance to Philadelphia at a less rate than the Pennsylvania Railroad carried from Pittsburg to Philadelphia. I stated that case to Mr. Scott, who, protesting his own profound ignorance of anything of the sort, caused inquiry to be made, and reported that no such thing had ever occurred, and added a fact, which I think will carry conviction to the minds of all here

Mr. Howard. Will the gentleman allow himself to be interrupted?

Mr. Cuyler. Certainly, sir.

Mr. Howard. I have this fact, that so far as the shipment of fourth class freights is concerned, shippers are prevented, by the discriminations made by the Pennsylvania Railroad, from shipping to the city of Philadelphia. They make discriminations in favor of the west. I have it from

gentlemen whom I know personally, men engaged in the flour and feed business, and the difference is just precisely the figures given, the difference between forty-five and thirty. Western men pay thirty, and Pittsburg men are charged forty-five. I have this from men of as high veracity as live. Now, is that true or false?

Mr. Cuyler. It is false, if the gentleman wants to know.

Mr. Howard. Very well, I do not think it is false.

Mr Cuyler. I have read, Mr. Chairman, from the law the right of the citizen, and I say that that citizen, cognizant of such facts as are stated by the gentleman from Allegheny (Mr. Howard), who does not avail himself of the remedy which the law clearly places in his power as a protection, is as unjust to himself as he is to the citizens generally of this commonwealth.

But what I wanted to present to gentlemen was this: The Pennsylvania Railroad Company owns the line between Philadelphia and Alliance, owns to Cnicago, owns to Cleveland; and on what earthly consideration could the company make a double carriage from Pittsburg to Alliance, and from Alliance back to Pittsburg again for nothing, in order to get the freight from Pittsburg to Philadelphia? Let gentlemen reflect upon the absurdity of it.

Mr. Guthrie. Will the gentleman allow me? I desire to explain. I think my friend from Allegheny erred in his statement in regard to shipping from Pittsburg. Mr. Dickey told me that he had shipped his freight from Philadelphia to Alliance, and then from Alliance back to Pittsburg, and thus saved money. And I will say further, that I think that was stated on oath by Mr. Dickey in an investigation. I am not sure of it, but I think it was stated under oath in an investigation.

Mr. Cuyler. My friend from Allegheny will perceive that the case he supposes is practically the same as that put by his colleague. It amounts simply to this: It amounts to the supposition that the Pennsylvania Railroad Company, owning the entire line all the way to Alliance, would carry this gentleman's freight for nothing from Pittsburg to Alliance, and back again from Alliance to Pittsburg in order to earn the freight she is to get between Pittsburg and Philadelphia. The officers of that company have had some little reputation for sagacity; they have not been reputed to be fools, whatever else may be said with regard to them. Such conduct would be so transcendently foolish that every intelligent mind must regard it as being positively incredible. The fact is that these charges are loosely and thoughtlessly made, and that, although the specified cases are infinitesimal in number compared with the vast mass of transportation, yet they suffice to stir the hostility which exists to corporations, and are magnified to large and overshadowing proportions in the public mind.

Mr. Sharpe. Let me ask the gentleman whether there was not a competing line from New York, which came in at Alliance, which might explain the mystery why the company should ship produce to Alliance and back again without charge?

Mr. Cuyler. What competition does the gentleman refer to?

Mr. Sharpe. The New York Central.

Mr. Cuyler. I do not think so. I do not think it touches it as a competing line. It would still carry with it the absurdity of which I have spoken, and still leave the citizen with the full redress which is pointed out by the act of Assembly, and if he will not avail himself of his clear statutory right by going into the courts of justice, which are the places where men and corporations are to be arraigned and to be punished for their wrongs, it is his own fault that he does not do it. Let him make his complaint there, where the facts may be calmly investigated, and their truthfulness ascertained, and an effectual remedy provided. This is not his proper tribunal.

I will not go into a more lengthy discussion of these cases, but I will allude to another that was mentioned on the floor. The gentleman from Susquehanna (Mr. Turrell) stated that he had been informed that the Cambria iron works had proposed to introduce the manufacture of shoes, had put up a capital of $200,000 for the purpose, and employed two hundred men, with a view to it, but had been compelled to abandon the business because of persistent discriminations against them, and in favor of Chicago. I can only say that I addressed an inquiry on that subject to every leading officer of the Pennsylvania Railroad Company, and I was informed by them, in answer, that it was the first time they had ever heard of such a thing; that it was not true that any application on the subject had ever been made to them, or any of them; that they had never heard that those works contemplated the manufacture of shoes; that it would not be a natural business for them to engage in; and that the whole subject was purely one upon which they were wholly uninformed.

Mr. Dodd. Will the gentleman permit me to ask him a question?

Mr. Cuyler. Certainly.

Mr. Dodd. Did the gentleman, in his inquiries, make any inquiries about the South Improvement Company?

Mr. Cuyler. I say the Pennsylvania Railroad Company never had any relations with the Southern Improvement Company of any sort or kind.

Mr. Dodd. Colonel Scott signed the contract.

Mr. Cuyler. I have nothing to do with Colonel Scott personally; he is able to take care of himself; but I say the Pennsylvania Railroad Company, in no manner whatsoever, directly or indirectly, was ever mixed up with that business. I speak of the corporation. I am not Colonel Scott's defender; nor am I to be understood as at all justifying any criticism that is made upon him. He is abundantly able to take care of himself, as gentlemen will find when they come into intercourse with him.

Now, Mr. Chairman, I have only to say that this company has once submitted to thorough investigation in the courts of justice; that those courts of justice are all the while open to the citizen, and the rights of the citizen are defined in words so clear, that the wayfaring man, though a fool, need not err therein; and that it is not manly, it is not right, it is not proper, when the plain remedy is pointed out and the tribunal for redress is established, that this species of wholesale denunciation should be resorted to and these vague allegations made, which, if true, should go into the courts of justice, where they properly belong.

I pass from this to another subject—

Mr. Turrell. Will the gentleman permit me to say a word?

Mr. Cuyler. Certainly.

Mr. Turrell. I simply wish to say that I made the statement from Mr. Morrell almost word for word, as he gave it to me; and in further corroboration of that I am happy to say, lest my veracity might be doubted, that Mr. Morrell has since that time, and since that article was prepared, had it submitted to him by the gentleman from Somerset, and he made the same statement to him.

Mr. Cuyler. I can only say after searching for Mr. Morrell, whom I have the pleasure of knowing very well, after going to three places where I hoped to find him, without success, I have written to him in regard to it, and his reply, when received, will be submitted to the convention.

Mr. Turrell. I only say this in justification of myself.

Mr. Cuyler. I do not doubt for a moment that the gentleman designed to state with precise accuracy what he supposed was told to him.

Now, Mr. Chairman, I wish to make this single remark: The law of railroad life is inequality. It is a matter of absolute vital necessity that it should be so. It cannot be otherwise. No two railroad companies are, or can be situated alike. There is inequality in their construction by reason of the region of country they pass through. There is inequality in their business relations by reason of the greater or less wealth of the communities which they reach by their lines. There is inequality in their relations by reason of the varying competition they encounter. All these circumstances combine to make the very law of railroad life *inequality*. Therefore I say that the effort to bring all these companies down to a single and inflexible rule, which shall be written in the constitution of the State as an iron rule, must of necessity be nugatory; it cannot work out a just result.

Take the line of the Pennsylvania Railroad. To build the line between Altoona and Cresson, over the mountains, cost vastly more than to build the line through the valley of Chester county. To operate that line, where the power of a locomotive is reduced to less than one-third the power it has upon a plain, requires a large expenditure all the while. To say, therefore, that freights shall be carried over the mountains elevated two thousand four hundred feet, and carried over such grades at the same price precisely that it shall be carried over the plains of Chester county, is an absurdity; and yet this bill does provide for a uniform rate of charge all the way through. It ignores the great general laws of trade and business and finance. No merchant dreams that he is to sell at the same price from a store where he is exposed to severe competition as he would from a store where he had no competition at all. No man could reason fairly or justly that, when the lines o the Pennsylvania Railroad reach Cincinnati, for example, and come into competition with other lines of transportation, they shall charge precisely the same rates that they would charge from Pittsburg, or from other points where no such competition exists. Nor is it an injustice to Pittsburg, because capital is entitled to earn its fair dividend, and if it can earn any dividend, no matter how small, toward that competent sum it should divide among its stockholders by the carriage of freight at a point where it encounters the greatest competition, it is in relief of the other community where no competition exists that it should carry that freight. That is the natural law of trade.

But we seem to be sitting here in this convention to ignore all the natural laws of trade and finance. We are sitting down to legislate that water shall run up hill; that fire shall not burn; that the opposite of that which the great laws of nature declare, just as much with regard to finance and railroads, and business generally, as they do with regard to the elements about us, shall be done; that those great laws are to be ignored and treated as if they did not exist at all. Such an effort is perfectly hopeless. We cannot legislate the opposite of that which the great laws of trade and finance have ordained. We must subordinate ourselves to them; or if we do not, we must put an extinguisher upon the business interests of the country.

Mr. Biddle. Mr. Chairman: If I felt the assurance that this article would be concluded this afternoon, in the condition in which the few last sections now stand, I would not rise to say a single word; and if the assurance is now made to me that the committee will vote the section now under consideration, I will cheerfully give way; but unless that assurance is made, unless I know that those who are the opponents of this measure are willing to let it pass now, and allow the article to go upon second reading, I deem it my duty to say something about it.

The debate upon this section has been so discursive in its tone, that we really have been entirely led away from the real proposition now before the house. There is nothing in this section that has a tendency to strike down vested rights; there is nothing in this section that goes to interfere improperly with the laws of supply and demand, with the laws of trade, which my colleague, Mr. Cuyler, very properly says are immutable, and which he who strives against, strives against only to his own detriment. What, then, is the real point under consideration?

Quite a number of these corporations were incorporated before the adoption of the amendment of 1857. That amendment provides in terms, that the Legislature shall have the power to alter, revoke or annul any charter thereafter conferred by special or general law, whenever in their opinion it may be injurious to the commonwealth, in such manner, however, that no injustice shall be done. It strikes me, that with the same reason might companies, incorporated after 1857, complain that their vested rights were struck at by the existing constitutional provision, as companies coming hereafter before the Legislature for special favors, or obtaining privileges under general legislation, can properly complain that the present article, if adopted as part of the fundamental law of the land, shall be made applicable to them.

No man recognizes more fully than I do the right of these great interests to be heard upon the floor of this house. I would go further and say that interests of such vast magnitude have the right to be represented here; and I have never objected to any gentleman, posessing peculiar means of knowing their wants and their wishes, and of stating objections to what he considers unwise legislation, presenting his views as fully and as often as he desires. So far from objecting, I believe a very large, a very decided majority of this house always hears with pleasure from those who have special sources of information upon any subject whatever.

But, Mr. Chairman that is not the question now before us, nor is the wisdom or the existing condition of the law at all a matter under consideration. Professional gentlemen may have different views in regard to the correctness of the decision known as the Dartmouth College case. That decision, in its true purview, in its real scope, was only dealing with a private charity founded by a private individual, who had a right to dictate the terms and limitations of his gift as he pleased. We may, therefore, believe, without at all desiring to strike at vested interests, that when the Supreme Court pronounced that any interference with the terms of that private bounty would be in violation of a contract, that every franchise granted by successive Legislatures, year after year, to these corporate bodies, did not necessarily partake of the same contractual character. It may have been supposed that such a deduction was pushing a just principle to an absurd conclusion. No man on this floor, however, quarrels with the law as it is. I state the case, I think, as it really occurred.

If the principle of the Dartmouth College case is so omnipotent, so universal in its application, as to bring within its protecting influence the franchises conferred upon these corporations, be it so; we so understand it; we so receive it; we desire not to legislate here otherwise; but it is for that very reason, and no man can look at this section without seeing it written transparently on its face, that we desire to say to these bodies for the future, "yes, we respect your contracts; true, the people, by these successive grants, have really left little or nothing to confer upon anybody else, but if what you have already got exists in the shape of contract, keep it; we will not disturb the enjoyment of what has been so obtained. But do not come before us hereafter, do not ask to take away the little remnant of that which is left as valuable in the hands of the sovereign power, and while you stretch out one hand to receive a boon, with another, present an obstacle to the enforcement of the constitution as it is established." It is to correct this great anomaly that this section is found here, and we may as well admit now and for all time, that unless you put a section substantially like this in the article under consideration, you may as well tear it up, and erase it from your records, and proceed to the discussion of something else; because we have been told here—I do not say by way of threat, but by way of warning—as to several of the provisions found in this article, that the two great leading corporations in the State can each afford to pay five millions of dollars into the public treasury, provided we fasten what are called these trammels upon the condition and action of the corporations who are hereafter to receive their life at the hands of this commonwealth, leaving, as we are told we must do, those others unaffected. I am not speaking rhetorically when I say this; I am merely repeating the very language——

Mr. Cuyler. No such language certainly fell from me. I never entertained any such thought.

Mr. Biddle. No, sir; the house know very well to what I refer. I am not speaking of what fell from your lips. I am repeating the very words that fell from the lips of a gentleman advocating (as undoubtedly he had a right to do) what he conceived to be the true policy that should be pursued by this convention.

Now, Mr. Chairman, how far have we proceeded? Do I understand the advocates of these corporations—and I use the word in no unkind sense; I recognize, as I said in the beginning, their right to be heard and to be heard fully; I will call them the friends—do I understand the friends of these corporations to say that no change is needed in the constitution by which they may be affected? That will hardly be said. That can hardly be admitted. Will gentlemen say to us, after the result of the labors of the last three or four days, that it is not a wise thing to prevent the absorption of competing lines, that it is not a wise thing to make these corporations answerable for what I still choose to call the consequential damages, resulting from injury by the construction of their works? Will gentlemen say that there is anything impolitic or improper in allowing stockholders, bondholders, or others having a pecuniary interest to know who their fellows are in each corporation? Will gentlemen say that we have substantially invaded any sacred right of contract by anything which has been done here? I cannot see it in that light. But suppose it be so, the objection should be made to those sections, and not to the section now under discussion which merely says, "You corporations, who boast and say, 'we cannot be touched? you are putting money in our pockets by what you are doing in regard to the future offspring of the Legislature;' you, too, shall come under the same general law whenever you place yourselves in the position of seekers of legislative favors." Where is the principle in this that strikes at the impairing of the obligation of contracts? Where is the injustice? Where is the black crape and pistol, in this, of the highwayman? Where is the robbery? Where is the thievishness? I do but repeat the terms that have been employed on the other side of this question in discussing the fundamental principle of justice and common sense contained in this article.

Mr. Chairman, I deny that there has been anything like an effort here, in any one single provision of this article, to attempt to extort, by the supposed superior force of the commonwealth, any right which has been consecrated under the terms of a contract, and which now exists in the possession of any one of these corporations. Point it out, if it be so. Do not denounce by general rhetorical phrases; do not perorate on this subject. Lay your hands upon any one single clause by which anything like injustice is attempted to be done, and my word for it, if this house shall be convinced that in their previous action anything like wrong has been committed, they will at once strike the obnoxious section from this instrument. But I would say to this house, and I would say to the gentleman who spoke last, who knows how to advocate so ably the interests entrusted to his care, that superior astuteness will always be more than a match for what is called superior force. The world is not governed now by brute force; intelligence is a much more powerful element in its direction, and it is no figure of speech to say that "the pen is mightier than the sword."

The pen which is employed year after year in the writing of the special provisions which each successive Legislature confers upon these corporations, and which have become so large that they are contained in a volume larger than the codes of many communities, bears mute but eloquent testimony to the truth of what I am saying. I will go as far with my friend as any one, in the attempt to remedy anything like an act of injustice where it is pointed out. I will go further than the exigency of this case requires.

We have had made, time and again, in the discussion of this article, references to the tonnage tax and to its repeal. I say now, although my action would probably have been misconstrued if I had been a member of the Legislature when that repeal was voted; I say, now, that I believe the repeal of the tonnage tax was an act of legislative wisdom, of legislative justice; that it ought to have been done; that the tax was acting unjustly and oppressively upon our own interests, and that the sooner it was got rid of, the better. And I am willing, morover, to concede—because the gentleman who last spoke states it—that the company in whose favor the repeal was made has lived up to the terms of its engagement with the commonwealth. Pray, what has that to do with the section under consideration, except, as I shall attempt to show directly, to strengthen and confirm the reasoning in favor of its adoption?

The section now under consideration means nothing more nor less than this: Suppose that the gentleman who spoke last (Mr. Cuyler), and the gentleman who preceeded him (Mr. Gowen), and other gentlemen who are specially interested and concerned in these companies, had themselves drawn up an article by which, recognizing the existence of certain evils, in connection with them, they had attempted, as I am sure they would fairly have done, if the task had been committed to them, to remove them. Their plan would have been laid before this convention for consideration. But I will go further; I will suppose that from the hands which framed it, it came forth so perfect that it required no single alteration or amendment. It is just about being adopted; some one gets up and says: "The Dartmouth College case instructs us that every franchise at present owned by any of these corporations is a solemn contract; most of these corporations date their charters back to a period long anterior to the year 1857; we know that as to all corporate bodies coming into existence after that date, the Legislature has the power to which I referred a little while ago, under constitutional sanction, to act upon those since incorporated. But there are many, and very great corporations, who say, and who say truly, your article will be inoperative as to them. Now, we recognize the anomaly; we recognize the practical absurdity, after these vast grants of power have already gone out from the Legislature, to attempt to fetter the limits of the few puny corporate children that may be brought into life hereafter. What is to be done by us?" Is it wrong, is it unfair, is it in the spirit of the highwayman, to say in answer to just such a question, "corporations already in existence, you who have already had conferred upon you a large share of the sovereignty of the State, if you desire to receive further Legislative favors, if you shall ask hereafter an extension of that which is already very large, conform to, bring yourselves under the operation of the present existing constitution. Liken yourselves to those who have been created since its adoption, and you shall then receive whatever may with propriety be granted to you. If you refuse to do this, the door of Legislative beneficence shall be forever closed in your faces?" What more is done, in saying this, than was done by the act of 1861, when the tonnage tax was repealed? Was there not, by it, concession made in the future by the corporation, as an equivalent for the remedial legislation? As well might my learned colleague from Philadelphia (Mr. Cuyler) tell me that the act of 1861 was an act of injustice and a violation of contract, because when the Legislature, in its bounty, in its sense of justice, if you please, chose to repeal the tax which was pressing so hardly upon the Pennsylvania railroad company, they coupled it with conditions, excluding them, and properly, from the acceptance of the bounty unless they took it with the terms annexed to it. That is all this section says; that is all it means. If this be striking down a contract, then why does my friend tell us, not by way of boast, but by way of just pride and confidence in the integrity of the company with which he is so familiar, that from that day to this it has fairly lived up to the terms of its engagement? That is all the section means; and I put it to the gentlemen of the convention whether it would not be a striking absurdity when we have heard, day after day, what we have heard, when it has been harped upon by way of objection to every provision, no matter how salutary, that you can only reach the future, that the past is beyond your control, whether we would not be guilty of an act of most monstrous fatuity, while we have the power now in our own hands, by writing into this article the few lines contained in this section, to compel these companies, when they seek for future benefits, to bring themselves under precisely the same law, which we are bound to believe good, because we ordain it for all future corporations, were we to strike them out, or omit them now, because they may prove unpalatable to those who have already waxed great under the large lease of power already extended to them.

For these reasons, Mr. Chairman, I trust the house will adopt this eighteenth section.

SHERIFF'S SALES.

The following are the prices obtained for the properties sold at Sheriff's sale on Monday last.

Chas. M. S. Leslie. No. 1, $1,500. No. 2, 900
C. M. S. Leslie. 3,700
Wm. J. Bell. 600
C. M. S. Leslie. 18,000
Hugh Wylie. 75
Robert Wilson. 2,000
Wm. F. Corbit. 4,800
Jacob Monk. 1,900
James Boyd. 50
Joseph Green. 1,125
Andrew McFarland. 2,300
John Maxwell. No. 1, $50. No. 2, 150. No. 3, 150. No. 4, 150. No. 5, 250. No. 6, 250. No. 7, 50. No. 8, 50. No. 9, 150
Patrick Carroll. 1,200
Cromwell P. Weaver. 190
Joseph Dever. 550
C. M. S. Leslie. 1,100
Joseph V. Peterman. 150
T. Flemming. 1,075
Joseph V. Peterman. No. 1, $350. No. 2, 450
C. M. S. Leslie. 1,100
Joseph and Mary Ann Shantz, owners, &c., and Jacob Rush, contractor. 5,500
James M. Keenan. 500
Joseph R. Tatem. 100
Wm. S. Ernst. 50
Edward Hughes, 2,400
Henry Weaver. No. 1, $510. No. 2, 360
Andrew J. Henderson. 1,950
Ann, Mary A., Helena A., and Sarah E. Mapother. 500
C. M. S. Leslie. 10,500
William Naylor. 3,150
James B. Smith. 1,700
Partrick Corr. 1,725
Adam Manning. 550
Daniel W. Gamble. 700
Edward Hughes. 1,050
C. M. S. Leslie. 1,600
Alexander Smith. 650
Samuel E. Graver. 425
Edward Ryder. 500
Chas. M. S. Leslie. 25
Chas. M. S. Leslie. No. 1, $1,200. No. 2, 50. No. 3, 450. No. 4, 375. No. 5, 100. No. 6, 50. No. 7, 50
James M. Keenan. Nos. 1 & 2, 100
Ann Coulter. No. 1, $1,200. No. 2, 1,300. No. 3, 1,200. No. 4, 1,200. No. 5, 1,100. No. 6, 1,200. No. 7, 1,250. No. 8, 1,450. No. 9, 1,225. No. 10, 1,000. No. 11, 1,000. No. 12, 800. No. 13, 775. No. 14, 1,000. No. 15, 825. No. 16, 525. No. 17, 550. No. 18, 500. No. 19, 500. No. 20, 2,000. No. 21, 1,600. No. 22, 1,500. No. 23, 2,000. No. 24, 2,000. No. 25, 2,500. No. 26, 2,000. No. 27, 2,200. No. 28, 1,000. No. 29, 900. No. 30, 800. No. 31, 700. No. 32, 600. No. 33, 500. No. 34, 500. No. 35 to 50, 500 each. No. 51, 700. No. 52, 700. No. 53, 750. No. 54, 500. No. 55, 1,400. No. 56 to 59, 500 each. No. 60, 1,200. No. 61, 700. No. 62, 900. No. 63, 1,600. No. 64, 1,050. No. 65, 4,000
C. M. S. Leslie. 16,000
James Mooney. 5,000
Joel R. Leidy, owner, &c. No. 1, $650. No. 2, 650
Edward Shields. 2,200
Edward Shields. No. 1, $1,200. No. 2, 1,200
I. M. Burrows. 2,300
George Zimmer and Oscar Pennell. 500
Owen McGurk. 400
Freeman Scott. Nos. 1 to 6, $3,000 each. Nos. 7 to 22, 500 each.
Ezra K. Conklin. 16,000
Joseph V. Peterman. No. 1, $500. No. 2, 450
Richard Walsh. 3,250
Samuel S. McCormick and Rhoda A., his wife 3,700
Alexander Smith. 300
Lewis Mayers. 350
Edward Pearce and Elizabeth, his wife. 45
Chas. S. Sanders. 550
Edward Mangle. 100
Samuel M. See. 2,600
James M. Keenan. Nos. 1 to 3, 1,000 each.
John M. Mole, owner, &c. No. 3, 25
Edgar W. and Oscar C. Oram. 13,600
Matthew Todd. 1,500
Henry M. Boyd. 3,200
Joseph Swartz, Sr. No. 1, $1,600. No. 2, 250. No. 3, 200. No. 4, 200
Wm. Henry Broadhead and Mary, his wife. 4,900
Thomas Brown. No. 1, $600. No. 2, 600. No. 3, 100
John U. Muller. 3,500
James J. Mullin. No. 1, $450. No. 2, 450
Joseph G. Hibbs. 100
Thos. Hynes. 2,650
Nicholas Scherer. 2,000
James C. Larkin. 500
Xavier Beckler. Nos. 1 & 2, 9,100
Edward Hughes. 10,000
Jacob Frame. 2,600
James M. Keenan. 3,950
John G. Williams. No. 1, 1,500
Jeremiah C. Perkins, dec'd. No. 1, $300. No. 2, 400. No. 3, 200. No. 4, 150. No. 5, 150
Jacob L. Senpeff. No. 1, $3,000. No. 2, 3,000
Jacob Leonard. No. 1, $575. No. 2, 625. No. 3, 625. No. 4, 875
James M. Keenan. 800
C. M. S. Leslie. 2,800
Lewis Wirth. 10,000
Michael Deginther. 8,800
John C. Paynter, trustee, and Sarah C. Backman. 50
Walter Kirk. 950
Chas. M. S. Leslie. No. 1, 200
John J. Haley. 12,300
Joseph M. Price. 500
Curtis J. Gilbert. 3,500
J. C. Richardson. 100
W. C. M. and Mary A. Jones 100
Catharine A. Quinn. 4,500
Geo. W. Marks. Nos. 1, to 3, $50 each.
Samuel MacFerran. No. 1, $175. No. 2, 200. No. 3. 250. No. 4, 275
Jos. G. Hibbs. 1,400

LAW DEPARTMENT OF THE UNIVERSITY OF PENNSYLVANIA.

The Lectures for October Term, 1873, and February Term, 1874, will be given at the University Building, No. 250 South Ninth street, rented for the accommodation of the Medical and Law Departments, pending their removal in the Autumn of 1874, to the new buildings, west of the Schuylkill.

Introductory Lecture by Professor P. Pemberton Morris, Wednesday, October 1st, at 4½ o'clock, at the building, No. 250 South Ninth street, below Locust street, after which the days of the respective lectures will be announced. sep. 19–2t

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE AMERICAN EXCHANGE BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to three million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled the INDEPENDENCE HALL BANK, to be located in Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE DRY GOODS BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE ARTISANS' BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE MARKET BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE GROCERS' BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the conferring of the powers of a Bank of Deposit, Discount and Issue upon the Philadelphia Banking Company, incorporated in accordance with the Act of Assembly approved March 11th, 1870, and an increase of capital to five million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation, in accordance with the laws of the Commonwealth, of THE SECURITY BANK, to be located in Philadelphia, with a capital of fifty thousand dollars, with the right to increase the same to five hundred thousand dollars jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE THIRD STREET BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with a right to increase the same to twenty-five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE CHESTNUT HILL BANK, to be located at Philadelphia, with a capital of fifty thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE STATE OF PENNSYLVANIA BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to ten million dollars. jul 4-6m

M. THOMAS & SONS, AUCTIONEERS.

Nos. 139 and 141, late 67 and 69 S. Fourth St.

REAL ESTATE SALE, SEPTEMBER 23d.

Will include—

Ninth, (South,) No. 408—Modern Three-story Brick Residence.

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Matlack, No. 881—Three-story Brick Dwelling.

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Will include—

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Poplar, No. 620—Business Stand—Three-story Brick Store and Dwelling.

Market, No. 24, Camden, N. J—Business Stand—Three-story Brick Store and Dwelling.

Market, No. 3649—Very Valuable Business Stand—Three-story Brick Hotel and Dwelling, with Side Yard, known as "Capt. Harry Connor's Saloon," 36 feet front.

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ASSIGNEE'S PEREMPTORY SALE, SEPTEMBER 26th.

On Friday Morning, at 10 o'clock.

Assignee's Peremptory Sale on the premises. Valuable Steam Marble Saw-mill, Fairmount avenue, west of Broad street. Lot 126 x 100 feet, two fronts. On Friday morning, September 26th, at 10 o'clock, will be sold by order of the Assignee of Eli Hess, on the premises, the Valuable Two-story Steam Marble Sawmill, Two-story Brick Roughcast Show-room, Brick Stable, Farm wagon, House and Lot situate on the south side of Fairmount avenue (late Coates street), 18 feet east of Fifteenth street, being about 126 feet front by about 100 feet deep. Subject to two ground rents, amounting to $675 per annum.

Steam Engine, Boiler, Machinery, Marble Saw Frames, Mantels, Marble Slabs and Blocks, Tools, Jacks, Horses, Carriages, Harness, &c. Immediately after the real estate, by catalogue, the entire personal property, comprising 10 horse power engine and boiler complete, Steam Marble Saw Frames, with Machinery, Rubbing-wheel, Machinery, Shafting, elegantly carved Statuary, and Italian Marble Mantels, Brocatell, Lake Champlain, Black and Italian Marble Slabs, Tools, Scrap Marbles, 3 Jacks, Work Tables, Saws, unfinished work, &c.

☞ May be examined, with catalogue, the day before the sale, from 9 to 3 o'clock. Sale Peremptory. Terms Cash. By order of John B. Sartori, Assignee.

For further particulars apply to Wm. A. Manderson, Esq., Attorney for Assignee, Office, No. 625 Walnut st.

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NOTICE TO THE MEMBERS OF THE BAR.—The Circuit Court of the United States, direct the Clerk to announce that no cases will be entered upon the Trial or Argument Lists of said Court for October Sessions, 1873, unless specially ordered by counsel on or before MONDAY, the 22d of September.

SAMUEL BELL,
Clerk of Circuit Court of United States,
sep 5-3t Eastern District of Pennsylvania.

Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, SEPTEMBER 26, 1873. No. 39.

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Supreme Court of New Hampshire.

BURLEIGH v. CLOUGH.

1. By his last will, H. devised to his wife—if she should be living at the time of his decease—all his estate, real, personal, and mixed, to her use and disposal during her natural life; and "what is remaining at her decease, undisposed of by her," the testator devised to D. and his heirs and assigns forever. *Held*, that the wife of the testator took by the will an estate for life, with a power to defeat the remainder over; and D. took a vested remainder, and not an executory devise.
2. H. died, and his wife, having taken possession of the property given to her by the aforesaid will, consisting of both real and personal property, and being also possessed of other real and personal property, which she held and controlled in her own right, made her own will, by which, after certain special bequests, she gave to B. "all the rest and residue of [her] estate, real, personal and mixed, wherever found, and however situated," &c. *Held*, that she did not, by force of her will, execute the power to defeat the remainder given to D. by her husband's will.
3. A power, technically speaking, is not an estate, but is a mere authority, enabling a person, through the medium of the statute of uses, to dispose of an interest in real property, vested either in himself or in another person.
4. A gift shall not be deemed an executory devise, if it can take effect as a remainder.
5. A remainder shall not be considered contingent, if it may, consistently with intention, be deemed vested.
6. A power of disposal annexed to an estate for life, although it may divest the estate in remainder, cannot enlarge to a fee an estate for life, expressly declared and limited.
7. Where a power is given which may be exercised by a will, it will not be executed unless there is a reference in the will to the power or to the subject of it; or unless the will would be inoperative without the aid of the power, and the intention to execute it become clear and manifest.
8. So, also, an act *in pais*, such as, for example, the use of money derived from an estate, in the only manner consistent with the profitable enjoyment of it, will not, in the absence of a manifest intention to appropriate the same, definitely and absolutely, be deemed an execution of a power over it.

Appeal by Benaiah P. Burleigh, and his wife, Mary Burleigh, against David C. Clough, executor of the last will of Hannah Hersey, from the decree of the judge of probate for the county of Belknap. The case is submitted on the following agreement of facts:

On February 21st, 1867, Jacob Hersey, of Sanbornton, made his last will, containing the following provisions: "I do give, devise and bequeath unto my wife, Hannah Hersey, if she is living at the time of my decease, all my estate, both personal and real, or mixed, wherever the same may be found, to her, the said Hannah Hersey, to her use and disposal during her natural life; and what is remaining at her decease, undisposed of by her, I give, devise and bequeath unto Joshua E. Dennis, and his heirs and assigns forever. And if my said wife, Hannah Hersey, is not living at the time of my decease, I do give, devise and bequeath all of said estate unto the said Joshua E. Dennis, to him and his heirs and assigns forever." Jacob Hersey died before June 18th, 1867, and his will was proved on that day. Hannah Hersey took possession of the property given to her by her husband's will, which consisted of real estate, returned in the inventory of his estate at $1,365, and personal estate, returned at $1,178 64. On November 20th, 1867, Hannah Hersey made her last will, in which, after certain special bequests, it is provided as follows: "I give, bequeath and devise to Benaiah P. Burleigh, and his wife, Mary Burleigh, all the rest and residue of my estate, real, personal and mixed, wherever found, and however situated, while they both live; and, in the event of the death of one of them, to descend to the survivor, his or her (as the case may be) heirs and assigns forever." This will, of which David C. Clough was appointed executor, was proved in June, 1869.

When Jacob Hersey made his will, on February 21st, 1867, his wife, Hannah Hersey, had real and personal estate in her own right, and on the same day she disposed of her estate by a will, which was revoked by her will of November 20th, 1867. Her real estate, which included the house she lived in at the time of her death, remained hers till her death, and was appraised in the inventory of her estate at $738. She also had, at the time of her death, personal estate valued at $814.97, with which the executor is charged in his account, as settled by the decree in the court of probate.

In the settlement of the executor's account of his administration of the estate of Hannah Hersey, in the court of probate, he claimed to be credited with the following items: "Delivered to Joshua E. Dennis, executor of J. Hersey's estate, the hay cut on J. Hersey's land after Mrs. H. Hersey's death, $128." The hay was cut on land of Hersey, as is above stated. "Also, a lot of crockery, which was of J. Hersey's estate, as inventoried, $5." "Paid Joshua E. Dennis, executor of J. Hersey's will, the amount of receipt for cash delivered by him as executor to Hannah Hersey, as per said receipt, dated May 20th, 1867, $262.96." The $262.96 was received by Hannah Hersey, as is above stated.

Under the wills of Jacob Hersey and Hannah Hersey, the said Burleigh and wife claimed that the executor should not be credited with the aforesaid items, while under the same wills the said Dennis claimed that said executor should be thus credited. The judge of probate credited and allowed said items to the executor, and from such allowance and credit the said Burleigh and wife appealed, and the appeal is depending in this case.

The money embraced in said receipt of May 20th, 1867, was not kept separate by said Hannah, and in its use by her no distinction was made between it and other money belonging to her, not derived from said Jacob. It was agreed that the said will of Hannah Hersey, executed on said February 21st, might be referred to in argument, if the court should be of opinion that it is important and material; also, the administration accounts of the said Dennis, and of the said Clough, as settled in the probate court. Neither Jacob Hersey nor Hannah Hersey left any lineal descendant. The wife of Joshua E. Dennis is a niece of Jacob Hersey, and the said Benaiah P. Burleigh is a nephew of Hannah Hersey.

Pike & Blodgett and *A. & F. A. Fowler*, for the appellants, cited and commented upon Fearne on Contingent Remainders, 418; Nightingale v. Burrell, 15 Pick. 104; Moffat v. Strong, 10 Johns. 12; Jackson v. Bull, 1b. 19; Jackson v. Robins, 16 Johns. 589; Ide v. Ide, 5 Mass. 504; Harris v. Knapp, 21 Pick. 412; Burbank v. Whitney, 24 Pick. 146; Hale v. Marsh, 100 Mass. 469; Dodge v. Moore, 1b. 335; Paine v. Barnes, 1b. 471; Ramsdell v. Ramsdell, 21 Me. 288; Pickering v. Langdon, 22 Me. 413; White v. White, 21 Vt. 250; Stroud v. Morrow, 7 Jones (N. C.), 463; Flinn v. Davis, 18 Ala. 132; Heath v. Knapp, 4 Pa. St. 228; Sherman v. Wooster, 26 Iowa, 273; Wilson v. McKeehan, 53 Pa. St. 79; Hayes v. Tabor, 41 N. H. 526; Eaton v. Straw, 18 N. H. 331; Ross v. Ross, 1 Jac. & Walk. 154; Flanders v. Clark, 1 Ves. 9; Butterfield v. Butterfield, 1b. 133; Scatterwood v. Edge, 1 Salk. 229; Attorney Gen'l v. Hall, Fitz. 314; Jackson v. De Lancy, 13 Johns. 537; Love v. Windham, 1 Lev. 290; Richards v. Bergavenny, 2 Vern. 324; Seale v. Seale, 1 P. Wms. 290; Albee v. Carpenter, 12 Cush. 382; Clark v Clark, 2 Head (Tenn.), 336; Henry v. Felder, 2 McCord, 323; Moody v. Walker, 3 Ark. 147; Elton v. Easom, 19 Ves. 73; Bennett v. Tunkerville, 1b. 170; Keats v. Burton, 14 Ves. 434; Jackson v. Coleman, 2 Johns. 392; 2 Redf. Wills, 659, 665; 2 Washb. R. P. 695; 4 Kent's Com. 270, 334; Gen. Stats., ch. 174, sec. 4.

Perley, for the appellee, cited and commented upon Doe v. Martin, 4 D. & E. 39; 2 Cruise Dig. 218, sec. 67; 4 Cruise Dig. 186, sec. 48; Yeaton v. Roberts, 28 N. H. 459; 4 Kent's Com. 335; 2 Washb. R. P. 648, 335; Holmes v. Coghill, 7 Ves. 505; S. C. 12 Ves. 214; Eaton v. Straw, 18 N. H. 320; Goodill v. Brigham, 1 Bos. & Pul. 197; 4 Cruise Dig. 264, sec. 75; 1b. 417, sec. 25; 4 Kent's Com. 318; 2 Washb. R. P. 618, 316, 325; Ide v. Ide, 5 Mass. 504; Attorney Gen'l v. Hall, Fitz. 314; 2 Redf. Wills, 659; 1 Redf. Wills, 448, 680; 2 Washb. R. P. 371, 670; 2 Redf. Wills, 327, sec. 12; Anon., 3 Leon, 71; Liefe v. Saltingstone, 1 Mod. 189; Robinson v. Dusgate, 2 Vern. 181, and Raithby's note; Maskelyne v. Maskelyne, Ambler, 750; Tomlinson v. Dighton, 1 P. Wms. 149; Nannock v. Horton, 7 Ves. 398; Surman v. Surman, 5 Madd. Ch. 123; Keith v. Seymour, 4 Russ. 263; Doe v. Wrighte, 2 B. & Ald. 710; 2 Preston on Estates, 81, 82; 6 Cruise Dig. 322, sec. 5; Reid v. Shergold, 10 Ves. 370; Holmes v. Coghill, 12 Ves. 206; Jackson v. Robins, 16 Johns. 537, 588; Smith v. Bell, 6 Pet. 68; Haralson v. Redd, 15 Geo. 148, 151; Cook v. Walker, 15 Geo. 457, 463; Rubey v. Barnett, 12 Mo. 3; Pulliam v. Byrd, 2 Strob. Eq. 134; Smith v. Hilliard, 3 Strob. Eq. 211, 214; Denson v. Mitchell, 6 Ala. 360; Burwell v. Anderson, 3 Leigh, 357, 358; Ward v. Amory, 1 Curtis C. C. 419; Den v. Humphreys, 1 Harr. (N. J.) 28; Dean v. Nunnally, 36 Miss. 358; Andrews v. Brumfield, 26 Miss. 115; Rail v. Dotson, 14 Sm. & M. 184, 185; Flintham's Appeal, 11 S. & R. 18; Morris v. Phaler, 1 Watts, 389; 2d Pres. Church v. Disbrow, 52 Pa. St. 219; French v. Hatch, 28 N. H. 331, 350; Leavitt v. Wooster, 14 N. H. 562; Sir Ed. Clere's Case, 6 Co. 17, *b*; Colt v. The Bishop of Coventry, Hobart, 159, 160; *Ex parte* Caswall, 1 Atkyns, 559; Jenkins v. Keymis, 1 Lev. 150; Parker v. Kett, 12 Mod. 469; 16 Viner, 487; Bennett v. Aburrow, 8 Ves. 609; Jones v. Tucker, 2 Mer. 533; Andrews v. Emmot, 2 Bro. C. C. 300, 301; Lovell v. Knight, 3 Sim. 275; Lempriere v. Valpy, 5 Sim. 108; Doe v. Roake, 2 Bing. 497; Denn v. Roake, 5 Barn. & Cress. 720; State v. Rollins, 8 N. H. 550; Bradish v. Gibbs, 3 Johns. Ch. 523; Mory v. Michael, 18 Md. 227; Gee v. Graves, 2 Head (Tenn.) 239; Wilson v. Gaines, 9 Rich. Eq. 420; Bell v. Twilight, 22 N. H. 500; 4 Kent's Com. 318, 322; Cunningham v. Moody, 1 Ves. 174; Fearne on Rem. 227, 228; Cave v. Holford, 3 Ves. 650; Vanderzee v. Alcom, 4 Ves. 771, 787; Reade v. Reade, 5 Ves. 748; Maundrell v. Maundrell, 10 Ves. 264; Hands v. Hands, 1 Term, 435; Varrell v. Wendell, 20 N. H. 431, 436, 438; Downing v. Wherrin, 19 N. H. 9, 85; Robinson v. Dusgate, 2 Vern. 181; Scott v. Joslin, 26 Beav. 174; Sugden on Powers, 104; Chance on Powers, 45, 121; 8 Vin. Ab. 206; 1 Roberts on Wills, 426, note; Blagge v. Miles, 1 Story, 426; Collier's Will, 40 Mo. 328; White v. Hicks, 33 N. Y. 383, 388; Porcher v. Daniel, 12 Rich. Eq. 360; Keefer v. Schwartz, 47 Pa. St. 508; Johnson v. Stanton, 30 Conn. 297.

FOSTER, J.

The first question naturally presented by this case is: What kind of an interest or estate did Hannah Hersey take under her husband's will? Was it a fee simple, or an estate for life?

In considering this question, we resort, in the first instance, to the application of those elementary rules of construction which provide that every portion of the instrument must be made to have its just operation, unless there arises some invincible repugnance, or else some portion is absolutely unintelligible; and that the intention of the testator is the prevailing consideration, and the supreme rule of interpretation. 1 Redf. Wills, 431–433.

The words of the devise are plain and distinct: "I give," &c., "all my estate, both personal and real, or mixed." * * "to her, the said Hannah Hersey, to her use and disposal during her natural life;" and what is remaining at her decease, undisposed of by her, I give, devise, and bequeath unto Joshua E. Dennis, and his heirs and assigns forever."

If the will had given the estate to Mrs. Hersey and her heirs, or to Mrs. Hersey, generally, without words of limitation, she would have taken, by the operative words of the will, an estate in fee; and that estate would not have been reduced below an estate in fee by the added power of disposal, because such a construction would be manifestly repugnant to the estate in fee already granted. The expression of the added power would be mere surplusage, since every estate in fee involves an absolute power of disposal of the whole.

But here the estate devised to Mrs. Hersey is expressly limited to an estate for life, with remainder in fee to Dennis; and we have no difficulty in reaching the conclusion that the intention of the testator was that she should take only an estate for life, with a power to defeat the remainder over.

The testator has used apt and explicit words of limitation to express this intention, which, to our minds, is as clear as that, by the use of equally apt and express words, he intended to give to the remainderman an estate in fee. If he had intended to give his wife an estate in fee, he would have expressed that intention by the use of such terms as he employed in the devise to Dennis, which is of the remainder to him and his heirs and assigns forever.

The question then arises, whether this intention is to be controlled by any superior rule of law; for an intention will not avail to create an illegal or an impossible estate. Smith v. Bell, 6 Peters, 68.

"There is an evident difference between a power and an absolute right of property," said Sir Wm. Grant, M. R., in

Holmes v. Coghill, 7 Ves. 506. See 4 Kent's Com. 335; 2 Washb. R. P. *325; 3 Washb. R. P. *303, *315, *334; Williams on Real Property, 249.

A power, when conferred by will, is a bare authority derived from the will. It is not an estate, and has none of the elements of an estate. It is defined by Bouvier as "an authority enabling a person, through the medium of the statute of uses, to dispose of an interest in real property, vested either in himself or in another person." See Williams R. P. 245; Co. Litt. 271 *b*, Butler's note, 231, sec. 3, pl. 4. "A power is an authority enabling one person to dispose of the interest which is vested in another." Buller, J., in Goodill v. Brigham, 1 Bos. & Pul. 197. "A general power of disposition, existing as a power, does not imply ownership; in fact, the existence of such a power, as a technical power, excludes the idea of an absolute fee simple in the party who possesses the power." Parker, C. J., in Eaton v. Straw, 18 N. H. 331.

The learned chief justice, in the same case, although he does not find it necessary, for the purposes of its decision, to controvert the opinion expressed by the appellants in the present case, that there can be no limitation over after the gift of a general power of disposition of an estate, remarks that such a proposition "is certainly not a necessary result from any legal principle;" and he adds, "there is nothing incongruous in holding that the gift of such a power, superadded to language which might otherwise be construed as conveying an absolute fee, tends to limit the preceding phraseology, so that it is not to be construed as creating such an estate.

The appellants contend, in argument, that this will must be construed as devising a fee, because the power annexed to the devise was general, and not a mere power of appointment in favor of specified persons. She had, they say, an unqualified right to dispose of the whole property—she was a free moral agent; and, because she could do with the property all that an owner in fee could, simply by executing the power, therefore she must *be* the owner in fee; and, by further consequence, the limitation over to Dennis is by way of executory devise, with which the right of disposition given to Mrs. Hersey, is incompatible.

It is quite obvious, that such an argument is the result of confounding the distinction between property and power. The estate given Mrs. Hersey is a property; the power of disposal a mere authority, which Mrs. Hersey may exercise or not, in her discretion.

If B., having a general power annexed to the life estate which he has derived from A., executes that power by a sale of the property to C., the title of C. is derived, not from B., who executes the power, but from A., who gave it.

"The appointer," says Mr. Washburn, "is merely an instrument; the appointee is in by the original deed. The appointee takes in the same manner as if his name had been inserted in the power, or, as if the power and instrument executing the power had been expressed in that giving the power. He does not take from the donee as his assignee." 2 Washb. R. P. *520; 1 Sug. Pow. (ed. 1856) 242; 2 Sug. Pow. 22; Doolittle v. Lewis, 7 Johns. Ch. 45.

This distinction between property and power being kept within view, it becomes unnecessary to controvert the proposition, supported, doubtless, by the authorities so abundantly collected by the learned counsel for the appellants, and so explicitly declared by Chancellor Kent, in Jackson v. Robins, 16 Johns. 589, that it is a clear and well settled rule of law, that an executory devise cannot be prevented or defeated by any alteration of the estate out of which, or after which, it is limited, or by any mode of conveyance;" that where conditions are repugnant to the estate to which they are annexed, they are void (2 Redf. Wills, 659); that a valid executory devise cannot subsist under an absolute power of disposition in the first taker (4 Kent's Com. 270); from all of which the appellants argue that the limitation over to Dennis, being by way of executory devise is void; for we are led to the inevitable conclusion, that the estate limited to Dennis was not an executory devise, but a vested remainder; and the reasons which apply to the destruction of an executory devise by joining it to a power of disposal, have no application to a remainder, limited upon an estate for life

We cannot so well express the definition and character of an executory devise as by adopting the language of the learned counsel for the appellee, in argument: "An executory devise is a future interest, such as the rules of law do not permit to be created in conveyances, but allow in the case of wills, like an interest given after an estate in fee simple, or to arise *in futuro*, without a particular estate to support it. Scatterwood v. Edge, 1 Salk. 229. They came into use after the Statute of Wills, 32 Hen. 8, and were allowed out of indulgence to testators, that they might, without the intervention of trustees to preserve remainders, establish future interests in strict settlement beyond the reach of those who had the prior estates; 4 Kent, 260; and such being the object, it was held to be essential to a good executory devise that the first takers should have *no power* to dispose of the interest devised. If, therefore, the first taker had the power by grant from the testator to dispose of the executory devise, the power defeated the whole object of such devises, and was held to make them inoperative though the power was not executed. Every good executory devise, as the rule would seem to be established in England, is 'inalienable, though all mankind join in the conveyance.' Scatterwood v. Edge, 1 Salk. 229; 4 Kent, 260; 6 Cruise's D. 461, 465. For this reason, a power of disposition has been held to be inconsistent with the nature of such an interest. It is against this rule, even in the case of an executory devise, that Parker, C. J., objects, in Eaton v. Straw, 18 N. H. 320."

The distinction between an executory devise and a vested remainder is elementary. An executory devise is such a disposition of lands by will, that thereby no estate vests at the devisor's death, but only on some future contingency. It needs no particular estate to support it. An estate in remainder is one limited to take effect and be enjoyed after another is determined. No remainder can be limited after the grant of a fee simple, because the tenant in fee has the whole. See Jackson v. Robins, 16 Johns. 537, 588; Downing v. Wherrin, 19 N. H. 9, 85.

Another elementary principle applies in cases where it may be doubtful whether an estate is an executory devise or a remainder, namely, that a gift shall not be deemed an executory devise if it can take effect as a remainder; and that no remainder shall be considered contingent, if it may, consistently with intention, be deemed vested. Blanchard v. Blanchard, 1 Allen, 225; Doe v. Perryn, 3 Term, 484–489, note; 4 Kent's Com. 202; and see Banister v. Henderson, Quincy, Ms., 120.

By the terms of the will, Mrs. Hersey took two things, an estate for life, and a power of disposal of the estate; and it is contended that the grant of this power enlarges the estate for life to an estate in fee—that the power becomes merged in the estate.

Now, as an estate in fee, involving the right of disposal, cannot be reduced to an estate for life, by implication, from the addition of words conferring a power of disposal, so a separate and distinct grant of a power of disposal, although it may divest the estate in remainder, cannot enlarge an estate for life, expressly declared and limited, to a fee, because the power of disposition is not inconsistent with nor repugnant to an estate for life, as we shall presently see. It is not repugnant, because, if no power of disposal had been conferred by the will, she would have still taken an estate for life, as she now takes both an estate for life and an added power of disposal.

And by this construction, the whole and every portion of the will becomes effectual, according to the manifest intention of the testator, which was, as we have no doubt, to give to his widow an estate for life at all events; and, more than that, a power of disposition of so much of the property, even to the extent of the whole, as her needs, her comfort, or her gratification should demand; and that the remainder, if any, should go to Dennis.

It will be found, upon examination, that a majority of the authorities to which we are referred by the appellants, which apparently go to the extent of holding that a power of disposition, annexed to an estate for life, enlarges the life estate to a fee, are cases in which the estate for life is not conferred by express terms, but arises from implication, such implication being deemed essential, in the particular case, in order to give effect to the intention of the testator, as manifested by the whole scope of the devise. Such is particularly the case in Ramsdell v. Ramsdell, 21 Me. 288; Pickering v. Langdon, 22 Me. 213; Burbank v. Whitney, 24 Me. 146; and White v. White, Ex'r, 21 Vt. 250. In neither of these cases is the estate for life granted by express terms of limitation. And in other cases cited to the same point, such as Harris v. Knapp, 21 Pick. 412; Hall v. Marsh, 100 Mass. 468; Dodge v. Moore, 100 Mass. 335; and Stroud v. Morrow, 7 Jones (N. C.) 463, the general expression of an opinion by the court, that those cases exhibited an estate in fee in the first taker, must be regarded as *obiter dictum*, since the real question involved was, not as to the character of the estate created by the devise, but, in the former of these cases, whether the devisee in fact, under the terms of the will, had a power of disposition, and in the others, what was the extent of that power?

In none of them, as I understand it, was the question raised as to the effect of the power upon the particular estate devised.

These cases, when compared with others, to some of which we shall presently refer, serve to mark this plain distinction—that where general words, implying an estate for life, if limited to such an estate, would manifestly defeat the intention of the testator, the intention shall control and enlarge the estate to a fee; but if the testator in express terms give an estate for life, the intention is manifest and beyond doubt; and in such case an added power of disposition cannot enlarge the estate, contrary to the testator's intention.

Thus, in Popham v. Banfield, Salk. 236, it is holden that, where a particular estate is expressly devised, a contrary intent is not to be implied by subsequent words; or, as the same case is expressed in 2 Vern. 449, "an express estate for life cannot be enlarged by an implication, but may by express words;" and, as again expressed in the statement of the same case, in 1 P. Wms. 54, "no estate raised by implication in a will can destroy an express estate."

In Thomlinson v. Dighton, Salk. 239, it is holden that "devise to A. for life, then to be at her disposal to any of her children, gives an estate for life, with power to dispose of the fee." In the argument for the defendant in the same case as reported 1 P. Wms. 149, it is said: "There are two cases that are express authorities that the wife in the principal case has but an estate for life, with a power to dispose of the fee; and these two cases do make this very difference, viz.: where lands are devised to one generally, and to be at his disposal, this is a fee in the devisee; but where lands are devised to one expressly for life, and afterwards to be at the devisee's disposal, only an estate for life passes to the devisee, with a bare power to dispose of the fee; for that (as it is said) words of implication shall not merge or destroy an express estate for life." The cases referred to are Anon, 3 Leon. 71, and Liefe v. Saltingstone, 1 Mod. 189. In accordance with these views was the opinion of the court. 1 P. Wms. 171.

In the case above referred to, from 3 Leon. 71, A., seized of lands in fee, devised them to his wife for life, and after her decease to give them to whom she would. The court said, "A. gave the lands expressly to his wife for life, and therefore she should not have, by implication, any further estate. But if an express estate had not been appointed to the wife, by the other words, the estate in fee would have passed." See to the same effect, Robinson v. Dusgate, 2 Vern. 181; Nannock v. Horton, 7 Ves. 398; Holmes v. Coghill, 7 Ves. 505; S. C. 12 Ves. 206.

Surman v. Surman, 5 Madd. Ch. 123, was a "bequest of household goods, &c., after payment of debts, to the testator's wife, for life or widowhood, with power to her to sell the same as she should think proper, for her own benefit and the maintenance of testator's nephew and daughter-in-law during their minorities, with a bequest over upon the death or second marriage of the wife, of the same, or so much as should then remain, to such nephew and daughter-in-law." *Held*, that "the widow was entitled to the residue (that is, after payment of debts) for her life or widowhood, with a power to apply any part of the capital for her own benefit and the proper maintenance of the nephew and daughter-in-law during their minorities; and that, on the death or marriage of the widow, the remainder of the capital unapplied was well limited over."

This case distinctly shows that the uncertainty whether there will be any remainder does not vitiate the limitation over, and that the power does not enlarge the estate for life to a fee.

And see Doe v. Martin, 4 D. & E. 39, at pp. 64, 65, where Lord Kenyon quotes Lord Hardwicke as saying in Cunningham v. Moody, 1 Ves. 174, that the effect of a power of appointment added to an estate for life "is, that the fee which was vested was thereby subject to be divested, if the whole were appointed."

And in Reith v. Seymour, 4 Russ. 263, it was holden that a gift of personal estate to the wife for life, with a direction that, after her death, one moiety thereof should be at her entire disposal, either by will or otherwise, amounts only to an estate for life in the use, with a power of appointment.

If we turn now to the American authorities, we shall find them numerous and conclusive to the effect that where the estate for life is devised by express terms, a power of disposal of the fee, whether general or special, will not enlarge the estate. In Jackson v. Robins, 16 Johns. 537, at p. 588, Chancellor Kent says: "We may lay it down as an incontrovertible rule, that where an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee; and the only exception to the rule is, where the testator gives to the first taker an estate for life *only*, by certain and express words, and annexes to it a power of disposal. In that particular and special case, the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion. This distinction is carefully marked and settled in the cases."

In the Virginia Court of Appeals this matter is considered at great length, and presented with much force by Tucker, President, in Burwell's Ex'rs v. Anderson, Adm'r, 3 Leigh, 348, particularly at pp. 356–358, where it is said "a devise to A., with power to dispose at pleasure, is considered as conveying *property*, not as conferring *power*; for the words of power will not be permitted to take away what, without them, is expressly given. 2 Preston on Est. 81, 82; 13 Ves. 453. But where there is an express and inconsistent estate for life given, the construction of the instrument is altogether different; for the express estate for life negatives the intention to give the absolute property, and converts these words into words of mere power, which, standing alone, would have been construed to convey an interest. This appears to me to be very clearly established by the cases that were cited at

the bar; which, further, lay it down, that where an *interest* and not a mere *power* is conferred, the absolute property is vested, without any act on the part of the legatee; but where a power only is given, that power must be executed, or it will fail."

Not to multiply quotations, the general principle established by the foregoing cases, and the manifest distinction between property and power, will be found laid down as the law in Flintham's Appeal, 11 S. & R. 18; 2d Pres. Church v. Disbrow, 52 Pa. St. 219; Haralson v. Redd, 15 Geo. 151; Cook v. Walker, 15 Geo. 457, 463; Morris v. Phaler, 1 Watts, 390; Rubey v. Barnett, 12 Mo. 3; Pulliam v. Byrd, 2 Strob. Eq. 134; Ward v. Amory, 1 Curtis C. C. 419, and numerous other cases.

Particular reference, however, should be made to the case of Denson v. Mitchell et ux., 26 Ala. 360, which overrules the case of Flinn v. Davis, 18 Ala. 132, cited by the appellants, if that case is to be regarded as supporting their view of the matter.

In Denson v. Mitchell et ux., it is said that "an express bequest of an estate for life negatives the intention to give the absolute property, and converts a superadded right of disposition into a mere power."

These views seem to be fully endorsed by the text writers; thus, Kent says (4 Com. 520, 521): "If an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexes to it power of disposition of the reversion. In that case the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee." See, also, 2 Washb. R. P. *371; Greenleaf's Note to 6 Cruise, 208, Devise, ch. 11, sec. 6.

In our own State the decisions seem to be not in conflict with the doctrines we have stated. Thus, in Eaton v. Straw, 18 N. H. 320, the head note is, "A general power of disposition, existing as a power, does not imply ownership, but excludes the idea of an absolute fee simple in the party who possesses the power."

This case is cited by the appellants as an authority to the point that there can be no limitation over after the gift of a general power of disposition, which is undoubtedly true if the distinction be entirely disregarded which we have found to be so marked and plain, and the general power of disposition be applied to a general devise, without limitation of a life estate. That was the case of an executory devise, and the precise point before us did not arise, but the doctrine of the case is expressed in the head note above quoted.

In French v. Hatch, 28 N. H. 331, at page 350, Mr. Chief Justice Gilchrist expresses in the plainest terms, the true rule, as follows: "Where there is a devise for life, in express terms, a power of disposition does not enlarge it to a fee. But where to a general devise, without any specification of the quality of interest, an absolute power of disposition is annexed, the devisee takes a fee. This distinction is carefully marked and settled in the case of Jackson v. Robins, 16 Johns. 558, and cases cited by Kent, Ch." This case which was a gift by will of both personal and real property expressly limited for life, necessarily involved the consideration of the distinction between a general devise and an express limitation for life. Upon this branch of the case, therefore, it is precisely in point, and seems to settle the law of this State in accordance with the doctrine declared by Chancellor Kent, in Jackson v. Robins.

And in the earlier case of Leavit v. Wooster, 14 N. H. 551, although the point was not presented in such manner as to require adjudication, the principle seems clearly recognized by Gilchrist, J., in the following language: "The quantity of estate devised to her is not a matter of doubt, as she is expressly limited to an estate for life. There are numerous cases which hold that where a devise contains no words of limitation, and the payment of debts and legacies is made a personal charge upon the devisee, he takes a fee by implication, unless there are other words in the will which limit the quantum of interest. But that question does not arise in this case, as the estate of the devisee is particularly described."

In Dennet v. Dennet, 40 N. H. 498, Bell, C. J., remarks concerning the case then before the court: "The terms of this will, 'all the residue of my estate,' if standing uncontrolled by other expressions, would pass a fee (citing among other cases, Leavit v. Wooster). They cannot be so construed here, because the devises following control the sense, and show that a life estate was intended to be given him."

The cases already cited from our own reports, together with Weeks v. Weeks, 5 N. H. 326; Ladd v. Harvey, 21 N. H. 514; Yeaton v. Roberts, 28 N. H. 459; and Healey v. Toppan, 45 N. H. 243, show that there is no distinction between real and personal property with regard to the limitation of a remainder after an estate for life, except, perhaps, in the case where the use necessarily involves the destruction of the property.

Richardson, C. J., in Weeks v. Weeks, 5 N. H. 326, remarks: "In ancient times there could be no limitation over of a chattel after a gift for life, but such a gift carried the absolute property. Afterwards a distinction was made between the use and the property. The use might be given to one for life, and then the property afterwards to another. But this distinction is now disregarded. The law admits of a limitation over by will of a chattel interest, after a life estate in the same." To the same effect is Ladd v. Harvey and Yeaton v. Roberts, before cited.

Many of the English cases before referred to in this connection, were bequests of personal property.

Smith v. Bell, 6 Peters, 68, is a very important case in support of the general proposition that a power of disposition does not enlarge an express estate for life. It would be interesting and instructive to quote lengthy passages from the luminous opinion of Chief Justice Marshall, in that case, but we forbear, commending the case to the attention of the lawyer and student, simply repeating the language of that celebrated jurist, that "the rule that a remainder may be limited after a life estate in personal property, is as well settled as any other principle of our law."

Having determined that Mrs. Hersey took by her husband's will a life estate with a power of disposal, and Dennis a vested remainder, subject to be divested by the due execution of the power, the next question presented is, was the power legally executed by Mrs. Hersey's will?

The property devised to Mrs. Hersey by her husband's will consisted of real estate, returned in the inventory of his estate at $1,365, and personal estate returned at $1.178.64, making $2.543.64. In addition to this, she had, in her own right, at the time of her death, real estate returned in the inventory of her estate at $738, and personal estate returned at $814.97, making $1,552.97.

By her last will, she gave certain special bequests, the character and value of which are not indicated by the case, and then declared as follows: "I give, bequeath, and devise to Benaniah P. Burleigh, and his wife, Mary Burleigh, all the rest and residue of my estate, real, personal and mixed, wherever found and however situated, while they both live; and in the event of the death of one of them, to descend to the survivor, his or her (as the case may be) heirs and assigns forever."

A preliminary question is suggested, namely, Did Jacob Hersey, by his will, give to his wife a power of disposition by will of the estate devised to her? The terms of the devise in Jacob Hersey's will are—"to her, the said Hannah Hersey, to her use and disposal *during her natural life;* and what is remaining at her decease, undisposed of by her, I give, devise and bequeath, unto Joshua E. Dennis, and his heirs and assigns forever."

It is suggested by the appellee, in argument, that "Hersey and his wife were two childless people, having each separate property, not very unequal in amount; that, in addition to her own property, which might well be considered of itself adequate to her support, he gave her the use of all his property for her life, with authority to dispose of such part of it as she might need or desire, leaving what might be remaining at her decease to Dennis, to whom he gave all his property in case he survived his wife; that giving her the power to apply to her own use such part of the property as she might choose during her life would abundantly provide for her comfort and independence, without entrusting to her the power to give away by will what remained at her decease, and so defeat the remainder limited to Dennis, and would fully answer all the object which we can suppose her husband had in the provisions made for her;" that the testator intended a substantial benefit to Dennis, and did not intend that anything of his should go by descent to the heirs of his wife, nor that any will of hers should take from Dennis what was remaining at her decease, and give it to her devisee or legatee.

The construction of his will, like hers, is to be governed by the intention of the maker, if it can be ascertained; and, supposing those circumstances alluded to to exist (which we do not understand to be controverted), they must be regarded as quite material, as affecting the question of intention.

And, in connection with the phraseology of his will, they suggest to our minds very serious doubts whether Jacob Hersey intended to give to his wife a power of disposition by will.

We do not, however, find it necessary to decide that such was not his intention.

Recurring, then, to the main question upon this branch of the case—Was the power of disposal executed by force of Mrs. Hersey's will?

The will disposes of her estate, but makes no mention of the power, nor of the estate which was subject to the power.

The rule must be regarded as settled, by doctrine and authority of very ancient date, and of almost uniform application, that where a power is given which may be exercised by a will, it will not be executed unless there is a reference in the will to the power, or to the subject of it, or unless the will would be inoperative without the aid of the power, and the intention to execute it became clear and manifest. 4 Kent's Com. 334; 1 Jarman on Wills, 628, note.

In Lovell v. Knight, 3 Sim. 275, Shadwell, V. C., said: "I apprehend it to be *perfectly settled* that whenever a will is couched in such terms as that, upon the face of it, it appears to express an intention to pass the general property which may belong to the party making the will, such a will shall not be deemed an execution of the power with regard to any specific property."

This remark was applied to the case where a married woman, having power to appoint leaseholds and stock, by her will, executed and attested as required by the power, but not referring to it, gave to her husband the whole of her property, both real and personal, and whatsoever she might possess at her decease. It was held that this was not an execution of the power.

This case is expressly affirmed in Lempriere v. Valpy, 5 Sim. 108, where the V. C., at page 121, adverts to what he calls the *known rule* laid down in Standen v. Standen, 2 Ves., Jr. 589; Standen v. McNab, 6 Bro. P. C. 193, 2d ed.; Bennett v. Aburrow, 8 Ves. 609; Jones v. Tucker, 2 Mer. 533; Jones v. Curry, 1 Swanst. 66. In Standen v. Standen, *ante*, the lord chancellor (Loughborough) declares the rule to be as expressed in Sir Edward Clere's Case, 6 Co. 17, *b*, that a general disposition will not dispose of what the party has only a power to dispose of, unless it is necessary to satisfy the words of the disposition.

In Jones v. Curry, *ante*, the M. R., in giving judgment, said: "This will contains no words which will be without operation, unless referred to the power: on the contrary, the testatrix uses terms of generality—'all my estate and effects of whatever denomination.' That clause would embrace all her real and personal property, but would it go beyond that?" And in Webb v. Honnor, 1 Jac. & Walk. 352, the M. R. said: "In this instrument there is nothing to show that the testator meant to dispose of anything but his own property. Every part of it is satisfied by giving all that he was possessed of."

The only exception to the requirement of a reference to the power or the subject matter of it, in order to the execution of the power, evidently is the fact that the will, in the given case, must be wholly inoperative without the aid of the power. "A general roving description of property in a will is not sufficient" to execute a power, said the V. C. in Rooke v. Rooke, 2 Drew & Smale, 38, 44. "If you can find evidence of the testator's intention to dispose of the property which is the subject of the power, then the court will give effect to that intention."

Best, C. J., in Doe v. Roake, 2 Bing. 497, 504, expresses the doctrine and the rule thus: "It has long been settled, that an express declaration of the intent to execute a power is not necessary; on the other hand, no terms, however comprehensive, although sufficient to pass every species of property, freehold and copyhold, real and personal, will execute a power, unless they demonstrate that the testator had the power in his contemplation, and intended by his will to execute it." See the remarks of Lord Chief Justice Hobart, in the Commendam case, Hob. Rep. 159, 160; and, for a review of the antecedent English and American cases, the opinion of Judge Story, in Blagge v. Miles, 1 Story, 426, where he says, at page 446:—"I agree that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then that doubt will prevent it from being deemed an execution of the power." And see Gratwick's Trusts, 1 L. R. Eq. 177; Attorney General v. Wilkinson, 2 L. R. Eq. 817; Johnson v. Stanton, 30 Conn. 297.

Now, although we can have no doubt that the rule of the common law in England, and wherever in this country it has not been changed by legislation, is in accordance with the doctrine declared by these numerous and most respectable authorities, we cannot refrain from expressing our extreme dissatisfaction with this supposed condition of the law.

Perhaps Lord Eldon used too strong language, if he made the remark attributed to him by Sir John Leach, in Hughes v. Turner, 3 Myl. & K. 688, that the rule, "although professed to be adopted in order to further the intention of the testator, in nine cases out of ten defeats that object."

However that may be, and whether the rule is the result of a correct interpretation of the law or not, its practical operation was found to work injustice in so many instances that British legislation was invoked for a remedy, and it became enacted by the Statute of Wills of 7 Wm. IV & 1 Vic., ch. 26, sec. 27, "that a general devise of real or personal estate shall operate as an execution of a power of the testator over the same, unless a contrary intention shall appear on the will."

"By this statute," says Judge Story, in a note to Blagge v. Miles, before cited, "all these refined and subtle distinctions, in relation to the execution of powers, are now swept away in England, and the doctrine has at last settled down in that

(*Continued on page* 310.)

LEGAL GAZETTE.

Friday, September 26, 1873.

JOHN H. CAMPBELL,
EDITOR.

HON. WM. M. MEREDITH.

EULOGIES OF THE DECEASED, DELIVERED BY HON. GEO. W. BIDDLE, OF PHILADELPHIA, AND HON. J. MACDOWELL SHARPE, OF CHAMBERSBURG, IN THE CONSTITUTIONAL CONVENTION, SEPT. 16TH, 1873.

MR. BIDDLE'S ADDRESS.

Mr. President: It is not because I expect to add anything to the comprehensive and eloquent eulogy that has been pronounced by the mover of the resolutions upon our deceased friend that I rise to speak; it is because I feel it a necessity to say something on this occasion of one whom I have known, whom I have honored, whom I have revered from early boyhood.

I may be permitted to say in the outset of these remarks, that I was allowed the great privilege of close personal intercourse with the distinguished deceased, that free interchange of mind with mind which enables us truly to form a just estimate of the character of a friend.

In a body like this, composed so largely of members of the same profession, it is not perhaps inappropriate to refer to the professional life of the distinguished dead. Indeed, so much of that professional life was, as it were, a public life, because in no question of great public interest was Mr. Meredith, for many, very many years of his active life at the bar, absent from one side or the other, that in speaking of his professional life, we, in a measure, touch upon that other life which has been so well referred to in the resolutions and in the speech introductory of them.

Mr. Meredith, born the son of an eminent practitioner of the law, was so well educated in and imbued with the principles of jurisprudence, that at an early age he stepped forth as the thoroughly trained lawyer, the ready advocate, equal to any forensic encounter; yet his advance was a slow one, and his success but tardy, for he neither had, nor affected, the popular arts by which practice at the bar is early secured. He could not solicit business, business must solicit him; not because he thought it wrong to solicit business, but because he disdained it. Success did ultimately come, as we all well know, and first in a cause which involved not only the interests of his native city, but, as it were, the interests of every citizen in this commonwealth. The exhibition in this case of his great legal acumen, his profound knowledge of the early history of the commonwealth, his wonderful mastery of all the weapons of advocacy, placed him at once in the front ranks of a profession then led by a Binney, a Sergeant, and a Chauncey. After the decision of the case I refer to, which occurred in the year 1837, a case involving the right of the people of this commonwealth to the full enjoyment of one of the public squares of thivicity, his success was assured and his advance rapid; for I feel entirely safe in saying that until his call by President Taylor to the secretaryship of the treasury, no important cause was argued in the State in which he was not retained on one side or on the other.

How he conducted the business entrusted to his hands very many gentlemen on the floor of this house well known, and it requires no statement from me to call to recollection the brilliant and successful manner in which his abilities were displayed in the service of every client by whom he was employed.

In the office of attorney general, which he filled at a comparatively recent date, his term of six years was marked by a singular devotion to the interests of the commonwealth. It would be rendering but poor justice to his character to say that no temptation could ever for a moment induce him to swerve from the strict line of duty. It is not in that way that I wish to speak of him; but I desire to refer to his zeal, his devotion to the cause of the commonwealth, his thorough personal identification with the interests of the State; all of which qualities were so eminently conspicuous as to impress, in a very marked manner, those who were brought into necessary opposition with him by the nature of their business. He retired from that office, leaving upon it, in a striking degree, the impress of his great abilities and his high character.

In concluding this very slight sketch of his professional career, I feel that I am not overstepping the bounds of just eulogium if I apply to him what the master of Roman oratory said of a great contemporary when he characterized him as the most eloquent of the lawyers, the most lawyer-like in his eloquence, *eloquentissimus jurisperitorum, jurisperitissimus eloquentium.*

But here, in this convention so lately presided over by him, it seems more appropriate to touch upon his public life, upon that side of his life which was dedicated to the public service, to public affairs. I wish to say a few words in regard to his political character.

Mr. Meredith was born a Federalist. He came into the world in perhaps the most exciting period of the politics of this country, certainly in as exciting a period as ever existed. He was born in the year 1799, in the presidency of the elder Adams; and intellectually precocious, he entered as a mere boy warmly and sympathetically into the political feelings and the political excitements of that day. His attachment to his own party leaders, or rather to the leaders of the party in which he was born, and to which he adhered so long as it was a party, partook of the ardor of his temperament; yet it was not to the principles of the party as such, so much as to the men who led it, that he gave his thorough adhesion. He was a Federalist, without being strongly attached to any of the peculiar tenets of that most respectable party. He certainly was not what might be called a concentrationalist, a consolidationist. He was rather the reverse, rather a States rights man. He was not a liberal constructionist; he was rigid in his views of the explication of the great charter which lies at the foundation of our government. It was to the Federal party as he conceived it ought to be, rather than to the principles which the existing Federal party enunciated, that he gave his full concurrence. While he worshipped the great men of the party, he never could have gone along thoroughly with all their political peculiarities. When he reached manhood he was undoubtedly strongly imbued with many of their views; but with his advent into active life that party had practically ceased to exist, for Mr. Meredith attained his majority just about the time of the second presidency of Mr. Monroe, when, as we all know, party opposition lay for the moment dormant, if not dead.

Mr. Meredith was formed to be a debater, and as has been very justly said by my distinguished colleague from Philadelphia (Mr. Carey), his fellow citizens were not slow in discovering his great powers in that direction, and at least a decade of years before he had become distinguished at the bar, by the unsolicited suffrages of the voters of his native city, he was elected to the Legislature of the commonwealth, where he soon became eminent.

Let me say a few words here about what I believe to have been some of his characteristics as a debater. He certainly was in the very foremost ranks in this respect, if not the very first. I disparage no man when I say this. Strong, vigorous good sense, clothed in nervous language, rising as the subject rose to fervor, and often to passion; directness of purpose, singling out the strong points of attack, and throwing overboard the little ones; wonderful power of repartee, biting sarcasm where he chose to resort to it, were only some of the parliamentary weapons which he had at ready command. His masterly treatment of any great political question has again and again impressed his listeners with admiration. How he seized with instinctive rapidity the weak points of his adversary; how cogently he drove home his own strong blows with sledge hammer force, many gentlemen here have again and again witnessed with delight, and almost with approval, even when they differed from the views of the speaker.

It has been said here, and truly said, there was nothing aggressive in his nature; but while he was not aggressive he held his honor in a wary distance, which made it dangerous to offer the slightest offence to it, and woe betide the man who incautiously or presumingly thought that in the way of attack he might safely measure his sword with Mr. Meredith's; his defeat was a foregone conclusion.

Mr. Meredith, without the most indirect solicitation on his part, or even on the part of his friends, after presiding long and well over the local Legislature of this city, and after conducting for a quarter of a century or so the leading business at the bar here, was called by President Taylor to one of the most important positions in his gift. That President did not live long enough (I think but little over a year) to enable him to develop anything like a fixed or settled policy, and therefore Mr. Meredith's great abilities were scarcely tested in the treasury department; but his trueness, his integrity of purpose, were shown there as everywhere else. His disdain of mere party intrigues, of mere partisanship, were conspicuous here, as they always had been throughout his whole life. He was too little, probably, of a politician to be very successful in public life. He dwelt too little upon that which is usually uppermost in the thoughts and calculations of the mere politician, to cope very successfully with those who walked nearer the earth; but had he been permitted to hold the position to which he was called, for its ordinary period, undoubtedly he would have greatly distinguished himself.

How he conducted himself as attorney general of this great commonwealth, to which post he was invited by our friend and colleague, Governor Curtin, has been so well spoken of by my colleague from Philadelphia, that I am indisposed to add a single word upon that portion of his public life.

Every man in Pennsylvania, every man in the country, felt a sincere pleasure when it was announced that he was to represent the United States as one of its counsel before the tribunal at Geneva. While the fact that he did not finally accept this position was not unfortunate for himself, it was certainly so, in my estimation, for his country. Had he been present as one of its leading counsel, I believe, from my estimate of his character, that this country would have been spared the humiliation of advancing pretensions not only destitute of justice, but even of the cover of plausibility, and which the good sense of the whole people, the moment they were announced, unhesitatingly rejected. Nor would our government have been placed in the dilemma from which it was in part curiously enough extricated by the pronunciation in advance, by the tribunal which might have been ultimately called upon to adjudicate them, of an adverse opinion as to claims which were withdrawn from its consideration without formal presentation and argument. Mr. Meredith would have been a party to no such procedure.

But the crowning event of his life, in my opinion, was the position to which he was called in this convention, not only by its unanimous suffrage, but by the unanimous heartfelt selection of every man here. No mere party man, no man who had erected as the standard by which he was to govern his political life, mere adherence to party, could have received this choice in such a way. It was because every one felt and knew that he never could, and never did "give up to party what was meant for mankind," that Mr. Meredith stood in the estimation of this body not only as its foremost man, but as the man who was entitled to receive the unsolicited vote of every delegate present. No doubt, in the ordinary acceptation of the term, he was a party man so far as to adhere to the general policy marked out by his party, surbordinating to the success of this policy any petty or private differences of opinion on minor points; no doubt he was a party man to the extent of sinking unselfishly his real or supposed claims when the interests of his party seemed to demand it. But he never pre-pledged himself to follow the dictates of party or party leaders, without regard to whether in his judgment they were right or wrong. Much less would he have ever bound himself in advance, under the specious plea of adherence to party, to accept unhesitatingly mere party nominations for all

offices, judicial and others, as they were cast before him by party dictators. Mr. Meredith was not that man; and the best authority entitles me to say that more than once he overlooked in this regard party considerations as altogether inferior to what he conceived to be his duty to himself and to his country.

Mr. Meredith's character was such, his public and his private character was so simple, so direct, so free from all affectation, he was so accessible in intercourse, that we scarcely knew how great a man he was until we found ourselves deprived of him. And this community in which he lived, perhaps a little cold in its external manifestations, a little too much averse to anything like demonstrativeness, only felt silently the worth and the value of the man who was dwelling in its midst. But when Philadelphia, with the whole country, was aroused by the intelligence of his decease to a full sense of her loss, she then keenly perceived and warmly and strongly expressed her sense of the bereavement. She has felt, and she will long continue to feel, in the death of this distinguished man, her very great loss, and she will long continue to search for, without finding, another fit to replace him.

MR. SHARPE'S ADDRESS.

Mr. President, we are conscious once again of the presence of death in this chamber. Since we crossed its portals on the 16th of July last, his messenger has summoned hence the distinguished and venerable president of this convention. A prince and a great man has fallen in our midst. It seems hard, indeed, to realize that William M. Meredith lives no longer upon earth; that he hath gone down to the grave and shall come up no more; that he shall return no more to this house, neither shall his place know him any more. But he hath gone to his rest, full of years and crowned with honor. After having scaled all the difficult ascents of professional success, after having attained the summit of professional distinction, after having shed the effulgence of his radiant intellect upon the jurisprudence of his country and his age, after having filled the ear of the nation with his great fame, he now sleeps well, where the weary be at rest.

I purpose not to enlarge upon the character, virtues, and career of this most remarkable man. Tongues far more eloquent than mine have done all this. Voices that have a much better right than mine to be heard on this melancholy occasion have spoken in fitting terms of the illustrious dead. Hearts that were knit to his by the closest ties of friendship, and cemented with his by a life-long intimacy and companionship, have come up into the mouth, and given utterance to their uncontrollable emotions. I have no ambition at all to thrust myself unduly upon the sacred solemnities of this sad hour. I only desire to add my humble tribute to the volume of eulogy that has gone forth from the hearts of this august body. I only wish to say that the chambers of my heart are also draped in mourning. and that in them dwells too the same consciousness that pervades this entire assembly, of the irreparable loss which we have sustained in the death of Mr. Meredith. The temptation to do so much was irresistible, for "I did love the man and do honor his memory, this side idolatry, as much as any." It is certainly safe to assert that there is not one of us whose heartstrings do not tone themselves in harmony with the voice of praise, and whose judgment does not commend the encomiums that have been heard here to-day on behalf of Mr. Meredith.

It matters not in what light we gaze at him, he dazzles us. It matters not in what pursuit we follow him, he was in all alike unapproachable. As a lawyer, learned, profound, unequalled. As an advocate, transcendently persuasive and eloquent. As a statesman, broad-minded, catholic and deeply versed in the science and true principles of government. As a patriot, imbued with a zeal and love of country far surpassing the passion of a devotee. As a citizen, progressive, enterprising, public spirited, and a lover of order. As a gentleman, without stain and without reproach. As a man, big hearted, benevolent, charitable, of unimpeachable integrity, and with the most exquisite sense of honor. As a *pater familias*, a model of all the domestic virtues. There was met in him, such a combination of rich qualities, great faculties and rare traits, as is seldom found in one man. But with all, he had an unassuming modesty and gentleness of deportment that added additional lustre to the glories that clustered about and adorned his character.

He possessed also in an eminent degree that crowning ornament of all mental stature, *good common sense*. Without this treasure, the most shining parts and most brilliant faculties can only achieve but temporary success. The meteor that flashes across the midnight firmament, and then goes out in darkness forever, is a fitting emblem of genius, without the ballast of a sound judgment. But the intellect of Mr. Meredith burst not in meteoric showers. It shone upon everything it touched with the steadiness and fixedness of the rays that come down from the sun. For he was not simply brilliant; he was also cool-headed. He had not the flash of genius merely, but with it, the clear-sightedness, calm deliberation, and sound understanding of the philosopher.

Neither was he one "to split the ears of the groundlings." He had no ambition at all for this. He had a native dignity of character, and an intense self-respect which lifted him high above all the arts and tricks of the demagogue. He was a statesman, but not a politician, in the present popular and degraded sense of that term. He was a party man, but not a partisan. He had faith in the utility of parties in a republic, and he believed his party was right. He rejoiced in its triumph—not for the sake of the spoils of victory—but for the sake of its principles. Loving his country as he did, he could not help loving his party, for to him the welfare of the nation was bound up in the success of his party. He had no confidence, however, in the Jesuitical dogma that the end justifies the means, and therefore he loathed with intense loathing the bribery, corruption and intimidation which are the crying evils and the burning shame of the politics of the present times. No earthly consideration could have induced him to countenance the employment of any sinister means or improper agencies, although they might have been demonstrated ever so clearly, to be absolutely necessary to party triumphs. He had an abiding confidence in the common sense and inborn integrity of the people, and he infinitely preferred honorable defeat to dishonorable victory. His whole aim was the happiness of his race and the prosperity of his country. His loyalty to his party was meant for this and this only. Who can help but admire him for it?

Mr. President, I feel that it would be presumptuous for me to undertake to weigh in my small balances the value of the life work of Mr. Meredith. I am wholly conscious that I have no capacity to take in the full measure of that great man. But I trust that indulgence will be granted to a brief allusion to one or two phases of his career that have enlisted my closest attention, and excited my highest admiration. Coming to the bar as I did at the immature age of twenty, I had of course no experience in the fierce conflicts of the forum, and no knowledge of the professional athletes that struggled for the prizes in that arena.

But he whose death we mourn to-day was then in the zenith of his great fame, and its effulgence reached even me in my quiet obscurity. The heart of the young professional aspirant must necessarily have some idol. Its altar must burn incense to some deity. I could claim no exemption from this common frailty—if frailty it indeed be. Hence, Mr Meredith became the object of my hero-worship, for he had won victories more highly to be prized than the conquest of kingdoms. His brows were wreathed with greener and more honorable laurels than those of the war-worn and blood-stained chieftain. It became my delight to glean from every source, and to garner up in the cells of memory every fact and circumstance that entered into his early professional life. With what interest I pondered and mused and wondered over the wild bursts of passion, that must have swept through the chambers of his heart, and the rough conflicts that must have torn the realms of his mind, while he patiently waited for public recognition and appreciation during his long novitiate.

Such a contemplation was consoling and somewhat flattering, for it proved that genius must sometimes at least temporarily wear the fetters of mediocrity.

But when my mental vision, passing beyond this contracted and unnatural orbit of such a brilliant luminary, followed his subsequent career, and grasped its magnitude and power; when I read and studied the great cases which his intellect had illumined; when I came to know and comprehend, imperfectly it is true, the mental sweep that could by a touch make the most abstruse principles luminous to the commonest understanding, then, indeed, I suffered the pangs of hopeless despair, for I realized that his goal was as far beyond my reach as the sun in the firmament. It was by such mental processes that I came to fix the professional standard of Mr. Meredith, for I had very few of the opportunities which some of the gentlemen of this conventio almost daily enjoyed of hearing and s ing him in this, to me, by far the most i teresting walk of his life. To me he was the epitome of all that was admirable and great and worthy of imitation in a lawyer. He would as soon have thought of violating the decalogue as of violating his professional word. He was one of that old-fashioned type of lawyers that stoutly doubted the professional ethics that would teach that a client's cause is to be gained at all hazards, and by any means. Whilst he was loyal to his client, he was equally loyal to truth and justice. If he did not always gain his case, he always saved his self-respect and honor.

For the passion that weds me to my profession, I do, therefore, the more honor him, because he, most of all his contemporaries, did exemplify its dignity and pre-eminence above all other temporal pursuits. And I am glad to hear upon this floor that my appreciation of him as a lawyer has been fully sustained by those who are so much more able than myself to form a correct and discriminating estimate of him in this regard.

Time will permit but a passing allusion to his duties and position as the president of this convention. His unanimous election to that dignified office was not only hailed with delight here, but also throughout the commonwealth, as a harbinger of that reformation in political and governmental affairs which the people so devoutly longed for, yet scarcely dared to hope for. It was a fitting seal to that popular judgment which had long since singled him out and commended him as the first citizen and great glory of his native city and State. His government here was characterized by urbanity, impartiality, promptness and dignity. Such was the weight of his character, and the sense of his intense honesty of purpose with us, that his decisions became the unquestioned law of this body. His administration has left behind it no private grievance to canker in any bosom, and no feeling of intentional slight or personal injustice dwells in any heart in this assembly. It seems to me that it is the experience of every one of us, that he was one of the very few great men who grew greater the nearer you approached him.

It was, therefore, with melancholy forebodings and sad misgivings, that we observed day by day the clay tabernacle that anchored his great spirit to earth gradually yielding to the assaults of disease. But he refused to put off the harness of active life so long as his spent frame could endure its weight. But though dead he yet liveth, and will live whilst learning and virtue and genius and moral greatness shall command the homage and admiration of the sons of men.

There are in the present Constitutional Convention of this State, three members of the last Constitutional Convention (1837-8), viz., Geo. W. Woodward, Wm. Darlington, and Saml. A. Purviance. The late Mr. Meredith was also a member of the Convention of 1837-8. There are now surviving, as far as can be ascertained, but twenty-one out of one hundred and thirty-three members of that body, viz., Daniel Agnew, Andrew Bayne, Andrew Bedford, Charles Brown, Joseph R. Chandler, Walter Craig, Wm. Darlington, John R. Donnell, David N. Farrelly Robert Fleming, John A. Gamble, Virgil

Grenell, Orlo J. Hamlin, Henry G. Long. Levi Merkel, Christian Myers, Hiram Payne, Saml. A. Purviance, Ebenezer W. Sturdevant, Robert G. White, and Geo. W. Woodward.

[Upon July 18th last, we published the following case, but through some inadvertence the proof of the same was not revised. To-day we reprint it with corrections, Judge Lynd having done us the favor to revise it.]

District Court of Philad'a

SPENCE v. WALLACE.

1. Goods purchased by a married woman having no separate estate, with money loaned to her, are subject to levy by her husband's creditors.
2. The act of April 3d, 1872, includes only the "earnings" of a married woman; it cannot be construed to include borrowed money.

Opinion by LYND, J. Delivered July 12th, 1873.

This was a feigned issue upon a sheriff's interpleader. The plaintiff was the wife of the defendant in the execution. She borrowed money, and bought therewith the goods levied upon. She had no separate estate. The jury rendered a verdict for the plaintiff, subject to the opinion of the court upon the following reserved question: Whether goods purchased by a married woman who has no separate estate, with money loaned to her, are subject to levy by the creditors of her husband.

Bucher v. Rean, 18 P. F. S. 421, seems to settle this question against the plaintiff. But her counsel points to the act of April 3d, 1872, Brightley's Dig. 1010, §§ 38, 39: "The separate earnings of any married woman of the State of Pennsylvania, whether said earnings shall be as wages for labor, salary, property, business or otherwise, shall accrue to and enure to the separate benefit and use of said married woman, and be under the control of such married woman, independently of her husband, and so as not to be subject to any legal claim of such husband or to the claims of any creditor or creditors of such husband, the same as if such married women were a *feme sole: Provided*, That in any suit at law or in equity, in which the ownership of such property shall be in dispute, the person claiming such property, under this act, shall be compelled, in the first instance, to show title and ownership in the same."

He contends that money borrowed by a married woman, though not upon the credit of her separate estate, is protected from her husband's creditors by the letter of this legislation. But by the letter of the act, "separate earnings" alone are protected. Unless "separate earnings" and "borrowed money" are identical, the letter of the act does not help the plaintiff. That that which one earns is entirely different from that which one borrows, is too clear for ratiocination. The clause "whether said earnings shall be as wages for labor, salary, property, business or otherwise," even if much less inelegant and obscure than it is, does not enlarge the operation or scope of the main sentence. The thing comprehended is still "earnings"—nothing else. To amplify here would be to waste time.

But again, he contends that the purpose of the act was to still further break down the common law disabilities of married women, and to make her separate earnings her separate property, free from the control of her husband and of his creditors, and that moneys advanced to her by her friends, to enable her to go into business, and to thus acquire profits or earnings, are as well entitled to protection as are such profits or earnings.

But this view overlooks the fact that a wife can have no *separate* credit. For what she borrows, with the concurrence of her husband, he is liable. Personally she is not liable for money loaned to her, although her separate estate, if any, and if properly pledged, may be liable. Robinson v. Wallace, 3 Wr. 129. Why should she have an independent control of that which she acquires at his expense? Why should his other creditors be shut out from such property, when this creditor can come in upon his general property? It was probably because of this that the Legislature did not frame the act so that "moneys loaned" to a married woman would be clearly within the letter of it.

This would be holding open the door for fraud so wide as to imply an invitation to enter. Should the law lead its subject into temptation?

It may be, too, that public policy dictated the omission. A failing debtor could contrive many indirect modes of getting his money into the hands of a friend, if that money could be loaned to his wife and be used in business by her, free from the reach of his creditors. Detection by the latter would be almost impracticable.

But even though no reason could be assigned why moneys loaned to a *feme covert* should not become her separate property, as absolutely as her separate earnings become so under the act in question, we should still deem it our duty, inasmuch as the two things are distinct and independent, to refuse to adopt the construction contended for by the plaintiff. Legislative and judicial functions must not be confounded. If it was the intent of the lawmakers to protect moneys loaned to a wife, they should have caused it to be so written.

Judgment for defendant on the point reserved.

Charles H. Downing, Esq., for claimant.

Thomas J. Diehl, Esq., for execution plaintiff.

Court of Chancery, England.

BOOTH v. ALCOCK.

1. The court will restrain a landlord from interfering with his tenant's lights, although the diminution of light is not great, and although if the contest were merely between neighboring properties, the court would only award damages.
2. The defendant being lessee of properties A. and B., granted an underlease of A., "together with all lights," to the plaintiff. He subsequently acquired the fee in B.
3. The court restrained him from so building upon B. as to interfere in any way with the lights of his lessee of A.

[March 20, 1873.—28 L. T., N. S. 221.]

By indenture dated 31st August, 1864, the defendant underleased to the plaintiff for the term of twenty-one years, a messuage, No. 26 Old Change, in the city of London, "together with all edifices, buildings, ways, lights, sewers, water-courses, rights, easements, advantages, and appurtenances." The lease contained a covenant for quiet enjoyment. At the time of granting the underlease the defendant was himself lessee of the messuage, for the term of eighty years, and was also assignee of an underlease of an adjoining messuage and premises in Distaff lane, situate on the east side of the Old Change property, of which the term would expire in 1868.

The messuage, No. 26 Old Change, was lighted on the east side by windows and a skylight. Subsequently to granting the underlease of the Old Change property, the defendant purchased the freehold of the property in Distaff lane, and pulled down the messuage with the intention of rebuilding it. The defendant proposed to raise the new building twenty-one feet higher than the old one, which would have the effect of interfering to some extent with the plaintiff's light.

On the 19th February, 1873, the plaintiff filed a bill to restrain the defendant from raising the house in Distaff lane to a greater height than the house which formerly stood there, or so as to interfere with the plaintiff's light and air. The case now came on on motion for injunction.

Cotton, Q. C., and *E. Harvey* for the plaintiff.

Glasse, Q. C., and *W. R. Ellis*, for the defendant.

The following cases were cited: Tipping v. Eckersley, 2 K. & J. 264; Beadel v. Perry, L. Rep. 3 Eq. 465; 15 L. T. Rep., N. S. 345; Senior v. Pawson, L. Rep. 3 Eq. 330.

The vice chancellor said he did not think the diminution of the plaintiff's light would be great, still there would be a material interference with it. If this had been an ancient light case between neighboring proprietors, he thought it would have been a case for damages and not injunction; but it was clear that a landlord could not do anything in derogation of his tenant's rights. The plaintiff was entitled to the uninterrupted use of his lights for every purpose for which they could possibly be used. The injunction must, therefore, be granted.

(*Continued from page* 307.)

country to what would seem to be the dictate of common sense, unaffected by technical niceties."

See, also, the remarks of Hoar, J., in Avery v. Meredith, 7 Allen, 397, where the rule of the common law is repudiated.

But the rule is too clearly recognized and established in our own State to be disregarded. See Bell v. Twilight, 22 N. H. 500. And while we cannot let the occasion pass without expressing our doubts as to its practical justice, we feel quite confident that its application to the present case will do no wrong, but on the contrary, will fully effectuate the intention of both Jacob and Hannah Hersey, with regard to the disposition of their several estates.

Our conclusion, in view of all the apparent circumstances, as well as the settled rules of construction, is, that Mrs. Hersey, by her last will, did not execute—as she did not intend to execute—the power conferred by the will of her husband.

The counsel for the appellants refer us to but two cases in support of their position upon this branch of the case. Neither of them is in point. In the one—Jackson v. Coleman, 2 Johns. 392—there was no limitation of a life estate to the wife, the testatrix, and no power to be executed by her; in the other—Harris v. Knapp, 21 Pick. 412—as we have already observed, the question was not as to the execution, but related only to the extent of the power.

The appellants, however, insist that, even in the position in which this case is placed by the opinions now expressed, their third reason for appeal must be allowed.

This is, because the judge of probate, in the final settlement of the account of the executor of Mrs. Hersey's will, allowed him the sum of $262.96 for cash which he had paid to the executor of Jacob Hersey's will, which sum was the amount of money that had been paid to Mrs. Hersey from her husband's estate.

This money was part of the gross amount of personal estate derived from her husband, the whole being, as appraised, $1,048.96; and this money was not kept separate by Mrs. Hersey, and, in its use by her, no distinction was made between it and other money belonging to her, not derived from her husband.

Upon this point, the position of the appellants seems to be, that, since Mrs. Hersey received personal estate from her husband to the amount of $1,048.96, and had at her death only $814.97, therefore she must have executed her power of disposal over the difference, which is $233.99, and that to that extent, at least, the executor's claim for $262.96 was improperly allowed; but, further than this, that the commingling of the money derived from her husband with her own money, and the indiscriminate use of the whole, constitute a disposal of the money, within the meaning of the will, and was an execution of the power to divest the remainder.

But the argument, so far as it is based upon an exhibition of figures, fails; for, by examination of the inventory of Mrs. Hersey's estate, to which we are referred by the case, it appears that the articles of personal property which she received from her husband's estate, and which at the time of her death remained unchanged in form, are not included in the $814.97, but are returned in the inventory separately "as an inventory of articles which belonged to the estate of Jacob Hersey, and which is in controversy as to title."

These articles amount to $342.77. There are also the avails of the hay cut on the land, and which would be a part of the proceeds of Mrs. Hersey's estate for life, amounting to $128, and these sums added to the rest of the personal estate, make the total $1,285.74, instead of $1,048 96—or $236.78 more than the amount derived from her husband's estate.

These figures, however, do not afford us much aid, while they furnish no support to the appellant's argument; for it does not appear how much personal property Mrs. Hersey had in her own right, at the time of her husband's death, nor how much of that derived from her husband was of such character that it would necessarily be destroyed and consumed in the using.

A change of form in the nature of personal property, which can only be profitably enjoyed by making such change, is by no means to be regarded, *per se*, as an execution of a power of disposition over it. The profitable use of money is obtained only by its investment in securities paying interest, or in property, like live stock, for example, on a farm, from the labor of which profit may be derived. The remainderman is not defrauded nor harmed—his estate is not divested nor diminished—if the money—the $262.96 limited to him by Jacob Hersey's will,—comes to him at last through Mrs. Hersey's executor, whether that money in the meantime, has been usefully employed or kept "laid up in a napkin."

The tenant for life is entitled to the use of the money. She is not required to give security for it to the remainderman, and her executor is only bound to account for the fund, not for the identical money, precisely as he has done in this case. Weeks v. Weeks, 5 N. H. 326; French v. Hatch, 28 N. H. 352; Healey v. Toppan, 45 N. H. 243.

In Healey v. Toppan, it is said that "there is nothing in the fact that real and personal estate are bequeathed together, at the same time, and in the same general or residuary bequest, that tends to show that the testator intended that the per-

sonal property, or any part of it, should be enjoyed *in specie* by the tenant for life."

A change, therefore, in the precise form of the property, whether it be goods, perishable or otherwise, or money, in order to the practical and profitable use of the same by the tenant for life, cannot be assumed to be the exercise of absolute dominion over it, and a conversion of it.

Money is not property of that perishable nature which is necessarily consumed in the using of it. The use may be enjoyed, and the equivalent avails of the same thing retained for the benefit and as the property of him to whom the principal is limited.

Any lawful use of the money, as tenant for life, is not to be deemed an execution of the power of disposal of it, in the absence of any act evincing that intent. What is relied upon by the appellants as an execution of the power, is just what the tenant for life would naturally do in the exercise of her rights as tenant for life.

The principles which we have already recognized apply fully in this connection; and as a conveyance of property, by deed or will, will not be regarded as an execution of a power over it, in the absence of any reference to the power or the subject of it, evincing an intention to execute it, unless the deed or will must otherwise be inoperative—so, here, such an act *in pais* as the use of this money, in the only manner consistent with the profitable enjoyment of it conferred by her husband's will, cannot be regarded as an execution of a power over it.

The equivalent sum of money paid by the executor of Jacob Hersey's will has been paid to the remainderman by the executor of Mrs. Hersey's will, in pursuance of the intention, not only of the original testator, but also, so far as appears or can be inferred, in pursuance of the design of Mrs. Hersey, and the duty imposed upon her.

The conclusion of the whole matter is, that the reasons for appeal are disallowed, and the decree of the probate court is affirmed.

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE AMERICAN EXCHANGE BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to three million dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE CHESTNUT HILL BANK, to be located at Philadelphia, with a capital of fifty thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

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Poplar, No. 1623—Modern Three-story Brick Residence. Executor's Sale — Estate of Madame Victoria Wedekind, dec'd.

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Pine, No 2320—Three-story Brick Dwelling.

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Eleventh, (North,) No. 1822—Genteel Three-story Brick Dwelling.

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Arch, No. 1520 Modern Three-story Brick Residence—22 feet front.

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Federal, No. 1307—Three-story Brick Dwelling.

Burton, No. 1729—Three story Brick Dwelling.

Spruce, No. 723—Modern Three-story Brick Residence. Peremptory Sale.

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Supreme Court of New Hampshire.

STEWART v. EMERSON.

1. In assumpsit for the price of goods sold, when the defendant pleads discharge in bankruptcy, the plaintiff is not estopped by the form of his action to reply that the debt was created by the fraud of the defendant.
2. A debt is created by fraud, when one, intending not to pay for goods, induces their owner to sell them to him on credit, by fraudulently representing or causing the owner to believe he intends to pay for them, or by fraudulently concealing the intent not to pay.

DOE, J.

I. The defendant claims that the plaintiff, by this suit upon the contract of sale, affirming the sale, cannot, in this suit, assert the creation of the debt by the fraud of the defendant; that the fraud of the vendee can be set up by the vendor only in an action founded on the fraud. The defendant's position is, in effect, that when the declaration is on a contract of sale, and the plea is discharge in bankruptcy, the replication of debt created by the defendant's fraud is bad; that an issue upon a traverse of such a replication is an immaterial issue, and a trial of such an issue a mistrial; and that, on a verdict for the plaintiff on such an issue, a repleader should be awarded, or judgment be arrested, or judgment be rendered for the defendant *non obstante veredicto*. Tidd Pr. 828. Is such a replication good? When, in an action brought by a vendor on a contract of sale to recover the price of the goods sold, the defendant pleads a discharge in bankruptcy, can the plaintiff reply that the debt was created by the fraud of the defendant.

The plaintiff declares upon a promise of the defendant to pay for goods sold, and, if he maintains his action, he maintains it upon the contract of sale affirmed by him. When a party has an election between two inconsistent rights or remedies,—for instance, when he can rely upon a contract, or renounce the contract and rely upon fraud,—and he has knowledge of all the facts material to be known in making a choice, his selection of one may be a renunciation of another. Butler v. Hildreth, 5 Met. 49. But the plaintiff in this case avers the fraud of the defendant, not as the plaintiff's cause of action, but as a refutation of the defendant's alleged defence of discharge. The plaintiff claims to recover damages, not for the defendant's fraud, but for the breach of his promise to pay for the goods bought; and in the replication he alleges the fraud, not as the ground on which his action rests, but to show that there is no ground on which the defendant's discharge can be applied to this debt. He asserts, not that the sale was void for fraud, but that, by reason of fraud, the debt was not discharged under the bankrupt act. He asserts the fraud, not for the purpose of rescinding the contract, but to show that the defendant has not been relieved from his obligation to perform his part of the contract.

The replication, "that the debt sought to be recovered in this suit was created by the fraud of the said defendant," follows the bankrupt act in recognizing the distinction between a debt annulled by the creditor's disaffirmance of it at common law, and a debt affirmed by the creditor, and not discharged under the statute by reason of fraud. The bankrupt act provides that no debt created by the fraud of the bankrupt shall be discharged under that act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt. The statute recognizes a debt, created by the fraud of the bankrupt, as a debt not discharged and not affected by the proceedings in bankruptcy, except so far as it may be paid by a dividend. So far as this case is concerned, the debt, if created by the fraud of the defendant, is excepted out of the operation of the bankrupt act. And when the plaintiff answers the plea of discharge by the replication of debt created by fraud, he does not attempt to rescind or invalidate or renounce the contract, but he affirms it, and claims that the debt is a valid, subsisting debt. In the declaration, he asserts a debt. In the replication, he asserts the same debt. He avers the fraud, not to avoid the contract himself, but to show that the defendant cannot avoid it; not to show the defendant that by reason of the fraud, the debt declared upon was never created, but to show that, being created by fraud, it was not dischared under the bankrupt act; not to show that there is no such debt, but to show that there is such a debt notwithstanding the discharge. In this course there is no inconsistency, and the plaintiff is not estopped to answer the plea of discharge by the replication of debt created by fraud.

II. The judge instructed the jury that the debt was created by the fraud of the defendant, if the defendant, by his acts or words, prior to or at the time of the sales, intentionally induced the plaintiff to believe that the defendant intended to pay for the goods, and the defendant in fact did not intend to pay, and the defendant induced this belief, intending to deceive the plaintiff, and induce him to sell the goods to the defendant, and the plaintiff was thereby deceived, and was induced by this misrepresentation to make the sales, and would not have made them if the defendant had not made this misrepresentation. Was this a correct statement of the law applicable to this case?

In Noble v. Adams, 7 Taunt. 59, the vendee, at the time of the sale, delivered worthless bills in payment, knowing them to be worthless. Gibbs, C. J., instructed the jury that if the vendee went to the vendor, having formed a deliberate plan to put off bad bills for valuable merchandises, knowing the goods would never be paid for, and intending then to abscond with the goods, or to throw them into an immediate bankruptcy, or to pass them over to a particularly favored creditor, the vendee was guilty of a fraud, and the sale would not change the property; but if the vendee only meant to give these bills, and himself by these bills, more credit than they deserved, but intended to continue to carry on his business, and to try to pay for the goods at some time or other if he could, that was not such a fraud as would vitiate the sale. This instruction, which was held to be correct, made the intent of the vendee never to pay, the material inquiry for the jury in that particular case, and did not present the criminal offence of obtaining goods by false pretences, as the test of fraud in a civil suit. It might have been taken for granted, at the trial, that the case was one of a criminal false pretence, if the vendee intended never to pay. The jury found the sale fraudulent. But it was held that the evidence did not show such a fraud as would vitiate the sale, because there was no proof of what passed between the vendor and the vendee, or by what practices the latter obtained the goods, without which it could not be known whether or not the means which the vendee used were such as to fix him with the offence of obtaining them by false pretences. The whole case, taken together, seems not to support the doctrine that obtaining goods on credit, by concealing an intent not to pay for them, is a fraud in a legal sense.

In Irving v. Motly, 7 Bing. 543, 552, Park, J., expressed the opinion that obtaining goods by false pretences is not the only ground upon which a vendor can vacate a sale, and that a contrary rule was not announced in Noble v. Adams.

In Bristol v. Wilsmore, 1 B. & C. 514, the bargain was that the price should be paid in ready money; but the vendee prevailed upon the vendor's servant, who made the bargain, to accept a worthless check for the price, by assuring him it was as good as money. It was held, upon authorities tending to show the case within the criminal law of false pretences, that, if the vendee obtained the property with a preconceived design of not paying for it, the fraud would vitiate the sale, and that whether he obtained it with such a design or not was a question of fact which ought to be left to the jury. Such a design was regarded as material; but it would seem that the court did not mean to declare it to be a fraud to obtain property by the mere omission to disclose such a design, without using any worthless bill, or check, or other thing considered as a false token in the criminal law.

In Hawse v. Crowe, R. & M. 414, the goods were to be paid for on delivery; the vendee gave for them a check drawn by himself on a bank, payable to the vendor; and the check was dishonored. Abbott, C. J., held that the transaction was fraudulent if the vendee had not reasonable ground to expect that the check would be paid.

In Kilby v. Wilson, R. & M. 178, the same judge seems to have held a preconceived design of a vendee not to pay, to be fraudulent.

In Ferguson v. Carrington, 9 B. & C. 59, the goods were bought on credit, were to be paid for by bills accepted by the vendee, such acceptances were given, and the vendee, immediately after receiving the goods, sold them at reduced prices. The vendor contended that it was manifest that the vendee purchased the goods with the preconceived design of not paying for them. At the trial, Lord Tenterden expressed the opinion that if the vendee had obtained the goods with a preconceived design of not paying for them, no property passed to him by the contract of sale. But the case turned on another point, and all the evidence of fraud may not be reported.

In Load et al. v. Green et al., 15 M. & W. 216, the jury found that the vendee bought the goods with the fraudulent intention of not paying for them. Parke, B., delivering the opinion of the court, described the action as trover brought against the assignees of a bankrupt to recover goods obtained by him by a fraudulent purchase from the plaintiffs without intent to pay for them, and which, therefore, the plaintiffs had a right to recover from the bankrupt himself, by avoiding the contract on the ground of fraud, on the principle of the case of Noble v. Adams, 7 Taunt. 59, and others. But the point decided has no bearing on the question whether obtaining goods, by concealing an intent not to pay for them, is sufficient to vitiate the sale.

In Chitty on Contracts, 356, it is said that if one purchases goods with the preconceived design of not paying for them, such sale does not pass the property therein. If this is the English doctrine, there would seem to be reason to expect that it could be more satisfactorily shown in English reported cases than it is in those cited by Chitty. Generally, no doubt, a vendor who alleges fraud in a purchase has some express misrepresentation of a material fact by the purchaser to rely upon, aside from a purchase on credit obtained by the concealment of an intent not to pay. But as the vendor necessarily understands, when the vendee buys on his own credit, that the vendee intends to pay, and the vendee necessarily intends the vendor shall so understand—as the vendee, by the very act of buying on credit, intentionally induces the vendor to believe he intends to pay, and obtains the goods by inducing the vendor to entertain that belief—if this, with an intent not to pay, had been regarded as fraudulent in a legal sense, it would seem that this ground alone would have been frequently taken, and that the English reports would show that it had been taken in many cases, and that it had been sustained by explicit decisions, or was so elementary and well understood that no one brought it in question. It can hardly be said that this is shown by the English cases usually cited in this country on this subject.

The English authorities certainly declare, in general terms, that a fraud may be committed by one person inducing another to enter into a contract, by the intentional and dishonest concealment of a material fact which is peculiarly within his own knowledge, or which the other party cannot, by due vigilance, discover; that a suppression of a truth may be equivalent to an express false representation. But the same authorities seem not to establish the legal bounds of this kind of fraud with precision, by a comprehensive definition or universal rule. It is said to be extremely difficult to advance any general principle upon this subject, inasmuch as what does or does not amount to fraud depends very much on the facts of every particular case, on the relative situation of the parties, and on their means of information. Chitty on Contracts, 588. Professor Parsons says the common law not only gives no definition of fraud, but perhaps asserts as a principle that there shall be no definition of it; and he suggests that a definition of it would inform the crafty by what fraudulent devices they could avoid the grasp of the law. 2 Parsons on Contracts (5th ed.), 769. But the common law claims that it is, or can be, or ought to be, known by all who are

subject to its government, and that it is a rational system, and not a collection of rules, maxims and definitions constructed upon verbal distinctions, to be applied in an arbitrary or literal sense; and it is not apparent how a definition of fraud, as accurate as legal definitions generally are, taken in the liberal sense indicated by the spirit, and not by the letter, in which all legal definitions are understood, would promote the safe practice of deceit.

The law enforces certain moral duties, and admits that others are of imperfect obligation. In trade, it prohibits a certain degree of craft, and does not prohibit a certain other degree. On this subject, as on many others, it may not be easy to fully describe the dividing line, on one side or the other of which all possible cases must fall (a difficulty from which moral philosophy is by no means free). The whole line may not be judicially promulgated at once, with an exactness and minuteness of detail superior to the fraudulent inventive faculty of all future time. The general course of the line is well known; its precise location at all points is presumed to be ascertainable by the application of settled principles, although, at certain points, it may be marked in the authorities only approximately by the cases on either side, whose positions are determined from time to time as they arise. A proposition concerning an immoral suppression of a material fact being equivalent to an express fraudulent misrepresentation, is everywhere recognized as a statement suggestive of a sound principle; but the proposition, as commonly expressed, does not determine what is a material fact, or when it is peculiarly within the knowledge of one party, or ought to be discovered by the other party, or under what circumstances the law requires it to be disclosed. Like *caveat emptor*, and many other maxims and rules, it may be designed to convey some idea of a certain general theory of the law, and not to designate the application of the theory to the varying circumstances of particular cases in actual practice.

In some jurisdictions in this country, the effect of a vendee's concealment of his intent not to pay has been somewhat considered. "If a man, knowing his own insolvency and utter incapacity to make payment, purchases goods of another, who is ignorant of any change of his circumstances, and sells them under the most implicit belief of the good faith and solvency of the buyer, in what respect does the transaction differ from a direct affirmation by the buyer of his own good faith and solvency? If the buyer conceals a fact that is vital to the contract, knowing that the other party acts upon the presumption that no such fact exists, is it not as much a fraud as if the existence of such fact were expressly denied, or the reverse of it expressly stated?" Story, J., in Conyers v. Ennis, 2 Mason, 236, 239, 240.

In Cross et al. v. Peters, 1 Greenl. 376, 380, the judge instructed the jury that insolvency, unattended by any misrepresentations or falsehood in obtaining credit, would not render the purchase from the plaintiffs void; and that unless the vendee obtained credit, with a fraudulent intent and secret understanding with one H. that the goods should be attached by him to secure his debt, the verdict should be for the defendant; but that, if the goods were purchased with such intention and understanding the verdict should be for the plaintiffs. The verdict was for the defendants; and the court refused to set it aside—first, because there was no proof that the vendee knew he was insolvent; secondly, because, if he had known it, he was not bound to disclose it, and no deceptive assurances or false representations were fraudulently made by him. It was said the purchase would be void if made in pursuance of the secret arrangement with H. because there would be an indictable conspiracy.

At the trial of Wiggin v. Day, 9 Gray, 79, the buyer's intent not to pay was regarded as material, as it might sometimes be, even if not sufficient of itself to constitute fraud.

"We can entertain no doubt that when goods are purchased with a preconceived intention not to pay for them, this is a fraud upon the vendor, which will entitle him to repudiate the sale. Such is the doctrine of the English authorities; and, although it has been questioned in some recent cases in Pennsylvania and New York, it rests upon sound principles of morality and law. In such a case the fraudulent party pretends to be a purchaser when he is not, but is, in fact, attempting to obtain possession of the property of another, dishonestly, with a view to deprive him of it without consideration. As far as the buyer is concerned, the whole sale is a mere fiction, a delusion imposed upon the seller, to induce him to part with the possession. If it be said that a mere intention does not constitute a fraud, the answer is, that the purchase, with such a fraudulent intention, is a fraudulent act. In its moral quality, it is hard to distinguish it from a larceny. There are other cases in which an intention to defraud entitles the party against whom the fraud is meditated to treat a sale as a nullity, such as sales made with intent to defraud creditors. And, however the law might be held elsewhere, in Massachusetts a purchase of goods, with an intent not to pay for them, is expressly recognized by statute as a fraud which will deprive the debtor of the benefit of the act for the relief of poor debtors, and may subject him to sentence of imprisonment. Gen. Stats., ch. 124, secs. 5, 24. Rev. Stats., ch. 98, secs. 31, 36." Dow v. Sanborn, 3 Allen, 181, 182.

"We believe that the rule is now settled, that if a person purchases goods with a preconceived design not to pay for them, the vendor has a right to treat the sale as void." Thompson v. Rose, 16 Conn. 71, 81.

In Powell v. Bradlee, 9 Gill & J. 220, 248, 278, it was held that a purchase is fraudulent, if the vendee at the time of the purchase is insolvent, knows he is insolvent, has no reasonable expectation of paying for the goods purchased, and conceals these facts from the vendor, who by ordinary prudence cannot know of their existence.

Obtaining property with a preconceived design never to pay for it, under color of a formal sale, induced by a sham promise to pay, which the party intends never to comply with, is a fraud. Bidault v. Wales, 19 Mo. 36; S. C., 20 Mo. 546.

In a dictum in Bell v. Ellis, 33 Cal. 620, 630, the rule, that the concealment of an intent not to pay is fraudulent, is doubted.

When dealings between a vendor and vendee during a period of years, naturally would excite and have excited the confidence of the vendor in the responsibility and integrity of the vendee, and the vendee commits an open and notorious act of insolvency by assigning all his property, and two days afterwards buys goods of the vendor without informing him of the assignment, the purchase is fraudulent. Mitchell v. Worden, 20 Barb. 253. The doctrine, that concealment of intent not to pay is fraudulent, was adopted in Buckley v. Artcher, 21 Barb. 585. "If a purchaser who is insolvent conceals that fact from the vendor, and thus obtains goods without intending to pay for them, it is a fraud." Durell v. Haley, 1 Paige, 492, 493. "A purchase, with intent not to pay, is such a fraud as will avoid the sale." Ash v. Putnam, 1 Hill, 302, 305. In Nichols et al. v. Pinner et al., 18 N. Y. 295, 297, 302, 303, 305–311, 315, the judge instructed the jury that if the vendee procured the possession of the goods from the vendors fraudulently, with a preconceived design not to pay for them, they would have the right to repudiate the sale. A new trial was granted because the judge refused to charge, as requested, that the mere omission of the vendee to disclose his insolvency was not fraudulent; and the question whether a preconceived design not to pay renders a purchase fraudulent, was not decided, although three of the judges expressed opinions upon it—Harris and Roosevelt, JJ., holding the affirmative, and Selden, J., the negative. Judge Harris, upon an examination of authorities, concludes that, in asserting that there must have been actual artifice, intended and fitted to deceive, before a vendor can reclaim his property on the ground that he has been defrauded, Smith v. Smith et al., 21 Pa. St. 367, stands alone, and is unsupported by principle. Judge Selden said: "The law takes no cognizance of a naked design which is demonstrated by no act. If one *does* only that which is lawful, and violates *in action* no positive duty, his intentions cannot be reached. An intent to overthrow the government is not treason without an overt act. An intent to commit murder or any lesser crime is never punishable, and an intent to commit a fraud is governed by the same rule. The intention may exist at one moment, and be changed the next. The party is *in loco penitentiæ* until he does some act in furtherance of the intent. The purchase of goods is a lawful act, and the validity of the purchase cannot be affected by the mere mental state of the purchaser." In Hall v. Naylor, 18 N. Y. 588, 589 (S. C., 6 Duer, 71), Comstock, J., delivering the opinion of the court, said, "It does not appear that Kerr & Co., on purchasing the goods in question, made any representations of their ability to pay for them. If, however, they concealed the fact of their insolvency, with a design of procuring the goods and not paying for them, it was a fraud, which rendered the sale void, if the plaintiff (the vendor) chose to so regard it. On the trial of such an issue, the *quo animo* of the transaction is the fact to be arrived at."

In Smith v. Smith et al., 21 Pa. St. 367, it was held, by a majority of the court, that a vendee's concealment of his insolvency and of his intent not to pay, without any fraudulent overt act or actual artifice, intended and fitted to deceive the vendor, is not fraudulent. Lowrie, J., delivering the opinion of the majority, said, "An intention not to pay is dishonest, but it is not fraudulent. * * * And it is no more fraudulent to have such an intention at the time of the purchase, than at the time when payment ought to be made. * * * It is no more fraudulent in an insolvent than in a perfectly solvent man, to have such an intention. * * * Insolvency is a state of one's affairs; and the consciousness of it, and the intention not to pay, are states of the mind, and if these constitute fraud, then it may be made out without proof of a single overt fraudulent act. And if none of its elements consist of an overt act, then the law requires no evidence of an overt act to establish it. * * * Where must we look for the fraud? Not in the buyer's intention merely. It must be a fraud upon the vendor, that is, a fraud acted out. We are seeking to avoid a contract because it was induced by fraud, that is, because there was some fraudulent act leading to it. The very statement of the proposition excludes the act of purchase from being an element in the fraudulent conduct, and makes it a consequence of it. What, then, is left but the dishonest intention and the concealed insolvency? And, surely, these did not induce the vendor to sell his goods. The error, in the other view, is in making the purchase a part of the fraud, instead of the object and consequence of it. All the books concur in placing the avoidance of the contract on the ground of actual fraud practised in procuring it. And, as between persons standing upon an equal footing, and holding as to each other no relation of influence or trust, all authorities, when they speak clearly on the subject, regard it as essential to actual fraud that the intent to mislead should be acted out by false representations, contrivances, or artifices, or by conduct which reasonably involves a false representation. The rule is proved by the exceptional cases, where special confidence is reposed and influence presumed. Here the law interferes, though there be no actual fraud. * * * There must have been actual artifice, intended and fitted to deceive, before a man can claim that he has been defrauded."

It is necessary to consider the reasons given by Judge Selden, in Nichols v. Pinner, and by Judge Lowrie, delivering the opinion of the majority of the court in Smith v. Smith et al., for holding that a person who induces another to let him have goods on credit, by concealing an intent not to pay for them, is not guilty of a fraud in a legal sense. The reasons given by Judge Selden are, that, as an intent to overthrow the government is not treason, and an intent to commit any other crime is not a crime, so a mere intent to commit a fraud is not the commission of a fraud; that the vendee, intending at the time of the purchase never to pay, may change his mind, and pay the price when it becomes due, and is *in loco penitentiæ* until he does some act in furtherance of the intent; that the purchase of goods is a lawful act, and the validity of the purchase cannot be affected by the mere mental state of the purchaser. Are these reasons sufficient? If one does only that which is lawful, the law does not generally take notice of his intention; but an act, lawful when done in good faith, with an honest purpose, may be unlawful when done in bad faith, with a dishonest purpose. The law, in many cases, takes particular notice of the knowledge, intent, and state of mind with which an act is done. The purchase of goods is, in general, a lawful act; but the purchaser's knowledge that the goods were stolen by the person of whom he buys them, may be a very material fact. 1 Hale P. C. 620. Upon a question of unlawfulness, and even of criminality, the intent of the owner of goods to part with the ownership, or only with the possession of them, is often decisive. Mowrey v. Walsh, 8 Cow. 238; State v. Watson, 41 N. H. 533. The purchaser's knowledge of the seller's intent to delay, hinder, or defraud his creditors may vitiate the sale, and deprive the purchaser of property for which he has paid the full value. Robinson v. Holt, 39 N. H. 557. The validity of a purchase may be affected by the mere mental state of the purchaser.

The substance of a contract is a mutual understanding, existing in fact or in contemplation of law. A contract of sale, from B. to A., completely performed, is their mutual understanding, executed by the delivery of the goods and the payment of the price. The understanding is, that A. is to acquire the possession and ownership of B.'s goods, and to pay for them. Without a mutual understanding that A. is to pay for them, there is no sale. If both parties understand there is to be no payment, the transaction is a gift, and not a sale. If B. understands there is to be payment, and A. understands there is to be no payment, it is neither a sale nor a gift, and the title does not pass, because there is no mutual understanding, unless a case of estoppel can be made out by one party against the other. When A. so conducts as to intentionally cause B. to understand that A. is a purchaser, or, in other words, that the transaction is a sale, he necessarily causes B. to understand he intends to pay, because a sale or purchase necessarily implies payment or an intent to pay. If he acts in bad faith, intending never to pay, and therefore the understanding is in fact not mutual, still B. could maintain an action on the contract, because A. would be estopped to deny that his understanding and intent were what he induced B. to understand they were. Having, by his words or conduct, wilfully caused B. to believe the existence of a certain state of facts, and induced him to act on that belief so as to alter his previous position by parting with his goods, A. is concluded from averring against him a different state of things as existing at the same time. Davis v. Handy, 37 N. H. 65, 75. This estoppel

B. may set up against A. But he is not obliged to set it up. He may take the ground that, there being in fact no mutual understanding, no meeting or agreement of minds, no harmony of intention, no joint assent to the same thing, there was no contract. And when he takes that ground, it may be said that the validity of the sale is affected by the mere mental state of the parties, or it may be said that there was no sale to be affected by the mental state of the parties. In this analysis, the entire contract falls to pieces and disappears, and the transaction, resolved into its original and real elements, becomes a wrongful and fraudulent conversion of B.'s goods by A. And when B. may allege that the contract or the debt was created by the fraud of A., he may sustain his allegation by proof of facts which would show that by reason of A.'s fraud there would have been no contract and no debt, if B. had chosen to take that ground.

The intent to commit a fraud is not the commission of a fraud; but when A., in the assumed character of a buyer, *animo furandi*, obtains goods of B. on credit by the concealment of such a material fact as an intent not to pay—a fact peculiarly within his own knowledge, and impossible to be discovered by B.—the fraudulent part of the transaction cannot be reduced to the fact concealed, the intent not to pay. The concealment of that fact is fradulent. B. has lost his goods: that is a serious part of the business. They have been taken from him with an agreement on his part to give time for payment: he cannot, in an action on the contract, recover their value till that time has passed: that time was obtained from him by A. for the purpose of gaining a position of safety and defiance by so disposing of the goods (and his own property, if he had any exposed to attachment) that B. could never recover his goods or their value. This is another practical matter, of no little importance. The fraudulent part of all this cannot be called a mere intention or state of the mind. The condition of both parties is substantially changed by means of the fraudulent concealment. B. has lost his goods, and A. has obtained them without any valuable consideration. Not only has B. lost them, but, if he is held to his agreement to give credit, he has lost them irrevocably; for it must be presumed that A. will avail himself of his advantage, and use the time of so-called credit for the purpose for which he obtained it. No one in B.'s situation would regard A.'s fraudulent design as wholly unexecuted; and if the law says it is wholly unexecuted, there is something singular in legal language or in legal ideas. If the law holds B., during the period of credit, utterly helpless, it not only allows A. to rob B., but gives A. time to make off with his booty after the robbery is discovered. An intent to obtain goods by a pretended purchase and not to pay for them, is a mere operation of the mind, that for inoffensiveness may be classed with an intent to overthrow the government. But actually obtaining goods, under the false pretence of a purchase, with intent not to pay for them, taking them from their owner by an intentional concealment of the real character of the transaction, *animo furandi*, is as far from being a mere naked, unexecuted design, as levying war is from being a mere emotion.

An intent to commit a fraud is not a fraud committed; but the question is, whether obtaining goods and credit under color of a pretended purchase by concealing an intent not to pay for them is a fraud committed, or whether in such an affair there is nothing fraudulent but an unexecuted intent to commit a fraud. If the intent not to pay were the only fraudulent intent, it might be claimed that the only intended fraud would not be committed till the time of payment arrived. But the fraudulent design of which B. complains is the intent of A. to get goods without payment, and by fraudulent concealment. That intent is executed the moment A. gets the goods. No overt act remains to be done by him to complete the artifice practised upon B. The expiration of the time of credit is not an overt act of A., or an execution of the entire fraudulent intent. By what A. does during the time of credit, he does not obtain the goods or the credit, nor induce B. to enter into a contract of sale, but merely fortifies himself against B.'s legal remedies. The intent not to pay is a material fact, by the concealment of which he induces B. to part with his goods on credit. And it is only by confining the dishonest design to the intent not to pay at a future time, that the fraudulent intent can be said to be unexecuted when the goods are obtained. But the fraudulent design is not merely negative,—not to pay at a future time; it is also affirmative,—to obtain the goods and the credit by the concealment of the material fact of the intention not to pay. This concealment is not a mere fraudulent intent: it is the execution of a fraudulent intent and the commission of a fraud, if a fraud can be committed by the concealment of a material fact. At common law, a fraud may be committed by the omission to disclose a material fact under some circumstances. Hanson v. Edgerly, 29 N. H. 343; 2 Kent's Com. 482–492, 513, 514. If the owner of goods desires to get rid of them without payment, he gives them away, or throws them away, or destroys them. Payment is his object in selling them. And, payment being the whole of the contract which he desires the vendee to perform, what fact can be more material than the vendee's intent not to pay, comprehending not only an intent not to try to pay, but also an intent to try not to pay? Whether the vendee's intent not to pay is a material fact, and whether it is so peculiarly within the vendee's knowledge (Hoitt v. Holcomb, 32 N. H. 202–206; Page v. Parker, 40 N. H. 71), and so peculiarly beyond the vendor's knowledge and means of information that the vendee's omission to disclose it is a concealment of it, may be questions of fact which the vendee might ask a jury to pass upon. But they are questions of such a nature that he must be presumed to waive them unless he distinctly raises them. What circumstance, then, is wanting to bring the case within the principle that a fraud may be committed by an omission to disclose a material fact?

During the time of credit, is the vendee *in loco penitentiæ?* When one fraudulently obtains goods on credit by a false representation, he is not *in loco penitentiæ*. The vendor may get his pay if he will wait; but he is under no obligation to wait, because, the contract of sale and credit being fraudulent on the part of the vendee, the other party is not bound by it. By what legal distinction is the vendee *in loco penitentiæ* when his fraud is concealment, and not *in loco penitentiæ* when his fraud is misrepresentation? If the vendor is not bound by his agreement in the latter case, how is he bound in the former. If, at the time A. converts B.'s goods to his own use, he discloses to B. his intent never to pay for them; if a future time of payment is agreed upon, both parties understanding that payment is never to be made; if B. relies upon A.'s changing his mind, paying for goods which by the agreement he is not to pay for, and turning a gift into a sale,—A. will have the agreed opportunity for changing his mind. But when he has obtained the goods by fraudulently inducing B. to believe he intends to pay for them, and fraudulently concealing his intent not to pay, and then claims a time in which to elect whether he will repent or not, he can maintain his claim only on the ground that, by a contract binding on the other party, he was to have such a time. The contract, induced by his fraudulent concealment, is in no part binding on the other party. Moreover, by what stipulation was the peculiar privilege *loco penitentiæ* secured? When B. alleges the validity of the contract, and claims payment before it is due, A. may defend on the ground that the action is premature. But when B. alleges that the debt was created by fraud, and A. claims, not that the action is premature and the debt not due, but that he is *in loco penitentiæ*, he claims that which would be a consequence of the contract being valid. The contract is what the parties mutually understood: B. understood that he gave A. time. Time for what? For payment, or for avoiding payment, or for repenting of a resolution not to pay? That is a question of fact which A. would not ask a jury to settle. B. did not undertake to give A. time to live, or time to do nothing, or time to do anything in general. He agreed to give A. time, in a certain sense, and for a particular purpose; and that purpose was an opportunity to carry out the intent to pay, which had no existence. B. understood the time was for payment; A. understood it was for avoiding payment; neither of them understood it was for repenting. A. caused B. to understand that the time was for payment, and to act upon such an understanding in the belief that it was mutual, and A. is estopped to deny that it was mutual. And the law cannot apply the penitential theory to such a case without altering a fraudulent contract, making it, in an essential and vital part, what neither of the parties understood it to be, and enforcing it upon the defrauded party. Even if the law were to make the contract for the parties, it would make a reasonable one, consistent with the sense of business men, the interests of trade, and the welfare of society. And it would not be reasonble to require B. to wait for a possible favorable result of a possible working of A.'s conscience, which he did not agree to wait for. In a practical mercantile view, the chance of A.'s improving the opportunity, as he intended, would be entitled to as much consideration as the prospect of his unintended reformation.

The reasons given by Judge Lowrie, in the opinion of the majority of the court in Smith v. Smith et al., are, in substance, the same as those given in the opinion of Judge Selden, in Nichols v. Pinner. They are all based on the proposition that a mere fraudulent intent is not a fraud—a proposition that does not cover the case of obtaining goods and credit by the fraudulent concealment of a material fact. In the former opinion it is said, that it is no more fraudulent to have an intent not to pay, at the time of the purchase, than at the time when payment ought to be made; that such an intent is no more fraudulent in an insolvent, than in a perfectly solvent man; that the act of purchase cannot be a part of the preceding fraud necessary to invalidate the purchase; and that the intent to defraud must be acted out by false representations, contrivances, or artifices, or by conduct which reasonably involves a false representation. The mere intent not to pay, separated from everything else, and considered by itself, without reference to any accompanying motive, word, or act of omission or commission, may be no more fraudulent in a legal or moral sense, at one time than another. But, while such an intent, coming into existence in A. after a real purchase, does not induce B. to make the contract of sale, the deceitful concealment of the fact of such an intent existing at the time of a pretended purchase, by which A. induces B. to part with his goods on credit, possesses every essential, moral, and legal element of fraud. The solvency or insolvency of A. may be evidence on the question of his intent; but his fraudulent intent and his fraudulent concealment of it are equally fraudulent, whether he is solvent or insolvent. No other preceding overt act than a fraudulent concealment of a material fact is necessary to constitute fraud. When the intent not to pay is concealed, the intent to defraud is acted out. The mere omission of A. to disclose his insolvency might not be satisfactory proof of a fraudulent intent in all cases. He might expect to become solvent. He might intend to pay all his creditors. He might intend to pay B., though unable to pay others. His fixed purpose never to pay B. is a very different thing from his present inability to pay all or any of his creditors. A man may buy goods, with time for trying to pay for them, on the strength of his own or inferred disposition to pay his debts, his habits, character, business capacity, and financial prospects, without his present solvency being thought of, and even when his present insolvency is known to the vendor. But who could obtain goods on credit with an unconcealed determination that they should never be paid for? The concealment of such a determination is conduct which reasonably involves a false representation of an existing fact, is not less material than a misrepresentation of ability to pay (Bradley v. Obear, 10 N. H. 477) and is an actual artifice, intended and fitted to deceive.

An application for or acceptance of credit, by a purchaser, is a representation of the existence of an intent to pay at a future time, and a representation of the non-existence of an intent not to pay. What principle of law requires a false and fraudulent representation to be express, or forbids it to be fairly inferred from the acts of purchase? A representation of a material fact, implied from the act of purchase, and inducing the owner of goods to sell them, is as effective for the vendee's purpose as if it had been previously and expressly made. If it is false, and known to the pretended purchaser to be false, and is intended and used by him as the means of converting another's goods to his own use without compensation, under the false pretence of a purchase, why does it not render such a purchase fraudulent? When the intent is to pay, it is necessarily understood by both parties, and need not be expressly represented as existing. When the intent is not to pay, it is of course concealed. Whether the deceit is called a false and fraudulent representation of the existence of an intent to pay, or a fraudulent concealment of the existence of an intent not to pay, the fraud described is, in fact, one and the same fraud. A man obtains goods on credit by fraudulently representing (that is, fraudulently causing their owner to understand) that he intends to pay for them; or, he obtains them by fraudulently concealing his intent not to pay for them; —if he obtains them in either way, he obtains them in both ways. In the instructions given to the jury in the present case, the question was presented as one of fraudulent representation. It seems to be immaterial, in such a case as this, whether the question is left to the jury as one of fraudulent representation, or of fraudulent concealment; and the instructions, in any view to which our attention has been called, do not appear to us to be erroneous.

Judgment on the verdict.

LEGAL GAZETTE.

Friday, October 3, 1873.

JOHN H. CAMPBELL,
EDITOR.

We have received from the publishers, during the last few weeks, a number of volumes of recent law books, but have been unable, through press of business and other matters, to properly notice them. We hope to be able to do so in our next issue.

CHARLES J. BIDDLE.

BAR MEETING.

On Tuesday, at noon, a meeting of the bar was held in the Supreme Court Room, to take action upon the death of Hon. Charles J. Biddle. It was very largely attended, and among those present were the following distinguished gentlemen: Justice Sharswood, Judges Cadwalader, Thayer and Ludlow, Ex-Chief Justices Thompson and Woodward, Ex-Judges Findlay and Parsons, Hon. Peter McCall, William L. Hirst, Esq., United States District Attorney William McMichael, United States District Attorney Valentine, and many others.

At twelve o'clock Ex-Chief Justice Woodward moved that the meeting come to order, and proposed as president Hon. George L. Sharswood, and as secretaries William McMichael and George M. Dallas. The motion was agreed to.

Judge Sharswood on taking the chair, said:

JUDGE SHARSWOOD'S ADDRESS.

GENTLEMEN OF THE BAR: We have been called together on this occasion to pay a tribute to the memory of one of our associates who has just passed from us. It is always sad at these meetings, and of late they have been recurring very, very frequently, both as to the younger and the older members of the profession. The deceased, Colonel Biddle, whose loss we are now deploring, has been for a number of years withdrawn from active practice; we have not seen him much in our court rooms, but there are none of us who knew him, I am sure, but did not appreciate his character. He had inherited talent and cultivation that made him a fine scholar. He was fully read up in all the literature of the English and other languages; he was a gentleman of the most polished manners, one of the most agreeable conversationalists that I have ever met; he was a brave man, not physical courage only, which nobody ever for a moment doubted he possessed, but that which is higher, moral courage. He could not only have faced a regiment of men in the field, but he could have faced popular opinion, if he was satisfied that his judgment was right before the whole community; a man without fear, because he was without reproach. To lose such a man from our midst is a great loss, and I hardly know how to express the feelings with which I came to this meeting. Perhaps I should end here. I have said as much as ought to be said by a presiding officer, and the meeting is now open and the chair ready to receive any resolutions that may be offered, and entertaining remarks that may be made.

Addresses were then made by R. C. McMurtrie, Esq., and Wm. A. Stokes, Esq.

Mr. Peter McCall then offered the following resolutions:

Resolved, That we have learned with great sorrow of the death of Charles J. Biddle, a member of the bar, a man who filled various public stations in military and civil life with distinction, and was possessed of a character for courage, fidelity to duty, courtesy and gentleness that endeared him to all with whom he was connected.

Resolved, That a committee of seven be appointed by the chair to communicate this resolution to the family of Mr. Biddle, with the expression of our sincere sympathy with them in their affliction.

MR. MCCALL'S ADDRESS.

In seconding these resolutions, Mr. Chairman, I am sure I but express the sense of the whole bar, when I say that the decease of Mr. Biddle may be regarded as a public calamity. The loss of one so pure, so noble cannot but be deeply felt by this community. If I were called upon to sum up in a few words the striking characteristics of Mr. Biddle, I should say he was a man for an emergency. If an enemy were at the gates, he is the man under whom I would like to serve. With a courage hereditary, as has been said, and with courage directed by superior intellect, prudence, moderation, wisdom in counsel and energy in action, he was the man of all others in whom public confidence could be reposed in any public emergency. Sir, this lion-hearted man, as has been said, was gentle as he was brave; kind, amiable, courteous, tender hearted, true as steel and faithful to his friends. He was a man, sir, that it was impossible not to respect, to admire; nay, more, sir, to love, and his loss, I am sure, will be as deeply felt by this community as it is by every member of this bar. He was a man of the highest probity, a true man, a lover of his country, a lover of its institutions. He helped, as has been said, to plant the flag of his country on the heights of Mexico, in those memorable battles which preceded the final result—Contreras, Chapultepec, Molino del Ray and Cherubusco, where he was distinguished by his gallantry, earning the highest applause of his senior officers—the same which he displayed in our unfortunate civil war, where he again offered his sword to his country. But, Mr. Chairman, not only had Mr. Biddle military talent, but I conceive he was a man of very fine talent, a high order of ability, a man who could grasp a subject and see the merits and points of the case or question presented to him as quickly as anybody, and arrive at as accurate a conclusion. He was a scholar, a ripe scholar, and a thorough gentleman. His scholarship was more than ordinary. He was a graduate of Nassau Hall, and that was the scene of my first connection with him; and, mark me, Nassau Hall will set him down among her distinguished children.

He was a man of fine literary tastes, a man of great reading, extensive reading—as an English scholar there were very few superiors. You could see that in his style. And besides, he was a very effective speaker; he showed that in the halls and on the floor of Congress, where he made a very distinguished mark. He was a forcible and effective speaker, and he was a clear, concise, and most effective writer; he handled the pen as well as he did the sword. I believe, sir, that as my friend, General Stokes, has said, if he had confined himself to the bar, he would have been a very distinguished lawyer; but his taste led him in other channels. It led him, finally, to another sphere of usefulness no less important, perhaps more extensive than the bar—I mean the conduct of the press, that mighty engine for good or for evil, which in this country more than in any other, exercises a powerful influence upon the public mind. How vast are the responsibilities of leaders of the press, the educators of the public mind, the moulders of public opinion, and the trainers of the thought of the country? The temptation I know is very great, very great to pander to popular prejudice, and to sacrifice the everlasting truth to popularity; that is the great temptation which the leaders of the press have to undergo; but Mr. Biddle never yielded to the temptation. He was always true to the line of duty, always the advocate of truth as he understood it to be, always aiming high and holily, endeavoring to elevate the standard of private and public morals. While he frankly and bravely advocated the opinions of the political party to which he was attached, he was always courteous to his opponents, and, as my friend has just said, the general applause which has been elicited is the best testimony in this respect.

I say the loss of such a man as this is a public calamity, and it is impossible for us to permit such a man as this to pass away, because his reputation is a part of our reputation. The press claim him, he did honor to them; and we also claim him as a member who has done honor to the bar. I say it is impossible that such a man should pass away without some manifestations from those who were connected with him, w'n we think under what circumstances he has passed away, cut down, snatched from us in the very bloom of his manhood, in the midst of his usefulness, with apparently many years before him. Little did I think when I met him a few days ago, and I seemed likely to pass away before him, that I should be called upon to pay this feeble tribute to his memory.

What an impressive lesson it should teach us, what a solemn and impressive lesson does it teach us, about the shortness and uncertainty of human life. Two or three days ago Mr. Biddle was apparently in ordinary health and in the vigor of his mind, and now to-day he is dead. Sir, this teaches also, a warning to be ready for that summons, the coming of which we know not the day or the hour.

JOSEPH A. CLAY'S ADDRESS.

MR. CHAIRMAN: I have but little to say, indeed, nothing but to tell of one trait which, in my own experience, illustrated the character of Colonel Biddle. I need not divert to allude to the differences which grew between men of the same profession, who were formerly friends, arising from the civil war, and I need not recall the time when the men who formerly clasped hands in friendship, but w were during the war opposed in opinio but the incident I am about to relate is lesson to us, and now that both of t parties have gone from us, I can det it without any breach of courtesy or friendship. It so happened that after t close of the war, when feelings were b ginning to subside, I was surprised o day by a visit from the late Hora Binney, Sr., who came to say that he h something on his mind, and you all kn what a Christian he was, under which could not rest without coming to s whether I could not put him right. I said that during the course of the war, could not tell whether he had stopp speaking or had broken off intercour with Colonel Biddle, or whether Colon Biddle had chosen to break off the inte course with him, but that he considered his duty to reconcile the matter; if I wou only go to Colonel Biddle and find o how the case stood, and say that he w sincerely sorry that all intercouse betwe them had been broken. I accepted t office, but did not intend to go to Colon Biddle for that special purpose, althoug I meant to speak of the matter the fir moment I met him. I did meet him o day in the Law Library, and the cordiali and gentleness and good feeling with whi he embraced the offer, and the affectiona and cordial recognition of those two me in consequence of his conduct, struck n as a noble example to all others, who u happily had broken off the ties of frien ship in consequence of our great nation calamity. It is to the honor of Colon Biddle to tell with what joy and heart good feeling he embraced the overtur and the beautiful spirit in which M Binney made it.

HON. M. RUSSELL THAYER'S ADDRESS.

Mr. Biddle was very much withdraw from the bar by circumstances which le him into other pursuits. The announc ment of his death was received, I am sur with profound and most universal regr by our profession; for he was a man t purity of whose life was manliness of cha acter, whose accomplishments reflecte honor upon the bar, and whose engagin manners and whose manifold resource and accomplishments very fervently a tached him to all his friends. He was all the relations which he filled in life t type of a pure and noble character. H was a brave and gallant soldier; he w a good lawyer, and an accomplishe scholar. He was able and generous, a was a firm and true friend.

In his political life he was honest. H was fair and he was impatient at falsehoo or deceit; he opposed with the force his whole nature what he conceived to b inherently wrong, and he was an open an candid adversary. In his strictures upo his opponents he took care not to tran gress what he believed to be the trut and treated every man fairly. I have right to testify to this, because I happene at a certain period of my life to occupy political position in connection with hi and I never had occasion to complain th he ever did anybody intentional injustic He was very zealous in the maintenanc of what he believed to be the truth, an in the enunciation of his own views i support of what he honestly believed t be right: but he was always fair, he wa

always an open and candid adversary, and he never resorted to any underhand practices, nor to any mean resources for the purpose of either advancing himself or his party, or decrying his political enemies or opponents.

Mr. Biddle, as I well remember, for we were about the same age, and came to the bar about the same time, gave promise in the early period of his professional experience of the very greatest success in his profession. I well remember several speeches which were made in the commencement of his career, in the prosecution of the public causes of the commonwealth, which he frequently, at that period conducted for the then district attorney, which were distinguished not only by great eloquence but by great ability and knowledge of his profession, by consummate skill in the handling of cases, and by a beautiful classic diction which gave grace and beauty to everything he uttered.

He was a man, who, in all the relations of life, might be taken as an example of a pure and disinterested character; a man of modest and retiring manners, probably more so than was for his advantage so far as regarded his success in life; a man accomplished in letters, exceedingly attractive in society, always considerate of the opinions and views of others, and very fascinating in the communication of his own. He was a man, sir, for whom no one who knew him could fail to have the very deepest respect on account of his personal character and his personal history.

Hon. Benjamin Harris Brewster's Address.

It is under the pressure of a feeling of melancholy and deep grief that I am prompted to say something before this meeting adjourns. Forty-two or three years ago Mr. Biddle and myself were students at Princeton College. We were boys together. I can recollect distinctly my impressions when he came to the college. He entered the freshman class. I was then a junior. His father then was one of the most important personages in this country, and when his son, Charles J. Biddle, came to college he was the object of universal observation and attention, because of his father's fame.

But he soon established for himself a character which overshadowed if it did not suppress the memory of his relation to his father and his father's name, and the history of his great race of heroic Americans, historic Americans.

Soon after he arrived there, by accident we became acquainted, an unusual thing in those days. I didn't know him, it is true, for I was far advanced in college, though young myself (there was a difference of only two years in our ages); and it was not the habit or the custom of boys in the upper classes to associate with those far below them. Their daily pursuits were different, as well as their studies. One of the professors, however, I think, Dr. McClure or President Cardigan, wished us to become acquainted, and thus we were brought together. Our acquaintance soon led to personal intimacy, and from that hour down to the day of his death, last Saturday, we were friends—sincere, earnest, honest friends. Never, for one moment, was the current of our friendship broken or disturbed. I left college, leaving him behind me, and I learned day by day, or certainly month by month, because Princeton was so near, how he continued persistently and steadily the character he started with, and how he improved with years and experience, and advanced in the admiration and affection of those by whom he was surrounded. He had the esteem of all. He was looked up to and respected by those far older than himself, as though he were a matured man though only a lad.

I have said that I came here with feelings of sadness. Indeed, I have felt sad ever since Saturday. A curious coincidence has happened me connected with Mr. Biddle. While sitting in my office, occupied with my business, a strange-looking person entered about the time Colonel Biddle was dying, and it seems did die. I asked him to take a seat, and desired to know his business. He sat down. He then asked me in a quiet and subdued tone, peculiar to the man, whose voice was always plaintive and touching, "if I didn't know him?" "Don't you know me?" I did not know him. "Why, don't you know me?" "No." "Am I then so much changed?" "Benny, don't you know me?" It was William McCully, an old friend, and he and I and Charles J. Biddle, were boys together. Twenty-eight years ago he was a member of this bar, having studied law with the present Chief Justice Read. He was admitted to college at the same time as myself, and came from college with me. He sought a practice here, but lost his health, and was obliged to go away. A friend of his, a very eminent gentleman, the Hon. David Kaufman, once an ambassador from Texas to this country, and afterwards the representative of Texas in Congress, came and found him in ill health and took him to Texas. While Mr. Kaufman lived, for a year or two, I learned all about him, but by and by my information ceased, and I believed him dead. I believed him dead, so that last Saturday I lost one dear friend, and there was restored to me another. Both of them were dear friends, and so you can appreciate how it was that I came to this meeting with feelings of sadness and deep depression. One was taken away, and the other was restored. The departure of the one reminded me how we must all pass away—as he passed away who started with me in life, with the exultant shouts of high-hearted boyhood; and the return of the other reminded me of the mutability of human events. The one is dead who, a few days since, was apparently in vigorous health, and the other who, because of failing health, had gone to the wilds of Texas, had there recovered strength, and turned away from his first calling to a higher one—the service of the Almighty and everlasting God. And there, in my office, a minister of the Gospel, he turned to me as a friend and reminded me of the past, and warned me to beware of the future.

Benjamin Rush's Address.

So many years have elapsed, sir, since I have had any active connection with the bar, that I assure you it is with great diffidence and distrust I venture upon this occasion to obtrude myself upon the notice of this meeting, and I purposely waited until you were about to put the question in the resolutions which have been made, lest I might chance to intefere with any other gentleman better qualified to speak. Having done so, however, I am prompted by two strong motives to ask your indulgence for a very few minutes.

Sir, I was one of those who knew and appreciated the lamented gentleman whose sudden death has cast such a shadow over us all. I knew him when he first came to this bar, and knew him afterwards when he was in Congress. I knew him when he returned to the bar, and knew him subsequently as an efficient journalist, to which allusion has already been made; and while I can add nothing to what has been said so earnestly in reference to his high character as a man and a gentleman, as a statesman and a soldier of the highest truth and honor and courage, while I can make no improvement in the eloquent and touching analysis of his character to which we have listened, and which afforded me a melancholy pleasure, still the strength of my regard for him will not allow me to remain silent.

In rising, sir, I would call attention to another among the many attractive attributes of Mr. Biddle's character, one which couldn't escape observation, but which has not yet been touched upon, and that was the strength of his fraternal feeling. It was most conspicuous, sir. I remarked it often myself, and have heard it remarked by others. You must also pardon me, sir, when I advert further to another thought present in my mind, not wholly unconnected with the object of this meeting. We stand, sir, almost in the very presence of death. It comes to all—it comes everywhere, and under all circumstances, to the young and the old, to those who occupy distinguished places in the land, and to those of obscurest place. Always and everywhere it is the same inexorable tyrant. Sometimes he lingers in the household, and sometimes he startles with a sudden stroke. We stand, I say, almost in the very presence of death to-day, and on such an occasion as this, not a great many years ago, in February, 1862, and I crave pardon for alluding to it, if not in this very room, certainly not far off, there was gathered a very large and distinguished meeting of the bar, called to pay tribute to the memory of one who, Mr. Chairman, I can at least say, was an honor to his profession—and whose highest earthly ambition was to dignify and adorn it. His death, too, was sudden. I always, since that time, intended to take the first suitable opportunity to present and tender my heartfelt and grateful thanks for what was said on that occasion, and, sir, it so happens, through a train of circumstances, that this is the first opportunity I have had to attend a meeting of the bar from that day to this. There are now in this room some who were present then, and sir, I am sure that the eminent gentleman whose death we all deplore was also present.

Upon my recent return to Philadelphia, the week before last, one of the very first of my former friends I met was Charles J. Biddle, and, sir, I was shocked with his appearance. I could not, of course, let my feelings escape my lips, but it seemed to me that death was then painted on his face.

Mr. Chairman, permit me to close my imperfect observations, by reading an article from one of the public tribunes, which was a political opponent of Mr. Biddle. The article struck me very much, and it is so well expressed that nothing can be added to it:

"'We who knew Mr. Biddle as a political adversary, can freely speak of him as a chivalric antagonist, a generous friend and an intuitive gentleman. He gave dignity to his party and to his profession. He adhered to the one in all its disasters, and seemed to honor it most when it needed him most; to the other he showed a fidelity that had in it a pride which scorned the courtier and shunned the slanderer.'"

Ex-Chief Justice Woodward's Address.

I rise to say that the words which have been uttered at this meeting should not perish, and that they ought to be preserved. I, therefore, wish some gentleman to move that a committee be appointed to publish a memorial, containing a brief memoir of the deceased, to include the utterances that have been made here this morning. I will be extremely happy to see such a memorial to perpetuate these thoughts, these words, and which I am sure would be a great solace to the friends and the family of the deceased.

Mr. Wm. L. Hirst. I make such a motion.

The motion was agreed to, and the Chairman appointed the following gentlemen as the committee: Ex-Chief Justice Woodward, Colonel J. Ross Snowden and William L. Hirst, Esq.

The question being on the resolutions, they were agreed to, and the Chairman announced the following committee which he had appointed in accordance therewith: Robert C. McMurtrie, Esq., Hon. Peter McCall, Wm. A. Stokes, Esq., Hon. Benjamin Harris Brewster, Benjamin Rush, Esq., Hon. M. Russel Thayer and Hon. James R. Ludlow.

The meeting then on motion adjourned.

Court of Common Pleas of Philadelphia.

FRICK & SNYDER v. GLADDINGS, Owners, and FRANKLIN CASSELL Contractor.

Sub-contractors filed liens against certain houses; the owner and contractor petitioned to have the liens stricken off, on the ground that under the act of April, 1872, the contractor only had the right to file a lien. The court refused the petition, because the contracts were matters for a jury and not for the court to determine.

Mechanic's lien claim.

Opinion by Finletter, J. Delivered September 26th, 1873.

The defendants filed their petition praying the court to strike off the liens.

The petitioners aver that they entered into a contract, in writing, with Franklin Cassell, for the erection of three houses, for a specific sum. That agreeably to the act of Assembly, the said contract was acknowledged before a proper officer of this commonwealth, authorized by the laws thereof, to take acknowledgments of deeds, and duly recorded within fifteen days after the execution thereof.

The act of April, 1872, is as follows: "That when any building or buildings shall be erected in whole or in part, by contract in writing, such building or

buildings and the land or lands whereon it or they stand, shall be liable to the contractor alone for work done or material furnished."

It is not contended that the liens are defective in form or substance. It is, however, argued that no right to lien existed under the circumstances in any one but the contractor, Cassell; that the plaintiffs' claims are therefore irregular and void, and should be stricken off.

It is too well established to require citation of authorities, that upon petition or demurrer the court may strike from the record mechanics' liens which are defective. The questions which are raised in such cases, are questions of law, and properly triable by the court and not by the jury.

The cases which establish the principle indicate that no question of fact can be determined by the court, and therefore cannot be determined upon petition or demurrer.

Whether the defendants contracted with Cassell in writing, and whether the contract was duly executed and recorded, and other matters, are questions of fact, not arising upon the record, which the court cannot determine, and which the plaintiffs have a right to have determined as all facts are, by a jury.

In Lee v. Burk, 16 P. F. S. 336, Justice Sharswood has carefully elaborated and discussed this whole subject in the light of all the authorities. He says: "The plaintiffs had a right to accept the issue tendered of no lien as an issue of fact, because it might well be that for some cause *dehors* the record, there was no lien, as that the claim had not been in fact filed within six months after the work done or material furnished; that the work was not done or the material furnished upon the credit of the building; that the plaintiffs had bound themselves to file no lien; or that the building was not such a one as was within the acts of Assembly; and there may be other defences coming under the same category."

Rule discharged.

LINGERFILLD et al. v. GEORGE.

An appeal from the judgment of an alderman is in time if filed on or before the monthly return day after the *affidavit and bail* are entered before the alderman.

Opinion by FINLETTER, J. Delivered September 26th, 1873.

Rule to show cause why appeal should not be stricken off.

March 24th, 1873, Judgment entered by the alderman.

April 10th, 1873, Defendant entered bail, &c., for appeal.

May 3d, 1873, Defendant filed his appeal.

It is contended in support of the rule, that as the judgment was entered March 24th, the monthly return day, next ensuing this date, was the first Monday of the following April; and that it was too late to file the transcript after that day. In other words, that the computation of time within which the appeal must be filed, should be from the rendition of the judgment.

The argument is based upon the peculiar phraseology of the act of May 1st, 1861, which is as follows: "That all appeals from aldermen, as aforesaid, shall be filed in the Court of Common Pleas of the city and county of Philadelphia, *on or before the monthly return day* in said court, next ensuing *the date of the judgment* before the alderman, instead of to the first day of the next term as heretofore."

We do not think this position well taken By the act of 1861, no appeal can be had until the affidavit has been filed. This is an additional restriction upon the right of trial by jury, and should not be allowed, by implication to destroy altogether that right, or to take away or abridge the time within which appeals under existing laws might be entered. It is not asserted that the act of 1861 in express terms repealed the act of 1823, which gave twenty days after the judgment, within which to enter bail to appeal, or that such was the object. We must, therefore, give such construction to this act as will make it in harmony with the act of 1823.

It is clear that the act of 1861 was not intended to operate upon the time in which an appeal could be taken, for upon that subject it is significantly silent. It is equally clear that its sole purpose was to prevent delay and litigation not based upon supposed right.

The first section, therefore, provides, "That no appeal shall be allowed unless the defendant shall make oath or affirmation that the same is not intended for delay, merely."

The effect of this section is to prevent any delay not meritorious. The second was designed to give and does give the litigants an earlier opportunity to have their disputes settled. It makes the return day, before or upon which the appeal may be entered, monthly instead of quarterly. It supplements and perfects the first section, and both work together to obtain speedy justice. This object is not inconsistent with the existing law which gave twenty days for appeal. Nor is it in conflict with or inimical to appeals which are not "for the purpose of delay, merely."

Rule discharged.

Supreme Court of Wisconsin.

THE STATE OF WISCONSIN ex rel. HENSHALL v. LUDINGTON et al.

1. The general power of the Legislature to prohibit entirely the traffic in intoxicating liquors, necessarily carries with it the utmost limit of legislative discretion in prescribing the conditions of sale and establishing the liabilities, both civil and criminal, of persons engaged in the trade, when it is tolerated.
2. The "Wisconsin liquor law," declared constitutional.

Opinion of the court by DIXON, C. J. Delivered September 1st, 1873.

Counsel for the respondent frankly concedes the constitutional power of the Legislature to entirely prohibit the selling or giving away of ardent or intoxicating liquors or spirits to be used as a beverage, and attack only certain provisions of the act as being inconsistent with the authority to sell conferred and repugnant to the constitutional rights of the citizen engaged in an authorized and lawful traffic and business. The point thus yielded, and as to which there would seem to be little room for controversy at the present day, of the general power of the Legislature over the subject of legislation acted upon, not only very much narrows the field of contest and investigation, but has, as it appears to us, also taken away all grounds of constitutional support for the objections specially urged against particular clauses and portions of the act. Assuming the general power of the Legislature over the subject to the extent of prohibiting entirely the traffic in intoxicating liquors or drinks, necessarily involves, as it seems to us, the admission of the utmost limit of legislative discretion in prescribing the condition of sale and establishing the liabilities, both civil and criminal, of persons engaged in the trade, in case the Legislature sees fit in any manner or under any circumstances of restriction or responsibility to authorize such sale or trade.

The law being prospective only in its operation, the legislative power to prohibit all sales must carry with it, as it seems to us, that of declaring the precise terms and conditions upon which any particular sale may take place. This would seem to be so by the familiar principle upon which the greater is always said to include the less. Possessed of the power of absolute prohibition under the constitution, it seems to follow that any relaxation from a plenary exercise of such power, or qualified or conditional enactment by the Legislature by which license to sell may be obtained in the way and subject to the liabilities imposed by the act, cannot be an encroachment of legislative authority, unless, indeed, the Legislature should transcend some settled principle of fundamental law, respecting the trial or mode of prosecution or punishment of the party charged with an infraction of the provisions of the act, or with having incurred some liability under it. Acting in obedience to those fundamental principles, in accordance with which the guilt or liability of the party charged must first be ascertained and established, and the judgment of the law rendered against him, it seems competent for the Legislature to attach such consequences, civil or criminal, to the mere act of sale as it pleases, even when such sale is made in pursuance of an authority of the Legislature qualifiedly given for that purpose. Empowered to prohibit entirely, the Legislature may license *sub modo* or conditionally only. It may affect the licensee with such restraints, conditions and responsibilities as it pleases, growing out of the act of sale. It may visit him with such consequences as it sees fit, proceeding from the same act. It may couple the license with conditions so oppressive, burdensome and unjust that no citizen can afford to apply for or accept the privilege and engage in the business, and thus the act, though nominally otherwise, may amount to a prohibitory law. These conclusions seem unavoidably to flow from the position admitted, or not denied, that the Legislature possess the unqualified power of prohibition. The Legislature may not take away the right of trial by jury, or of proceeding by due process of law to ascertain the fact of violation or liability incurred. It may not require the accused to plead guilty, to confess judgment, or to give evidence against himself. Neither may it create an arbitrary or violent presumption of guilt upon facts equally or more consistent with innocence. It may not change the rules of evidence or the burden of proof established according to the principles of the common law and secured and made perpetual by the constitution; nor destroy vested rights, or punish one man for the delinquencies or misconduct of another, or, without his consent, make him answerable in damages for the injurious consequences of the acts of another in which he had no participation, or with which he was wholly disconnected. These and other like things the Legislature may not do; but with respect of the act of sale, over which the power of legislation is conceded to be unlimited, and with respect to the responsibility which shall attach to the doing of that act or the conditions under which it may be done, the way seems open for the Legislature to enact whatsoever it pleases. As already more than once observed, this conclusion seems clearly to result from the unrestricted and arbitrary nature of the discretion vested in the Legislature in the exercise of what is termed the police power of the State. The Legislature may say to all citizens and persons within the State that they shall not sell, give away or traffic in at all as a beverage, or it may say that they may do so, being responsible for all the injurious consequences of their acts, which consequences are pointed out and defined by previous law. The power of the Legislature in this respect is like that which it possesses in creating and conferring rights and franchises upon a corporation which must be such and such only, as it prescribes. It may declare, for example, that a railway company applying for the franchise, shall be an unqualified insurer of the safety of all goods entrusted to its care. Fire, though a very useful, is at the same time a very dangerous element, and the Legislature may declare, as it has done in Massachusetts and several other States, that any railroad corporation shall be absolutely responsible in damages for any injury done to any building or other property by fire communicated by a locomotive engine of such railroad corporation. Ross v. Railroad Company, 6 Allen, 87.

And herein, as this court conceives, consists the chief defect and fallacy of the positions assumed and argued with so much ingenuity and research by the learned counsel for the respondents. They forget, as it appears to us, that the subject with which we are dealing is not one of those pertaining to the primary and fundamental rights of the citizen, and as to which no unlimited control has been vested in the Legislature. They seem to overlook this principal ground of distinction, and argue as if the action of the Legislature was an infringement of the natural and inalienable rights of the citizen, declared and guaranteed by the constitution, instead of the exercise of a discretionary power against which no limit has been set by that instrument. And this, we think, the turning point of the controversy, namely, that the Legislature may grant or withhold authority to sell at its pleasure, and granting such authority, it is held by the licensee at the mere pleasure or grace of the body granting it. It is held by him, not as a mattery of primary and absolute right, but as a favor which,

like all favors, must be received upon such terms and conditions, and subject to such burden and inconveniences as the donor thinks proper to impose and the donee elects to accept. Unlike other trades and employments which it is the right of the citizen to pursue, undisturbed by arbitrary legislative interference and control, the person who engages in this must within the limitations above indicated, do so subject to such disadvantages and restraint as may be prescribed by the law-making power which authorizes it.

It is fallacious, therefore, to argue from the incompetency of the Legislature in other cases, that there exists no legislative power to make harsh and unjust discriminations, or so enact inequitable and oppressive conditions upon a subject like this. Conceding that the operation of the law will be what counsel say, and that their criticisms of its provisions are well founded and true, still these do no annul the law or affect its validity in a constitutional sense, but only render it "void in its *obligatory quality on the mind*, and therefore determine it as the proper object of abrogation and repeal, so far as regards its civil existence." They are proper arguments to be addressed to the Legislature, but not to this court. This court must accept the law as counsel must, and as all citizens must, just as the Legislature has deemed expedient to enact it. Speaking in the sense of that "immovable principle" of natural justice which should govern all legislative bodies in their enactments, but not in that restricted sense of the constitution which leads to the disregard or abrogation of the expressed will of the Legislature by any other than the legislative body itself. It has been observed by one of the greatest statesmen and wisest political philosophers of modern times, that "in reality there are two, and only two, foundations of law; and they are both of them conditions without which nothing can give it any force. I mean equity and utility. With respect to the former, it grows out of the great rule of equality which is grounded upon our common nature, and which Philo, with propriety and beauty, calls the mother of justice.

"All human laws are, properly speaking, only declaratory; they may alter the mode and application, but have no power over the substance of original justice. * * * * * Law is a mode of human action respecting society, and must be governed by the same rules of equity which govern every private action." Burke's Works, vol VI., page 22.

If, therefore, the Legislature has exceeded the limits of natural equity by the statute in question, in imposing conditions and declaring liabilities for acts done under the license granted; if it has made the license liable for damages which are remote or consequential, when by the rules of the common law and the principles of natural justice he should only be held responsible for those that are proximate or direct; if it has made him answerable in full damages, where in truth his act was only in part, and it may have been in a very small part, the cause of the injury complained of; if it charges him with the consequences as of an act partially or wholly wrongful or criminal in its nature, but which he innocently performed; and if, in fine, the statute is justly subject to all the objections urged against it by counsel. Still the answer must be, that the remedy is of a kind which must be sought in the legislative, and not in the judicial department of the government. They may constitute the best of reasons for legislative modification or repeal, but are none whatever for arresting the operation of the law by the judgment of this court

The foregoing observations, we believe, meet all the constitutional objections which have been urged, and leave only one of that kind concerning which more particular notice and comment seem to be required. It is assumed that the law legalizes or sanctions, in an unqualified sense, the act of sale by the party who has complied with the formal requirements prescribed, and obtained a license in the manner provided for by it; and then it is argued that the Legislature has no power to inflict penalties or mulct the party in damages for the performance of a lawful act. The difficulty with this proposition is, as will be seen from the course of reasoning above adopted (if such reasoning be correct), that it assumes that to be an absolutely lawful act, which is so conditionally, or with qualification only expressly so made by the very terms of the law which authorizes the sale, it enters into and becomes a part of the license or authority to sell; that the individual accepting the same bestowed *ex mero motu* by the Legislature, takes its subject to the burdens thus lawfully imposed. The terms and conditions annexed by the law and qualifying the authority herein, and run with the license, and bind and restrain the licensee. He consents to them by accepting the license. The law is to be construed as a whole, and all its parts looked to with a view to their operation and effect on each other, conformably to the intention of the Legislature. The form of enactment, being that by way of proviso appended to the clause granting authority to sell, is such as to make the conditional nature of the license most clear and indisputable. The person or persons licensed are permitted to sell, but not otherwise than upon the conditions named in the proviso of the first section. He or they must enter into the bond therein prescribed, and submit to the obligations thereby imposed, and to the liabilities fixed and declared by the sixth section. For as we read and understand the statute, and as we think the Legislature evidently intended the first and sixth sections are to be construed together. The bond provided for in the first section is to secure the liquidation and payment of the damages recovered under the sixth. The language of both sections sufficiently indicates this, so that the sixth section, which is more specific in its terms and accurate in the definition of the liabilities imposed operates as a limitation upon the general words contained in the first, and restricts the general obligation of the bond to the class of cases or kind of damages mentioned in the sixth.

The court has thus, at the earnest solicitation of counsel on both sides, considered and expressed its opinion upon the constitutional questions presented, and argued upon the motion to quash the alternative writ of mandamus, and it has done so without first adverting to the question, preliminary in its nature, whether the case made by the petition is in any way a proper one for the application of the remedy, which question, had it first been considered, would have resulted in the decision of no other. No writ of mandamus can properly issue in such a case, as this. The licenses issued without the giving of the bond being void, of course no revocation of them by the mayor is necessary. It would be a merely idle act for him to do so, and a still more idle act for the law or this court to require it to be done. But whether the licenses are void or not, there existed ample remedy by suit or prosecution at law to test the questions and settle the controversy, which of itself is always sufficient cause for refusing the writ or for quashing it, if it has been improperly issued.

Motion to quash granted.

BAR MEETING.

At a meeting of the bar, held Saturday September 27th, 1873, the following resolution was adopted.

Resolved. That the chairman be instructed to call a general meeting of the bar of Philadelphia, to consider the propriety and expediency of forming a permanent association, to be composed of the entire bar, and to consider further the question of having such association incorporated; and that such general meeting be called by such mode of publication as he may think most suitable.

To carry out the instruction in the above, the undersigned hereby calls a general meeting of the bar at the new Court of Quarter Sessions, on Saturday, October 11th, 1873, at 3 P. M.

D. W. O'BRIEN,
Chairman.

M. THOMAS & SONS, AUCTIONEERS.

Nos. 139 and 141, late 67 and 69 S. Fourth St.

REAL ESTATE SALE, OCTOBER 7th.

Will include—

South, No. 1410—Business Stand—Three-story Brick Store and Dwelling. Orphans' Court Sale—Estate of Thomas Hassan, dec'd. Proceedings in partition.

South, rear of the above—Lot of Ground. Same Estate.

Dugan, No. 325—Two-story Brick Dwelling. Orphans' Court Sale—Estate of Richard McCunney, dec'd.

Third, (North,) No. 219—Very Valuable Business Stand—Four-story Brick Store.

Pine, No. 814—Very Elegant Brown Stone Residence, with Side Yard—44 feet front, 162 feet deep to Keble street—2 Fronts. Executor's Sale—Estate of John Eisenbrey, Esq., dec'd.

Seventh, (North,) No. 837—Modern Three-story Brick Residence.

Front, (South,) No. 957—Three-story Brick Dwelling. Orphans' Court Sale—Estate of James Peel, dec'd. Proceedings in partition.

Tenth, (North,) Nos. 249, 251 and 253—3 Three-story Brick Dwellings with 7 Three-story Brick Dwellings in the rear on Liberty court. Executor's Sale—Estate of Thomas Pratt, dec'd.

Sixth, (North,) Nos. 607 and 609—2 Handsome Modern Three-story Brick Residences. Orphans' Court Sale—Estate of Samuel B. Jones, dec'd.

Market, No. 718—Very Valuable Business Stand - Three-story Brick Store, with 2 Four-story Brick Buildings in the rear fronting on Jayne street—3 fronts.

Second, (South,) No 1615—Three-story Brick Dwelling.

Chestnut, No. 3328—Handsome Modern Three-story Brick Residence.

Bond and Mortgage, $1,000. For account of whom it may concern.

Bond and Mortgage, $1,000. Same Account.

Penn, No. 218, Camden, N. J.—Modern Three-story Brick Residence.

Tulip, Third House South of Wayne—Two-story Brick Dwelling.

REAL ESTATE SALE, OCTOBER 21st.

Will include—

Green and Johnson, N. W. Corner, Germantown—Modern Two-and-a-half-story Stone Residence.

Green, No. 1334—Three-story Brick Residence.

Bank, No. 18 - Business Stand—Four-story Brick Store.

Westmoreland, East of Twenty-first—2 Three-story Brick Dwellings.

Delaware, in the rear of the above—2 Three-story Brick Dwellings.

Market, No. 242—Very Valuable Business Stand - Four-story Brick Store.

Jacoby, No. 223—Three-story Brick Dwelling. Orphans' Court Sale—Estate of William S. Mason, dec'd.

Forty-fifth, above Silverton avenue—Two-story Brick Dwelling. Orphans' Court Sale—Estate of Valentine P. Foy, dec'd.

Forty-fifth and Silverton avenue, N. W. Corner—Store and Dwelling—3 fronts. Same Estate.

Spruce, No. 732—Very Elegant Four-story Brick Residence, with Stable and Coach House. 24 feet 9 inches front, 250 feet deep—2 fronts. Orphans' Court Sale—Estate of Huston, Minors.

Thompson, (formerly Duke,) west of Palmer—Three-story Brick Dwelling. Orphans' Court Sale—Estate of Margaret Benner, deceased.

Pine, No. 2528—Genteel Three-story Brick Dwelling and Stable. Orphans' Court Sale—Estate of Catharine Shields, dec'd.

Pine, No. 4107—Three-story Brown-stone Residence, with Side Yard. 40 feet front, 160 feet deep. Orphans' Court Sale—Estate of J. Thomas Elliott, dec'd.

Walnut, Nos. 3705, 3707, 3713 and 3715—4 Modern Three-story Brick Residences. Sale Peremptory.

REAL ESTATE SALE, OCTOBER 28th.

Will include—

Southampton avenue, Chestnut Hill—Lot. Executor's Peremptory Sale.—Estate of Owen Sheridan, Jr., dec'd.

Southampton avenue.—Lot. Same Estate.

Evergreen avenue, adjoining Fairmount Park—Large Lot, 11½ Acres. Same Estate.

Mount Vernon, No. 1623—Modern Three-story Brick Residence. Sale by Order of Heirs.

Tenth, North of Montgomery avenue—Valuable Business Location—3 Coal Yards, Large Lot.

Reed, Dickinson, Tasker and Twenty-ninth—Brick Yard, Very Desirable Building Lots. Orphans' Court Sale Estate of George M. Clark, dec'd.

West Market, West Chester, Pa.—Handsome Modern Three-story Stone Residence, 1½ Acres.

Westmoreland, East of Twenty-first—2 Three-story Brick Dwellings.

Delaware, in the rear of the above—2 Three-story Brick Dwellings.

Spruce, No. 723—Modern Four-story Brick Residence.

Ninth, (North,) Nos. 46 and 48—Valuable Business Stands—2 Three-story Brick Stores and Dwellings. Bulk windows, and all the modern conveniences. Executors' Sale—Estate of M. H. Harlan, dec'd.

Front, (South,) No. 229—Valuable Business Stand—Four-story Brick Store, extending through to Water street.

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE AMERICAN EXCHANGE BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to three million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled the INDEPENDENCE HALL BANK, to be located in Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE DRY GOODS BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE ARTISANS' BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE MARKET BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE DELAWARE RIVER BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE GROCERS' BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the conferring of the powers of a Bank of Deposit, Discount and Issue upon the Philadelphia Banking Company, incorporated in accordance with the Act of Assembly approved March 11th, 1870, and an increase of capital to five million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation, in accordance with the laws of the Commonwealth, of THE SECURITY BANK, to be located in Philadelphia, with a capital of fifty thousand dollars, with the right to increase the same to five hundred thousand dollars jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE THIRD STREET BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with a right to increase the same to twenty-five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE CHESTNUT HILL BANK, to be located at Philadelphia, with a capital of fifty thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE STATE OF PENNSYLVANIA BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to ten million dollars. jul 4-6m

JAMES A. FREEMAN & CO. AUCTIONEERS.

No. 432 WALNUT STREET.

REAL ESTATE SALE AT THE EXCHANGE, OCTOBER 15th.

On Wednesday, at 12 o'clock noon.

Orphans' Court Absolute Sale.—Ninth and Fitzwater streets. Four-story Brick Dwelling, at S. W. corner, and a Genteel Four-story Brick House on Fitzwater street, corner of Montcalm street. Lot 18 x 90 feet. Estate of Augustus Winchester, dec'd.

Orphans' Court Absolute Sale.—Lancaster avenue. Business Stand—Three-story Brick Store and Dwelling, east of Forty-seventh street. Lot 16½ x 120 feet along a 40 feet street, 27th Ward. Estate of Dennis Heenan, dec'd.

Orphans' Court Absolute Sale.—Lancaster avenue. 2 Three-story Brick Stores and Dwellings, adjoining the above, east of Forty-seventh street, each lot 16 x 120 feet. Same Estate.

Orphans' Court Absolute Sale.—Silver Ground Rent $40 per annum, well-secured and promptly paid out of lot Lombard street, east of Fifth street. Irredeemable. Estate of Lavinia Sheed, dec'd.

Orphans' Court Absolute Sale.—Ground Rent, $60 well-secured and promptly paid, Lot Morris street west of Fifth street. Same estate.

Orphans' Court Absolute Sale.—Dauphin street. Three-story Brick Dwelling, east of Sixth street, 19th Ward. Lot 15 x 64 feet. $105 Ground Rent. Estate of Mary Pfeiffer, dec'd.

Orphans' Court Absolute Sale.—No. 525 S. Nineteenth street. Three-story Brick Dwelling and Lot 15 x 55 feet. Estate of Margaret E. Gordon, dec'd.

Peremptory Sale.—No. 1004 Brown street. Three-story Brick House, and Lot 16 x 62 feet. Sale by Order of the Devisees of Jenkins P. Tutton, dec'd.

Executors' Absolute Sale.—Hamilton street. Two-story Brick Factory Building and Valuable Lot 40 x 100 feet to Lynn street, east of Twenty-third street, 15th Ward. Estate of Fleetwood Lodge, dec'd.

Executors' Absolute Sale.—Camden, N. J. Large Lot of Ground fronting on Jackson and Webster streets, west of Broadway, South Camden, 120 x 191 feet. Same Estate.

No. 3407 Walnut street.—Handsome Modern Three-story Brick and Brown Stone Residence, with back buildings, west of Darby road, 27th Ward. Lot 20 x 140 feet. Has every convenience. $6,000 may remain.

No. 2124 Vine street.—Handsome Three-story Brick Dwelling, with brown stone dressings, has back buildings, and every convenience. Lot 18 x 102 feet. $5,000 may remain.

Fourth and Morris streets.—Business Stand—Three-story Brick Drug Store and Dwelling, at N. E. corner. Lot 18 x 40½ feet. Has the modern conveniences and is in good order.

Fourth street, Nos. 2003, 2005, 2007 and 2011.—Four Neat Three-story Brick Dwellings, above Norris street, 19th Ward. Lot 16 feet front, and from 40 to 60 feet deep. Will be sold separately.

FOR SALE.—10 Acres, containing 700 feet, River front, on Front street, South Ward, Chester, Pa., adjoining Delaware River Iron, Ship and Engine Works, an excellent location for a Ship Yard. Also several Desirable Building Lots, 300 feet square, in South Ward, and the Borough of South Chester.

Apply to

A. J. REES,
P. O. Box 221, Chester, Pa.

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FOR SALE.—Elegant Private Residence, 408 South Ninth street, below Pine, four minutes' walk from Chestnut street. Conveniently situated for any one in business near the centre of the city. House in thorough repair every way, with every modern convenience—Large Saloon, Drawing Room, Stationary Wash Stands in every chamber, good Heaters—Fine large kitchen, Stationary Stone Wash Tubs, Baths and Water closets on 2d and 3d floors.—House in thorough order. Can be bought low, if applied for soon, on terms to accommodate. Apply to

J. M. GUMMEY & SONS,
mar 1 No. 733 Walnut street.

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OFFICE AND BURGLAR-PROOF VAULTS IN

THE PHILADELPHIA BANK BUILDING.

No. 421 CHESTNUT STREET.

CAPITAL, $1,000,000. PAID, $600,000.

FOR SAFE-KEEPING of GOVERNMENT BONDS and OTHER SECURITIES, FAMILY PLATE, JEWELRY, and other Valuables, under special guarantee, at the lowest rates.

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NORTHERN DISTRICT.
U. S. Circuit Court of Ill.

SCAMMON v. KIMBALL, Assignee of the Mutual Security Co.

1. A claim against an insurance company for loss under its policies, *held* in this case not to be a set-off against an unpaid subscription to its capital stock.
2. Though the charter of the company only required the stockholder to pay in a part of his subscription, the balance was in the nature of a trust fund, for the creditors of the company.
3. Though in a solvent company the debts might be considered mutual and the set-off allowed, the fact of insolvency changes the rule.
4. A stockholder coming into equity for relief, should first do equity by making good his share of the capital stock. Lawrence v. Nelson, 21 New York, 158, approved.
5. Though the bankrupt law recognizes rights of set-off, it was not intended to enable one occupying a fiduciary relation, to take advantage of the bankruptcy of the company.
6. Set-off cannot be allowed except between parties sustaining the simple relation of debtor and creditor. And this principle applied to the case of a treasurer of an insurance company.

Geo. W. Smith and *Samuel W. Fuller*, for complainant.

The transaction with complainant was a loan to him. The charge for interest and its payment, the method of depositing and calling for moneys, &c., are all of the character which dealings between borrower and lender naturally and usually bear. No trust attached to the moneys in the hands of borrowers. Prior to the year 1870, and to his appointment as treasurer, complainant stood as any other person to the company, competent to contract with it, and to become a borrower of its moneys. The office of treasurer only required him to keep the custody of moneys which came to him as treasurer. It did not prevent him from becoming either a debtor or creditor of the company.

The present relations of the complainant and defendant are the result of an agreement made by the company when solvent, and to this agreement all the officers and stockholders of the company were parties. The policyholders who are now creditors of the company have received or are about to receive, the gains which accrued from it, and the complainant should not be excluded from the privileges which belong to a borrower of money having a cross-demand.

He holds these moneys under an agreement to pay interest, which fact constituted him a debtor of the company, and gives him the right to make this set-off upon the principles established in the case of Drake v. Rollo, Assignee, &c., heretofore decided by the court.

Williams and *Thompson*, for assignee.

The evidence of an arrangement or contract was incompetent, having no tendency to establish a contract of loan. Directors, when assembled, must act as a body, and conversation among them is no evidence of their action. Butler v. Cornwall Iron Co., 22 Connecticut, 335; Essex Turnpike Co. v. Collins, 8 Massachusetts, 298; Bank of Columbia v. Patterson's Adm'r, 7 Cranch, 299.

The charter of the company forbids the loan of the capital stock of the company, except upon security. The contract, therefore, which the complainant attempts to establish, is forbidden by law, and is void.

For some general principles applicable to the construction of charters, see Commonwealth v. Erie & N. E. R. R., 27 Pennsylvania, 339; Plank Road Co. v. Douglass, 9 N. Y. 444; Bank of Augusta v. Earle, 13 Peters, 587.

Charters of corporations are strictly construed by the courts, and no powers are held to be granted by them, except those expressly given, or such as clearly exist by necessary implication. The mode of using the capital of the company is determined by the charter. If the transactions in reference to the funds of the company, amount to a loan to one of the directors, without any security whatever, and without any stipulation as to time, then there was a violation of the charter, the contract was void, and the fund was still the fund of the company, in the hands of a director, not invested by contract of loan or otherwise.

Directors of corporations are agents and trustees, and their contracts with the corporation are regarded with disfavor, and scrutinized with jealousy and suspicion. The strictest proof of the fact of the contract, and of its fairness and justice is required. The fund which was taken by the complainant was a trust fund for the payment of the debts of the company. It was charged with this trust before it was taken, and it could not be divested of it by the manipulations of the complainant. Curran v. Arkansas, 15 Howard, 304; Wood v. Dummer, 3 Mason, 308; Voss v. Grant, 15 Massachusetts, 505; Spear v. Grant, 16 Id. 9; Nathan v. Whitlock, 3 Edwards' Chancery, 228; S. C., 9 Paige, 151; Richards v. Insurance Co., 43 New Hampshire, 263; Koehler v. Iron Co., 2 Black, 715; Robinson v. Smith, 3 Paige, 222; Charitable Corporation v. Sutton, 2 Atkyns, 404.

When it was reported to the stockholders and to the public that these funds were "in hand" or "in bank," the stockholders and the public had a right to assume and believe that so much, at least, of the company's assets were available for the payment of liabilities without set-off, defalcation or discount of any kind; and when they are sought to be charged with a set-off by one of the largest creditors, and one occupying the most intimate relations to the company, the transactions by which such a state of things is brought about, are, in law, fraudulent, and cannot be sustained.

One holding a position of trust cannot use it to promote his individual interests by buying, selling, or in any way disposing of the trust property. Butts v. Wood, 37 New York, 317; Coleman v. Second Avenue R. R., 38 Id. 201.

One occupying the double relation of manager and crediter of a bank, cannot bind the bank by any act of his concerning his own funds. Claflin v. Farmers' Bank, 25 New York, 293.

As to the effect of the relation of a director to the corporation upon contracts made by him with his company. Stacy v. Bank of Illinois, 4 Scam. 91; Benson v. Hearthorn, 1 Young & Collyer, 329.

A treasurer is a trustee in the strictest sense of the term, and trustees cannot borrow the trust funds. Perry on Trusts, § 453, and cases cited in Note 9; Ex parte Lacey, 6 Vesey, Jr., 626; Pocock v. Redington, 5 Id. 799.

George W. Smith, in reply: The power of the directors was limited only by their discretion in the performance of their duties. Session Laws of Illinois for 1853, p. 394, § 4.

The non-recorded acts of a corporation may be proved by parol, and it may be bound by an implied contract, provided such act is within the scope of its authority. Abbott's Digest of Corporations, 223 and 281; Maher v. Chicago, 38 Illinois, 266; Langsdale v. Borton, 12 Ind. 467.

The company had power to make this contract. "The capital * * * may be loaned upon promissory notes or bills of exchange, or otherwise, not having more than twelve months to run." Session Laws of 1853, p. 396, § 13.

That the evidence of indebtedness in the form of a note is wanting is not material, the essential thing being the personal responsibility of the borrower. The account kept by the company with the complainant was a sufficient compliance with the law, and, further, the words "or otherwise," warranted a lending in the manner now in question.

Directors are not, by reason of their office, incapacitated from dealing with the corporation as individuals. The same rules apply here that apply to trustees purchasing of the *cestui que trust*. Perry on Trusts, § 183, and cases cited.

And the trustee may purchase from the *cestui que trust*, provided there is a distinct and definite contract, and one in which there is no fraud and no advantage taken. Tiffany v. Bullard; Beeson v. Beeson, 9 Penn. St. 280; Davon v. Fanning, 2 Johnson's Ch. 252.

None of the cases cited by the defendant on this point militate against the position assumed by complainant.

The stockholders repeatedly applied the interest moneys, derived under this contract, as dividends upon the stock notes, and recognized the agreement in every way in which it was possible so to do.

The case of Dogget v. Rollo, assignee, &c., recognized the equitable claim of the complainants in that case, although one of them was at the time the chief officer of the company. His appointment as treasurer made no change in law in the position of complainant under the contract, as it made none in fact.

If there were any disabilities resting upon complainant, the stockholders might, and did, waive them.

The opinion of the court was delivered by DRUMMOND, J.

This was a bill in equity to claim a set-off against certain demands of the assignee of the company. The debt sought to be set off arose as follows: At the time of the fire in Chicago, on the 8th and 9th of October, 1871, the plaintiff held several policies of insurance against the company, as indemnity for loss by fire. He sustained loss to a large amount, which, it is conceded, was within the terms of the policies, and for which the company is liable. This and other losses at the same time, rendered the company insolvent, and it was shortly after put into bankruptcy by its creditors. The assignee, while admitting the liability of the company, denied that the debt could be set off against the demands of the company, and filed a cross-bill asking for a decree against the plaintiff for these demands. They were two, and the first arose as follows: The charter of the company authorized the subscribers to the stock, to pay a small per centage of their subscriptions in money, and to give notes with real or personal security for the remainder, and declared that when $50,000 of the capital stock was subscribed, and five per cent. paid, and the remainder secured, business could be commenced. The plaintiff was one of the original subscribers for a considerable amount of the stock and paid in one instalment, and gave promissory notes to the company, secured as required, for the remainder. This has never been wholly paid by the plaintiff, and at the time of the decree of bankruptcy, he was indebted to the company for a part of his subscription to the stock.

The other demand was as follows: From the organization of the company,

in 1864, the plaintiff had been a director and a member of the executive and financial committee, and one of its chief managers. After the stock was subscribed and a portion of it paid, the plaintiff proposed to take the amount, hold it subject to call, and pay interest at ten per cent. This offer was never distinctly and in form accepted by the board of directors, but the plaintiff being a banker at the time, held the money, and interest was credited on the sum total. The act and the result seem to have been acquiesced in by the directors and by the company for some years. There were other assets which appear at first to have been paid to the treasurer or secretary, and deposited to the credit of the company in the Mechanics' National Bank, of which the plaintiff was president. The money in his hands was used as required. In 1868 a further call was made on the stock subscription, and afterwards, what was obtained, as well as other funds, appears to have been deposited in the Mechanics' National Bank to the credit of the plaintiff. There was always a treasurer of the company, and in 1870 the plaintiff was elected treasurer, and re-elected in 1871, and was treasurer at the time of the fire, October 8th and 9th, 1871. In 1870, the plaintiff objected to paying ten per cent. interest. No distinct action was taken on this. After he was elected treasurer, the money of the company was permitted to remain in his hands as before, by general acquiescence. There was credited to the company each year, at first ten per cent. interest, and for the year ending July 1871, eight per cent There was nothing on the books of the company to show that the money was loaned to the plaintiff, but they contained reports made from time to time, with interest credited. The books and reports, and indeed all the records of the company, treated the money in the hands of the plaintiff as stock or cash assets, or cash in bank, and after September, 1869, all money was charged to the treasurer. At the time of the fire the plaintiff had in his hands, under the circumstances above mentioned, the sum of $39,188.33, belonging to the company.

It was claimed by the plaintiff that at the time the funds of the company were thus in his keeping, in consequence of losses, he had made considerable advances to the company to enable it to pay the same.

The first question is, whether the plaintiff, has the right to set off his losses under policies of the company against his subscription to the stock. In one sense, what the plaintiff owes to the company on his stock is a debt due the company. What the company owes the plaintiff on his policies of insurance, is a debt due the plaintiff. The debts are mutual, in that they exist from one to the other reciprocally. And if the debt due from the plaintiff were an ordinary debt, then, as we have already decided in the case of Drake v. Rollo, assignee, the set-off would be allowed, although the result would be to pay the plaintiff his claim against the company in preference to other creditors. We are to apply the bankrupt law to the law of the State creating the corporation. The charter authorized the company to commence business on the payment of five per cent. of the amount subscribed, provided the payment of the remainder of the stock was secured.

The purpose of this was to accommodate the stockholders, by permitting secured promises to pay to stand in the place of the money. It was still intended as a fund to protect the creditors of the company, and the charter pointed out the special manner in which the fund could be made available in case of necessity, and which has been followed in this case. So long as the company was solvent there might not be any serious objection to the stockholder insisting that his loss on a policy should be an answer to a call to pay his subscription to the stock, because if he were to pay his subscription, the company would be obliged immediately to refund to the extent of the loss. In that case no one is injured by the allowance of the set-off. But where the company is insolvent and bankrupt, it is different. Some one must sustain a loss, and the question is whether the stockholder who has not paid his stock subscription, and who happens to have a policy on which the company is liable shall bear his share of the loss, or shall be paid in full to the extent of his subscription. Does the fact of insolvency or bankruptcy make no change in the rule? We think it does, and that there is a difference in principle between the two cases. We have the right to judge of causes from their effects, and to reason accordingly, and certainly we ought not to sanction a rule which produces so much loss to the general creditors of the company, unless by following a different course we trench upon some settled principles of law or equity. Where a party borrows from the capital of the company, takes out a policy, sustains a loss, and in case of insolvency and bankruptcy, claims to set it off, we admit it, because he is an ordinary debtor of the company, and therefore comes within the rule that one debt answers another, however hard it may occasionally be, and doubtful on general principles of ethics. But in this case the plaintiff is not an ordinary debtor of the company. The charter has permitted him to retain a part of the capital of the company, and hold it in trust for the creditors. And, it seems to us, that to allow him, under the circumstances of the case, to pay himself in the way he seeks for his losses under the policies, would enable him to take advantage of his fiduciary relations, and obtain a preference over the other creditors, not warranted by the equitable principles of the bankrupt law, and contrary to the manifest intent of the charter of the company.

In a court of equity, as a set-off may be allowed which is not sustainable at law, so we suppose, though generally equity follows the law, there may be a set-off, technically good at law, which, owing to the relations of the parties, may not be admissible. In this case the plaintiff comes into a court of equity for relief, and we think he should first do equity by making good his share of the capital stock, on the strength of which the company obtained its credit, and were enabled to start in business. This has become equity, because he is in one sense a trustee of that fund, and because, further, the company is insolvent and in bankruptcy.

Some very late English authorities were cited by the plaintiff's counsel, which it is insisted are decisive of this case in favor of the set-off.

The first was—In re Duckworth, 2 Law Reports (Chancery Appeal Cases). 1866-7. It is difficult to comprehend this case fully without an examination of the various statutes referred to. The party had subscribed for certain shares of stock in a company; he was also a creditor. The company was wound up under a special statute. Afterwards the party made an assignment for the benefit of his creditors, which was registered in bankruptcy. The question was between the representative of the company, under the winding-up act, and the trustees, under the bankruptcy registration, as to the right of the latter to set off the debt from the company to the party, against calls for the subscription, and the court held that the set-off was allowable, on the ground apparently that the case was one of ordinary mutual debts, and so within the statute in bankruptcy as to set off. It was admitted that if the court of chancery, as such, had been adjudicating the case, that the set-off would not be allowed, because the true construction of the winding-up act cut it off.

But treating it as a court of bankruptcy, and not as a court of equity, and independent of the differences between that case and this, the reasoning of the court is not very satisfactory. The judge merely says, it is his opinion that there would be a set-off under a particular section of the statute.

The other case is In re Universal Banking Corporation, 5 Law Reports (Chancery Appeal Cases), 492—1869-70—and is similar to the first and relies upon it.

So far as these cases show that a subscriber to the stock of a company may set off a demand due from the company against his subscription, under the circumstances set forth, there may be certain analogies between those cases and this, though the debts are treated throughout as ordinary debts, and no consideration seems to have been given to any relation of trust existing between the parties. And besides, as already intimated, there are various statutes referred to, which may have more or less affected the views of the court. The winding-up act seems to concede that the principle of set-off, in case of contribution, is wrong, as it prohibits it.

These cases were both decide after the passage of our bankrupt law, and therefore could not have entered into the consideration of the law maker. But there are some decisions in this country which do not agree with the principle of those late English cases.

It seems to be admitted by the counsel of the plaintiff, that in the case of mutual companies, so called, the rule did not apply of allowing set-off. One case may be referred to—Lawrence v. Nelson, 21 New York R. 158—where the party had given what is termed a "premium note," and had sustained a loss—one a debt due him from the company, the other by him to the company, and he sought to set off his claim on the policy against his premium note, and the court held that this could not be done in that case, because the note constituted a part of the capital of the company, and in case of insolvency to suffer it to be done, would be giving one creditor an unfair advantage over another.

The bankrupt in this case was called a mutual company, though technically a stock company, but we are somewhat at a loss to understand the alleged difference between the two cases; it is true we can call one a joint stock company and the other a mutual company, but names do not change things. In both the "bills payable" constitute a part of the capital of the company, and a trust fund for the benefit of creditors. In both the party owning the bills receivable has met with a loss on a policy of the company. The difference, if any, seems to be in favor of the premium note as claiming a set-off, because that is given for the policy, and by a species of arrangement stands indirectly as a part of the capital, whereas here the bills receivable have to be treated directly as a part of the capital, and were given with that special purpose.

It seems to us that the argument of the court in the case of Lawrence v. Nelson, applies to this case.

It is said that the bankrupt law has not taken away any of the rights of set-off, but has recognized and enforced them. That is so, but the bankrupt law was not intended to encourage anything inequitable, or to enable one to take advantage of the bankruptcy of an individual or of a company, to obtain payment in full, while others could only have a pittance, and especially when those seeking the advantage occupied relations of trust.

It follows, from what we have said, that we are of opinion that the plaintiff has not the right in equity to set off his losses on the policies against his liabilities for the payment of the stock of the company. We think that the obligation of every person who subscribes and owes for stock in such a company as this, is, in case of its insolvency, to pay what he owes for the benefit of the creditors.

The other question is as to the equitable right of set-off of the claims under the policies against the funds which the plaintiff held as the treasurer of the company.

Here the position of the plaintiff was unquestionably that of trustee. The only point is whether that was changed by the contract, or, rather, understanding of the parties. It may be admitted that the fair inference is that the plaintiff had the right to use the money, because the payment of interest implies that; but it is impossible to consider this part of the case fairly, without bearing in mind the peculiar relations of the parties to each other. If the plaintiff had authority to employ the funds, as treasurer, he was obliged to have them always ready to answer the necessities of the company. He was still, as to them, a trustee, and not an ordinary debtor of the company. It was the case of a trustee using trust funds with the consent of the *cestui que trust*, but always on the condition that they were to be so used that he could meet the object of the trust.

The evidence shows that at the time of the fire the plaintiff had in his hands the funds of the company. It was as treasurer. Having met with losses on his policies, he claims the right, so to speak, of sequestering the funds in his hands as treasurer to answer his losses

as a general creditor of the company. If we concede this may be permissible in case of an ordinary debtor, we think it would not apply to one occupying the situation of the plaintiff. He would be receiving the obligations of the company upon different terms from an ordinary policyholder, and he would occupy a vantage ground over others.

There are several difficulties in the way of a set-off on the special facts of the case. The plaintiff was elected treasurer in 1870. Whatever arrangement was made, if at all, was prior to that time. The most that can be said is that after he was elected treasurer, the funds in his hands, while they were, from time to time, reported as cash or capital, drew interest, which was accounted for, and this with the acquiescence of those who may be presumed to represent the company. There was no distinct contract made with him while he was treasurer, which would constitute him the debtor, and nothing more, of the company.

The plaintiff was not only the banker of the company, but its treasurer, considered as sustaining those relations to the company pertaining to the office. It is very clear that whatever may have been the view of the plaintiff, the directors and the company did not regard the plaintiff as the mere borrower of the funds in his hands, and before a set-off would be admissible as between the company and its treasurer in case of the insolvency or bankruptcy of the former, there ought to be satisfactory evidence that he, as to the money, had taken the position of an outside party; in other words, that he had, as to the money, ceased to be the treasurer of the company.

We need not refer to the question, whether if it was a loan to the treasurer by the directors, it was a violation of law, and therefore invalid. We prefer to place it on the ground that under some of the conceded facts of the case, the set-off is not maintainable, unless there is established the simple relation of debtor and creditor. This, we think has not been done, and therefore we overrule the claim of set-off.

The original bill will be dismissed, and a decree will be rendered for the assignee on the cross-bill for the amount due.

U. S. Circuit Court, Dist. of Massachusetts.

WALTER BENN et al. v. CARLOTTA LECLERQ AND ARTHUR CHENEY.

A person who deposits in the copyright office the title of a drama not original with himself, cannot secure such title to the exclusion of others who have applied such title to a dramatic composition founded on the same story, before the date of such deposit. *Int. Rev. Rec.*

This is a suit in equity to restrain the defendants from the infringement of the plaintiffs' copyright by representing a play called "The New Magdalen." The title of the play copyrighted by the plaintiff was in these words: "The New Magdalen, a drama in a prologue and three acts, adapted from Wilkie Collins' celebrated novel of the above title, by Walter Benn, author of sundry dramatic works, and with directions, casts of characters, &c." It appeared in defence that Wilkie Collins, a celebrated English author, had made and published a novel with the title of "The New Magdalen," and it was alleged that at the time of the deposit of title by the plaintiff, Mr. Benn, he had composed a drama under the same title, partly adapted from the novel so far as it was published, and partly anticipating the novel when the novel should be published. It was proved that before the deposit by Mr. Benn of the title, Mr. Collins had gone far in the completion of this drama.

There was a hearing on Thursday afternoon on a motion for a temporary injunction, when the decision was reserved. The judge has now denied the motion. He said that the plaintiff by his copyright secures only the dramatic composition of which he is the author. He could not prevent others from composing or publishing a similar book on the same subject, provided that they did not pirate from his book, but relied on their own intellectual and mental powers. It was clear that Mr. Benn could not be the originator of the title of the drama complained of. It was not original with him as a product of his own mind, nor as the title of a drama, Mr. Collins having applied it to an original drama before the plaintiff deposited it for copyright. The judge referred to the case of Osgood v. Allen, recently decided in the district of Maine (3 Official Gazette of Patent Office, 124). He, however, said that cases might occur in which a title would be protected independant of the contents of the book. But they would not occur under the copyright laws, but under the common law provisions, which protect the stamp put on goods offered for sale, the protection being analogous to that granted in case of trademarks. But no such state of facts existed in this case as that the court would prohibit the use of the title on this ground.

Opinion by SHIPLEY, J., May 17th, 1873.

In this case a bill in equity was brought to enforce rights claimed by the plaintiff, Mr. Benn, under a copyright. On the 28th of February, 1873, he deposited with the Librarian of Congress the title of a drama substantially in these words: "The New Magdalen, a drama in a prologue and three acts, adapted from Wilkie Collins' celebrated novel of the above title, by Walter Benn, author of sundry dramatic works, and with directions, casts of characters, &c." This is the title. It is not "The New Magdalen" alone, but it is the whole title as filed and recorded. By this deposit, undoubtedly Mr. Benn would have secured the dramatic composition bearing the title he had deposited so far as it was original with him, provided he subsequently complied with the other provisions of the statute requisite to be performed to perfect the copyright. But in securing this product of his mind, the dramatic composition of which he is the author, he secures that only. And the rule applied in this court in numerous cases applies here also. He secures only that which was his own. He cannot prevent others from composing or publishing a similar book on the same subject, provided that they do not pirate from his copyrighted book, but rely on their own intellect and mental power.

The rule is familiar, and the present case forms no exception to it. The complaint sets forth that defendant not only acts and represents a drama with the same title, but that it contains the same cast of characters, and that this cast is secured to him by the copyright. There is no evidence of this, for there is no evidence of the cast of characters of the complainant's play, and no evidence that complainant's play has ever been performed at any place where defendant could have seen and copied it.

It appears in defence that Wilkie Collins, a celebrated English author, has made and published a novel under the title of "The New Magdalen." And at the time of the deposit of title by Mr. Benn it is claimed that he had composed a drama under the same title, partly adapted from the novel so far as it was published, and partly anticipating the story of the novel, where the novel was not published. It was proved that before the deposit by Mr. Benn of the title, Mr. Collins had gone very far in the completion of this drama. It is clear, then, that Mr. Benn cannot be the originator of the title of the drama complained of. It was not original with him as a product of his own mind, nor was it original as the title of a drama, for it was applied to an original drama by Mr. Collins before Mr. Benn deposited it for copyright. The case, then, presents this simple question: Can a person who deposits in the copyright office the title of a drama not original with himself, secure to himself such title to the exclusion of others, who have applied such title to a dramatic composition, founded on the same story, before the date of such deposit? The statement of the proposition is its refutation. In Osgood v. Allen, 3 Official Gazette, Patent Office, p. 124 (the case on the proprietorship and use of the words "Young Folks," as a title or part of a title to a magazine or newspaper), this court held as follows, and it sees no reason to change or reverse the doctrine there affirmed. It must not be understood that the court will not protect a title in any case. Cases may occur in which a title would be protected independently of the contents of the book. But they would not occur under the copyright laws. They would occur under the common law provisions, which protect the stamp put on goods offered for sale, and the protection would be analogous to that granted in case of trade marks. In that case it must be shown that the defendant has pirated an original title, the product of the copyrighter's, not a title taken from a composition of the same class or character to which another author had already appropriated it. Now Mr. Collins cannot be charged with piracy of the title in this case, for he had used it as a title for a novel, and a drama before Mr. Benn conceived the idea of depositing it for copyright. No such state of facts as that under which the court would prohibit the use of the title exists here. The dramatic composition of plaintiff has not been represented. It follows from this that the injunction must be denied.

Recent Decisions.

NEW HAMPSHIRE.

[Head notes of decisions of Supreme Court of New Hampshire to appear in Vol. 52, N. H. Reports. By courtesy of John M. Shirley, Esq., State Reporter.]

PLUMBER v. CURRIER et al.

Independent admissions may be shown in evidence, though made in the course of negotiations for a reference or compromise of a dispute;—thus: on the trial of a dispute as to whether certain premises were held by the plaintiff or the defendant under an agreement to pay rent, or otherwise, an offer by the defendant to refer the question of how much the plaintiff should pay as rent was properly received.

Whether unthreshed wheat and oats are provisions, within the meaning of the statute exempting property from attachment, is a question of fact for the jury (Ladd, J., dissenting).

Where a good verdict can be concluded by the court from facts specially found by the jury, it will be done, and judgment entered accordingly.

BASCOM v. MANNING et al.

In an action of assumpsit brought to recover damages for a breach of warranty in the sale of a lot of cotton, it appeared that the plaintiff had pleaded the facts upon which his right of action depended in defence, *pro tanto*, of a suit brought against him for the price of the cotton, by the present defendants in Massachusetts; that he afterwards suffered judgment to go against him by default in that suit, offering no evidence in support of his plea. *Held*, that he was not estopped by the record and proceedings in Massachusetts from maintaining the present action.

DAVIS v. GILLETT.

As a general rule, a sum of money in gross, stipulated to be paid for the non-performance of an agreement, is considered as a penalty or security for the payment of such damages as the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party. It will be incumbent on the party who claims to recover the sum as liquidated damages, to show that they were so considered and intended by the contracting parties.

A., by his bond, acknowledged himself to be "holden and firmly bound" to B. "in the sum of one thousand dollars." The condition of the bond was that A. should not engage in a specified business within a certain time and place.

In the absence of any evidence concerning the intention of the parties, it was *held* that the sum of one thousand dollars was to be regarded as a penalty, and not as liquidated damages.

WOODWARD et al. v. SHERMAN et al.

A., B., and C. entrusted with D., a dealer in horses, one horse each, belonging to them individually, to be sold. D. sold the three horses together to the defendants, on credit, for $650,—no separate price being made for either of them in the trade. The three individual owners afterwards joined in an action of assumpsit against the purchaser to recover the price. *Held*, that the action could not be maintained.

LEGAL GAZETTE.

Friday, October 10, 1873.

JOHN H. CAMPBELL,
EDITOR.

L. HORACE PAULY, ESQ.

A large meeting of the members of the bar was held in the Supreme Court, Wednesday, October 8th, 1873, to take action in relation to the death of L. Horace Pauly, a young member of the bar, who died on Sunday evening last.

John B. Gest, Esq., occupied the chair, and John M. Ridings and Wm. Henry Lex, Esqs., were selected as secretaries.

Edwin L. Abbett, Esq., presented the following resolutions:

Whereas, By the hand of Divine Providence we have been bereft of our brother member, Louis Horace Pauly, Esq.

Resolved, That we lament his decease, and sincerely feel that in his death the bar of Philadelphia has sustained the loss of one who, though young, had, by his varied and thorough acquirements in classical and legal learning, united with strict integrity and Christian piety, already won the love and confidence of all who came in contact with him, and who, had he lived, would not only have cast a lustre upon the bar, but served as a worthy example to his brethren.

Resolved, That a committee of five be appointed to communicate the foregoing resolutions to the bereaved family of our deceased brother.

Appropriate addresses were delivered by F. A. Osborne, Franklin Swayne, Jerome Carty, Alexander R. Cutler, and H. G. Ward, Esqs.

A committee which included the officers of the meeting was appointed to communicate the resolutions to the family.

On motion adjourned.

THE ALDERMANIC SYSTEM IN PHILADELPHIA.

Speeches in the Constitutional Convention of Pennsylvania upon the proposition to abolish the system and introduce minor courts.

Mr. Cuyler. Even if the proposed change involved all that the gentleman from the city (Mr. Hanna) has just said, it would be a wise economy in the city of Philadelphia. Even if it involved the necessity of providing court rooms and all the machinery of courts, in the dollar and cents point of view it would be a large saving to the city; by which I mean simply to say that no effort upon the part of the authorities of this city has ever been able to compel an honest return from the magistracy of this city to the treasury of the city. I mean to say that the money that is withheld from the treasury of the city by the petty magistracy of the city would more than cover all the expenses to which the gentleman alludes, even if he were correct in supposing that it was necessary to incur such expenses; but it is not necessary to incur them. There is no more need that the city should provide court rooms for the magistrates contemplated by this section than there was that it should have provided them in times past for the aldermen, or that it might find it necessary in the future to provide them for the aldermen, supposing the old system to be continued.

But, Mr. President, the honest truth is, that the very name of aldermen has come to be in Philadelphia almost a disgrace. There are a few men of character—a very few—among them; men of integrity and well-deserved and well-earned reputation; but that remark is not true of the mass of the aldermen; and since the Legislature has placed upon those aldermen political duties and given them the control of the registry, the frauds that have been practiced in the exercise of that power has made the whole body so odious that they are a stench in the nostrils of the citizens of Philadelphia to-day.

Now, this section provides for no material change from that which has existed before, save that, first, those who are to exercise the office will receive fixed salaries instead of being paid by fees and by a control over the penalties that are paid in for violations of city ordinances or of acts of Assembly; and, second, in that a class of men learned in the law will discharge the duties that have been heretofore discharged by the aldermen. Why should not this be the case? Their duties are judicial. They ascertain and decide questions which involve the legal rights of the parties brought before them. Can it be an objection that they are to be learned in the law? Can there be an argument made that men who are to decide legal questions, and oftentimes to decide them finally, shall be men who are accomplished in the art that they practice? I cannot conceive of any well-founded objection that could be urged under such circumstances.

As it is now, the decision of an alderman upon a question in civil practice that is brought before him amounts to nothing except simply to increase costs. Who ever heard of a case of late years before an alderman in the city of Philadelphia that was not appealed from him to the Court of Common Pleas? Where, then, was the advantage in the action of the alderman? What benefit has been derived either to the suitor or to the public by reason of the existing system? The expense of the hearing before the alderman is incurred, and uniformly the case is appealed, and then comes up saddled with these additional expenses to be paid by the suitors at last. Why is this? Simply because our aldermen are not competent for the duty they discharge. If our aldermen were men of weight, of character and of learning in the law, the people would abide by their decisions; appeals would become rare; they would more often, far than they do now, finally dispose of questions that come before them. It is therefore to get rid of that difficulty; it is to discourage appeals by providing honest and competent men to decide the cases in the court below, thus relieving the humble suitor who seeks the court of the alderman from the oppression which the costs and expenses of that court constantly involve—it is for that, largely, that this section is devised.

That is my reason for thinking it would not be well to strike from it the words "learned in the law." I think they ought to be lawyers; that there is just the same argument in favor of requiring the petty magistracy to be learned in the law that there is in requiring the superior magistracy to be learned in the law, and in some respects even more important, because the suitors in their courts are in a very large degree people of humble means, to whom costs are a serious consideration: and the fact that they can secure an honest and competent judgment upon the questions that they bring before these magistrates, and thus put an end to the controversy raised, will save them from the costs that constantly roll up if the case is appealed, and save them from the delay which that appeal necessarily involves.

I scarcely supposed, sir, that it was necessary in the city of Philadelphia to urge a reason why the existing petty magistracy of our city should be abolished, and I am most of all astonished that a gentleman like my friend who last addressed this convention, who must know, from the necessities of his position as a member of the councils of this city, how necessary this change is, should be found upon this floor advocating the continuance of the old system. Its ills have been so severe that they have demanded the constant attention of the press of our city and of our citizens at large, calling for this very reform which this section proposes. I might refer to the action of the press upon this very section. There is hardly a journal in the city of Philadelphia that has not taken occasion to commend the wisdom of it and to advocate its final adoption by this convention. So far as I am aware there is not a single newspaper in the city of Philadelphia that has urged the continuance of the old system, or advocated any such view as that which my colleague from Philadelphia has just now expressed.

I hope, therefore, that the convention will not recede from the action which was taken in committee of the whole, and that the section just as written will be adopted.

Mr. Hanna. I should like to ask my colleague one question before he closes, whether nearly all the complaints made against the aldermen of the city of Philadelphia do not originate from the fact that under the registry law they have the right to appoint the election officers?

Mr. Cuyler. No, sir; that has been an aggravation of the ills of our people, but offences quite as serious and quite as numerous were perpetrated on the part of that body before the registry law was passed. The outcry has been persistent and continued for years in our city.

Mr. Biddle. Mr. President: There is undoubtedly in this section a great deal that must commend itself to the intelligent action, and, I hope, adoption of this convention. The change by which these officers are salaried, instead of being, as now, the recipients of fees and thereby incited to foment petty litigation, is a most admirable one. So the mode of their selection, by which a choice is given to the people of the city at large to take out from among their midst officers qualified to act in this department, is, in my judgment, a good one. So, perhaps, although I have more doubt in regard to this point, their longer tenure of office. So far I am in entire accord with the section as it now stands, and were there nothing else in it, I should waive any difference of opinion on minor points and vote for it. But there is one part of it which cannot receive my assent. Undoubtedly it is very desirable to have these men learned in the law, as this section somewhat ostentatiously announces; but would they be learned in the law by being selected exclusively from the ranks of the bar? I was reminded when I read these words in the section, of what Lord Brougham once said on the floor of the House of Lords. He was referring to two dukes, one a royal duke and the other the Duke of Wellington, and he characterized them somewhat thus: "One noble duke illustrious by his great actions, and another noble duke illustrious by the courtesy of this House!" I think these magistrates would be learned in the law by the courtesy of this House, or of this section as it stands. It would be either a hospital and house of refuge for broken down men who could find no rest for the soles of their feet elsewhere, or be a school for unfledged lawyers. I prefer infinitely to take from the body of the people to settle petty disputes which have no intricacy, which require nothing for their solution but a sound, clear head, and an honest heart, men who are commonly called business men. I am satisfied that they would be the class from which these aldermen or justices of the peace should be drawn. I would not exclude a man who had been educated in the profession of the law, because that would be unwise. He might undoubtedly be ranked in the category I have endeavored to describe; but to tell the body of the petty suitors of the city, which this section does in effect tell them, that a man must have at least turned over for four or five years the pages of Blackstone, I never can endorse. I do not believe that in that way you would get the class of men who ought to be the arbitrators and mediators between the suitors who would come into these courts. I believe a little knowledge would rather induce the men so selected to take pleasure rather in the quillets and the quillips of the law than in the real merits of the case. I believe substance would be sacrificed to form. I know, and every Philadelphian knows, that we have had in our midst heretofore a class of men who discharged those functions, who were not technically learned in the law, but who yet administered the law as applicable to the disputes in their forms with great advantage to the suitors, and with credit to themselves. The names of many of them were enumerated here when the debate occurred a couple of months ago and it is not worth while to go over them now. Some of them I believe yet remain to-day to do honor to their positions.

I am for allowing just such men as we had thirty or forty years ago to continue to settle these disputes. My colleague from Philadelphia, who spoke last has detailed, undoubtedly with a great deal of truth, the defects of the present system. But they have been defects engendered by other influences than the want of acquaintance with the technical rudiments of the law. They have been engendered

by the system of fees. They have been engendered by casting upon the shoulders of these men political duties. They have been engendered to a very great extent, by the operation of the registry law which has turned into a red hot politician every magistrate in this county. They have not, in my opinion, been engendered by the want of the title of attorney at law after the name of these men.

Why, sir, what is the kind of disputes which come before these magistrates? They are generally questions of *meum and tuum*. Nine of the cases out of every ten that come under the jurisdiction of these magistrates are whether a petty debt is owed or not, whether a debt is owed upon a book account, or whether a debt is owed upon a due bill, or something of that kind; I say it with all respect to my colleague (Mr. Cuyler), who I know is earnest in this matter, and whose earnestness has great weight in my eyes, that it would not be wise to introduce the technical rules of actions to apply to this class of cases. Of course it is said that it is not proposed to do that, but what is the use of having a man before whom to commence an action on a promissory note who knows that the action is to be commenced by a writ in an action in the case sounding in tort, when all that it is necessary to know is—"did the man make the note? Is this his signature? Did he order the bill of goods? Was the service rendered to him? Is his identity established?" These are the usual questions which these magistrates are called upon to decide, and I submit that it would be a great deal wiser to allow them to be settled by the dictates of plain common sense than to run into anything like a technical system. These men, styled "learned in the law," would think it necessary to earn the title which this convention confers upon them. You would have the most technical refinement introduced where really nothing is necessary but the common judgment of a common ordinary man.

While, therefore, I am willing to retain in the section that which is valuable, I am not willing to give a place in it to that which I am satisfied not only entirely disfigures it, but which would be most unacceptable to the people. I believe, and it certainly is an argument entitled to some consideration, although it is not an argument which should be an overruling one in the consideration of any one of these questions, that by introducing such a section as this, you would array a very large body of the people against the adoption of the constitution. You would certainly array every man who has aspirations to this office who has not the qualifications which the section now repuires. You would array a very large class of people who think it unnecessary to have these disputes settled by men who are technical lawyers. It would be considered an attempt on the part of this convention, the composition of which is, to the extent of four to five, made up of lawyers, to create for themselves a class of petty offices, and while this would undoubtedly be an unjust charge, still it would have its weight in the community.

I hope for these reasons, which all have more or less value in this question, that the amendment of the gentleman from the city will be adopted.

Mr. Armstrong. I am in very strong sympathy with the purpose to be attained by this section. It is unnecessary to review the question in detail; but I will venture to remind the convention that not only the Reform Association, but the Prison Association and the papers of the city, and in fact, all who have given unbiased and unprejudiced consideration to this question, are of opinion that there is great necessity for a change in the aldermanic system in this city. I do not think it wise to limit the selection of these officers to persons who are learned in the law, and I shall therefore vote to strike out that part of the section. I think "a little learning is a dangerous thing," especially at the bar, and that lawyers who would take positions of this kind are not the persons to give dignity to the position, or to give a wise administration to the law within it. The purpose of this kind of magistracy is more analogous to voluntary arbitration, in which the arbitrators are sworn justly and equitably to try the case. Questions of law do not arise before this kind of magistracy. They are questions to be determined upon a fair consideration of facts. To leave the section as it now stands would ensure hostility from sources which the constitution ought not to encounter. With the section amended so as to leave the choice of magistracy to the citizens at large, I regard it as one of exceeding great value. I hope, therefore, that the amendment will be adopted, and that thus amended, the section will be agreed to.

TESTIMONIAL TO JUDGE NELSON.

It is already known to our readers that shortly after the retirement of Judge Nelson from the bench of the Supreme Court of the United States, the bench and bar of this State, as represented at the time at the capitol, adopted an address to him, prepared by Hon. John V. L. Pruyn; it was signed—as a general thing in open court—by the judges of the Court of Appeals, and the larger body of the judges of the Supreme, the Superior, and some of the county courts, and by the great body of the leading lawyers of the State, nearly all of whom were personally well known to Judge Nelson. Messrs. Pruyn, Wm. M. Evarts, and Dudley Burwell were appointed a committee to present this address to the judge, and were prepared to do so in a more formal manner in June, but an attack of illness from which Judge Nelson was suffering at that time prevented.

On Saturday last the chairman of this committee telegraphed a friend that he would arrive here that evening, and Judge Nelson was prepared to receive him. After a few moments spent in general conversation, Mr. Pruyn took from its case the the elegantly bound testimonial—the address being engrossed with the pen, in a style which closely resembles a fine engraving—and remarked in substance as follows:

It is my very agreeable duty, Judge Nelson, on behalf of a committee appointed by the Court of Appeals, to present to you an address from the bench and bar of your native State, on your retirement from the high judicial station which you have so long occupied to the advancement of justice, to the honor of the bench, and to the satisfaction of the country.

This address, I beg to assure you, when submitted to the Court of Appeals, was very cordially approved, and warmly responded to by Chief Justice Church, for himself and on behalf of his brethren of the bench.

My associates of the committee, Mr. Burwell and Mr. Evarts, have requested me to say how much they regret that they cannot be here at this time, and to convey to you the expression of their high respect.

Our long, and I trust I may add, our cordial relationship, as well at home in our State as at Washington, render this duty a very pleasant one to me, and I regret that circumstances as to which you have been informed, have for som time delayed its discharge. With your permission I will now read the address and the order of the Court of Appeals.

Judge Nelson said he should be happy to listen to it, and Mr. Pruyn read as follows:

To the Honorable Samuel Nelson, late Senior Associate Justice of the Supreme Court of the United States.

SIR:—Your professional brethren of the bench and the bar of the State of New York, beg leave on your retirement, after nearly fifty years of service in the courts of your native State and the United States, to express to you their warm regard for your personal character and their sense of the integrity, the learning, the usefulness, and the dignity which have marked your entire judicial life.

During this long period, you have been called upon to take part in the decision of points of great interest and delicacy, in international law, and in settling questions of profound importance in our constitutional jurisprudence, many of them under anomalous and exciting circumstances. To these we may add your patient and well directed industry, in expounding our patent laws, in passing upon questions of personal rights, and in disposing of the great mass of litigations growing out of commercial and business transactions, which uniformly pressed upon you for judicial determination. In the discharge of these duties you have at all times enjoyed the confidence of your professional brethren, of the litigants who were before you, and of the public, to an extent never exceeded by any judge who has presided in a court in which our language was spoken, or in which the great principles of constitutional liberty were respected and enforced. You have illustrated by your example that careful and discriminating integrity, and learning joined to common sense, the conceded qualities of a great judge, thoroughly harmonize with courtesy and kindness to the members of the bar, and with fearlessness and firmness in the discharge of a duty. How much you have thus made the practice of the profession in the courts in which you have presided, an agreeable duty, is impressed upon many grateful memories, and it is gratifying to feel assured that after we shall have passed away, history will preserve in its strongest colors the record of your judicial labors, and will pronounce it "well done" in the warmest terms of approval.

Our best wishes are with you in the retirement you have chosen, and our prayer to the Final Judge of all is, that your future days may be as peaceful and as happy as your past life has been useful and honorable.

We are your brethren and friends.

STATE OF NEW YORK, IN COURT OF APPEALS, ALBANY, January 28, 1873.

Ordered, That Messrs. John V. L. Pruyn, William M. Everts and Dudley Burwell be a committee to deliver to Judge Nelson the address from the bench and bar of this State, this day signed by the judges of this court.

COE'S TEN BROECK,
Deputy Clerk.

This having been done, Judge Nelson remarked how deeply he was impressed by the kindness and consideration of his professional brethren, and stated that he would at an early day communicate with the committee in writing. A copy of his letter we have been kindly furnished, in time for publication in this connection:

To Messrs. J. V. L. Pruyn, chairman; William M. Evarts and Dudley Burwell, committee.

The volume presented to me, containing the address of the judges of the Court of Appeals of the State of New York on my retirement from the bench of the Supreme Court of the United States, and which has been adopted by the Commission of Appeals, and judges of the Supreme and Superior Courts of the State, and subscribed by about five hundred leading members of the bar, among the most distinguished of the State, confers an amount of honor and regard for which I find it difficult to make any adequate acknowledgment. If I could feel that my nearly fifty years of judicial labor in the State and National Governments had earned the commendations thus bestowed, I could proudly say that every wish and resolution of my life in this respect have been accomplished. But allowance must be made for the well known generosity and magnanimity of the profession, and the affection and friendship growing out of a long official and personal intercourse. Yet this does not lessen my sense of obligation for the unusual and extraordinary tribute of affection and respect, so elaborately prepared, and which I shall preserve with gratitude and care for the remainder of my life, and leave it at last as a precious legacy to my children.

I beg to express my thanks to the committee appointed by the Court of Appeals to present the address of the bench and bar, for the civil and complimentary manner with which that duty has been performed by its chairman.

Yours, respectfully,
S. NELSON.

In the hour of social intercourse which followed the delivery of the testimonial Mr. Pruyn narrated a pleasant incident which occurred at his own house a few years ago, while Chief Justice Chase was his guest, and which, as a compliment to our esteemed "first citizen," and an honor to the late chief, we think will bear publication: Mr. P. said that in the course of

conversation in regard to the Supreme Court, he addressed his guest as "Chief Justice," when the latter pleasantly answered: "Oh, I am not 'Chief Justice'—our brother Nelson is the *Chief* Justice." How deeply the late chief regretted the retirement of Judge Nelson from the bench, were all looked up to him as the leading mind, is well known to the personal friends of both.

Supreme Court of Iowa.

PEORIA AND ROCK ISLAND R. W. CO. v. PRESTON.

1. Where an act of incorporation fixes the amount of capital stock, and the number of shares into which it shall be divided, the corporation cannot make an assessment upon the shares of a stockholder for the purpose of carrying on the general business of the company, until all the capital stock has been subscribed, unless either expressly or by implication a different intent appears in the charter or in the contract of subscription.
2. The charter of a railway company provides that its capital stock should be one million dollars, and be divided into shares of one hundred dollars each; that the persons named as corporators should be authorized to cause books to be opened for receiving subscriptions to said capital stock, to the amount of $100,000; that each subscriber at the time of subscription should pay to said commissioners the sum of five dollars on each share by him subscribed; that the corporate powers of the company should be vested in a board of nine directors, who should elect from among themselves a president and vice president, and have power to appoint a secretary, treasurer, and all other officers necessary for the transaction of the company's business; and to require such officers to give security for faithful performance of their duties; that the first election for directors should be held as soon as might be after $100,000 of stock should have been subscribed; that the directors should have power, and were required to re-open the books to fill up the capital stock, and should continue to receive subscriptions until the whole amount of such capital should have been taken; that all subscriptions to the stock should be paid at such times, and in such amounts and on such conditions as said directors should prescribe: *Held*, that the company had no power to call upon the subscribers for payments on their subscriptions, in addition to the five per cent required to be paid at the time of subscription, until the entire one million dollars of capital had been subscribed.
3. An act amending the charter of a railway company and authorizing it to construct and maintain a branch or lateral railway from some suitable point on its main line to a point named in such amendatory act, does not so change the original purpose of the incorporation, as to release previous subscribers to the stock from the obligation to pay their subscriptions.

Appeal from Scott Circuit Court.

Action to recover of defendant a subscription of five shares to the capital stock of plaintiff, amounting to five hundred dollars. The answer 1st. Denies each allegation of the petition. 2d. Avers that by the act under which said plaintiff was incorporated, passed by the Legislature of Illinois, March 7th, 1867, and annexed as an exhibit to the answer, the capital stock of said company is fixed at one million dollars, and that the directors are required to receive subscriptions therefore until the whole amount of capital stock shall be taken. That at the time the calls for payments were made by the directors as alleged in the petition, the said amount of one million dollars had not been subscribed for. Wherefore the directors had no authority under such charter to make calls for payments on subscriptions beyond five per cent. required to be paid at the time of subscription, and calls so made were null and void.

3d. That the sum of one hundred thousand dollars had not been subscribed to the stock when the board of directors was elected, nor when the calls for payments were made, therefore said calls were illegal and said election of directors null and void.

4th. Denies that due notice of any of the calls for payments was given thirty days previous to the time when either of such payments was required to be made by publication in such newspapers and for such time as said directors had determined, as required by said act of incorporation.

5th. Avers that on March 10th, 1869, after defendant had subscribed for stock, as alleged in petition, the Legislature of Illinois passed an act, a copy of which is attached to the answer, amending the act of incorporation of said company, thereby essentially changing the purpose and enterprise for which said corporation was originally incorporated, and that said company was authorized to construct a different line of railway, one terminus being fixed by said act at the city of Muscatine, and the other left indefinite. That said alteration of said charter was never assented to by defendant; but that defendant being a citizen of Davenport, was induced to subscribe for stock wholly for the promotion of the trade and prosperity of his said place of residence, by the construction of said railway from Peoria to Rock Island, and that by constructing said road to Muscatine his motive in subscribing would be defeated, &c. The other portions of the answer and the amendments thereto are not necessary to an understanding of the points ruled herein. The plaintiff demurred: "To the second section of the answer, because the subscription of one million dollars is not a condition precedent to calls for payment on stock, and because subscriptions of the entire capital is not necessary before calls can be made, unless so stated in the agreement, or in the act of incorporation. To the fifth section of answer because it shows that the subsequent act passed has only extended the power of the corporation, and not materially altered its object and intent."

The demurrer was sustained and defendant excepted. Jury trial on the remaining issues.

Verdict and judgment for plaintiff.

Defendant appeals.

Putman & Rogers, and *James T. Lane*, for appellant.

Grant & Smith, for appellee.

DAY, J.

I. We regarded as settled by the weight of authority and reason, that where an act of incorporation fixes the amount of capital stock, and the number of shares into which it shall be divided, the corporation cannot make an assessment upon the shares of a stockholder, for the purpose of carrying on the general business of the company, until all the capital stock has been subscribed, unless, either expressly or by implication, a different intent appears in the charter, or in the contract of subscription. The reasons for this rule are to our minds unanswerable. If the capital stock is fixed at one hundred thousand dollars, divided into one thousand shares, the subscriber of one share, agrees to bear the one-thousanth part of the expense incident to the enterprise. If one-half the capital stock shall be found sufficient to accomplish the purpose of the association, then his agreement is upon his share of one hundred dollars to pay fifty. If, however, an assessment can be made upon his share, and the business of the association entered upon when but fifty thousand dollars of stock is subscribed, the stockholder is compelled to bear the five-hundredth part of the expense of the undertaking. Thus a contract is enforced against him which he never executed. And the same is true if an assessment can be made when anything less than the whole amount of stock is subscribed. Besides, it is apparent that *some* amount of stock must be subscribed before assessments can be made. But if no provision is made in the charter nor in the contract of subscription, there is nothing by which this amount can be fixed, unless it be the amount of capital stock which the corporation is allowed to hold. If an assessment can be made upon any less amount than this, there is just as much warrant of law for entering upon the business of the association and making assessments upon stock when *one hundredth*, as when ninety-nine-hundredths of the stock is subscribed. Again, a person called upon to take stock in an enterprise considers the things to be done and the amount pledged to their accomplishment.

If the undertaking can be commenced before the amount designated is secured, the means of finishing what is begun may never be obtained, and the amount expended may be lost.

This whole question underwent an exhaustive discussion in Salem Mill Dam Co. v. Rosses, 6 Pick. 23, decided in 1827. We despair of being able to add anything to the reasons there assigned. See also S. C., 9 Pick. 187.

This case was followed in Massachusetts, by Turnpike Co. v. Valentine, 10 Pick. 142, in 1830; by Cabot & West Springfield Bridge Co. v. Chapin, 6 Cushing, 50, in 1850; by Worcester & Nashua Railway Co. v. Hinde, 8 Cush. 110, in 1851; by Stoneham Branch Railway Co. v. Gould, 2 Gray, 277, in 1854; In New Hampshire, in the New Hampshire Railway Co. v. Johnson, 10 Foster, 390, decided in 1855.

In Maine, in Penobscot Railway Co. v. Dummer, 4 Maine, 172, and in Old Town Railway Co. v. Veazie, 39 Maine, 571, both decided in 1855.

See also Littleton Manufacturing Co. v. Parker, 14 N. H. 543, and Contocook Valley Railroad Co. v. Barker, 32 N. H. 363.

These cases all hold the doctrine above announced, and settle the law in the three States named.

We have not been referred to any well considered case holding the contrary view.

In Hamilton & Deansville Plank Road Co. v. Rice, 7 Barbour, 158, cited by appellee, the capital stock was fixed in the charter at $26,000. but the act of incorporation provided that when $500 per mile was in good faith subscribed, and five per cent. paid thereon, the subscribers might elect directors, execute their articles, and file them in the office of the secretary, and that from that time they should be a legally organized incorporation.

The agreement which the defendant signed, obligated him to become a member of the company as soon as the amount of stock required by the act of incorporation should be subscribed, and to pay the amount of subscription when the company should be organized. Under this agreement it was very rightly held that when $500 per mile was subscribed and the company organized, the subscriber should pay the amount of his stock. This was no more than an enforcement of the agreement according to its terms.

In Rensselaer v. Wetzel, 21 Barbour, 56, the facts are somewhat different, but the whole case is based upon that of Hamilton & Deansville Plank Road Co. v. Rice, *supra*, the whole opinion upon this branch of the case being as follows: "Nor was a subscription to the full amount of the stock named in the articles a condition precedent to the recovery," citing 7 Barbour, 166.

It is apparent that as authority upon the general proposition this case is entitled to but little, if *any*, weight.

In Waterford, &c., v. Dalbiac, 4 English Law and Equity, 455; S. C., 6 Wilsby, Hurlston & Gordon, 433, the opinion is so meagre that it cannot be ascertained that it conflicts with the views hereinbefore expressed, the whole case being disposed of in an opinion of less than three lines.

In Lexington & West Cambridge Railway Co. v. Chandler, 13 Met. 311, the act of incorporation provided that the capital stock should not exceed two thousand shares; that the number of shares should be determined from time to time by the directors, and that as soon as two hundred and fifty shares should be subscribed the company should proceed to construct and open their road.

After more than two hundred and fifty shares had been subscribed, the directors voted to close their books.

This, it was held, was in effect fixing the number of shares at that already subscribed, and a subscriber to the stock was held liable.

This is fully in accord with the views before expressed, first: Because the articles of incorporation authorized the company to proceed to construct and open the road when two hundred and fifty shares should be subscribed. 2d. Under the authorized vote of the directors fixing the number of shares at that subscribed, the whole stock was taken.

In Fay's Ex. v. Lexington & Big Sandy Railway, 2 Metcalf (Ky.), 314, the capital stock of the company was fixed at one million dollars, but the charter provided that whenever stock to the amount of one hundred thousand dollars was subscribed, the company should organize *and go into complete operation*.

In an action against a stockholder on an assessment, it was held that the petition must aver the subscription of one hundred thousand dollars. This case also is in harmony with the general views here expressed.

In Kennebec & Portland Railway Co. v. Jarvis, 34 Maine, 360, the amount of stock which the corporation might hold was not fixed in the charter, but by a vote of the corporation, and this is the ground of the holding that a stockholder may be made liable before all the stock is subscribed.

In the Iowa & Minn. Railway Co. v. Perkins, 28 Iowa, 281, the general question

of a right of a corporation to collect assessments until all the stock should be subscribed was not decided, the defendant being held liable in view of the terms of his subscription.

The only case to which our attention has been called apparently in conflict with the leading case in 6 Pick. 23, is that of Schenectady Plank Road Co. v. Thatcher, 11 N. Y. 102. The opinion advances no reasoning in opposition to the Massachusetts cases which it seems to misapprehend, and from the facts of which it seeks to distinguish the cases in hand. We feel warranted, therefore, both from authority and reason, in holding that where an act of incorporation fixes the amount of capital stock which a corporation may hold, no assessment can be made upon the share of a stockholder, until all the stock is subscribed, unless a contrary intention appears, expressly or by implication, either in the charter or the contract of subscription.

II. The next question which presents itself is as to the proper construction of the charter. Does it contain anything evincing an intention that assessments may be made upon the shares before the subscription of all the capital stock? Section three of the charter provides that the capital stock of the company shall be one million dollars, and be divided into shares of one hundred dollars each.

Section four of the act provides that the persons named as corporators shall be authorized to cause books to be opened for receiving subscriptions to said capital stock, to the amount of one hundred thousand dollars; that each subscriber, at the time of subscription, shall pay to said commissioners the sum of five dollars on each share by him subscribed; and that when the directors of said corporation shall have been elected, the commissioners shall deliver to them the amount of money received, and the books and papers belonging to the company.

Section five vests the corporate powers of the company in a board of nine directors, and provides that they shall elect from themselves a president and vice president, and shall have power to appoint a secretary, treasury and all other officers deemed necessary for the transaction of the business of said company, and to require such officers to give security for the faithful performance of the duties of their office.

Section six provides that the first election for directors shall be holden as soon as may be after the said one hundred thousand dollars of stock shall have been subscribed.

Section seven of the charter is as follows: "The directors shall have power and are hereby required to re-open the books to fill up the capital stock of said company, and shall continue to receive subscriptions thereof until the whole amount of such capital (not subscribed before said commissioners) shall have been taken; and shall also receive subscriptions to the additional capital stock of said company, should the same be increased by said directors, pursuant to the authority herein given, at such time and places as the directors may deem expedient; and all subscriptions to the stock of said company shall be paid at such times, and in such amounts, and on such conditions as said directors may prescribe, under the penalty of the forfeiture of the stock, and all previous payments thereon; and they shall give notice of the payment thus required, and the place where, and the time when the same are required to be paid, at least thirty days previous to the time when said payment shall be required to be made, by publication in such newspaper, and for such time as said directors shall determine."

These are all the provisions of the charter affecting the question under consideration. They contain nothing, it seems to us, evincing an intention that assessments may be made before all the capital stock is subscribed. The commissioners were authorized to open the books and receive subscriptions to the amount of one hundred thousand dollars, thus taking the initiatory steps towards the organization of the corporation. The charter requires five per cent. of the subscription to be paid at the time of subscribing. It would be manifestly inexpedient to allow these commissioners, without any bond for the faithful performance of their duties, to take the entire subscription of one million dollars, and receive five per cent. thereon, amounting to fifty thousand dollars. Prudence, and even necessity requires some organization of the company before all the capital stock was subscribed. Hence the charter provides that when one hundred thousand dollars shall have been subscribed, directors shall be elected, who shall select from their number a president, and vice president, appoint a secretary and treasurer, and require them to give bonds for the faithful discharge of their duties. The charter requires these directors to re-open the books, and to continue to receive subscriptions until the whole amount of capital stock, not subscribed before the commissioners, shall have been taken. This duty is specifically enjoined upon them." A failure to perform it is a failure to observe the positive requirements of the charter. This section contains nothing authorizing an assessment until all the capital stock is subscribed. True, it provides that the subscription shall be paid at such times, and in such amounts, and on such conditions as the directors may prescribe. But this evidently means that when the company has so far complied with the conditions of its charter as to be entitled to subscriptions, then the directors may prescribe the times and amounts and conditions of payment. It surely does not mean that, notwithstanding the requirement that the directors shall re-open the books and continue to receive subscription until the whole amount of stock is taken, they may nevertheless refuse to do so, enter upon the construction of the road, and assess the shareholders to the full value of their shares. And yet it *does* mean this or no authority is conferred to assess until all the stock is subscribed. But two limits upon the authority of the board of directors, to do everything necessary to the accomplishment of the objects of the corporation, can legally be deduced from the charter. The one is when one hundred thousand dollars of stock is subscribed. The other is when *all* the stock is taken. There is no logical ground upon which the authority can be claimed to arise at any intermediate point. The former limit nullifies the provisions of the section *requiring* the directors to re-open their books and fill up the stock. Such construction is not admissible. It follows, therefore, that the latter is the true limit. There is nothing at all unreasonable in this construction. One million dollars of stock is certainly not a very extravagant sum for the building of ninety miles of railroad, when it is borne in mind that almost, if not quite, that sum would be necessary for the ironing of the road alone. Nor does this instruction place any impediment in the way of corporations. It is quite easy for them to provide that operations shall begin, and assessments shall be made when any given amount of stock shall have been subscribed.

But when the charter is silent upon the subject, the court cannot establish an amount and say that when that is reached, the liability of shareholders shall attach. Such a course would be found to be as impracticable and unsatisfactory in its execution, as oppressive and unjust in its results. Courts enforce contracts, but do not make them. The charter construed in Salem Mill Dam Co. v. Ropes, 6 Pickering, 23, was in all essential respects like the one involved in this case.

Our conclusion is that the charter does not confer authority to make assessments upon the shares of the stockholders until all the stock is subscribed, and that the demurrer to this portion of the answer was improperly sustained.

III. The amendment to plaintiff's charter set up in the fifth section of the answer authorizes plaintiff to construct and maintain a branch or lateral railway, from some suitable point on its main line, to a point on the Mississippi river opposite the city of Muscatine, in Iowa. It does not essentially change the original purposes of the incorporation. The incorporation is not relieved from the necessity of building a railroad from Peoria to Rock Island, as originally contemplated. The amendment merely confers enlarged powers and additional privileges upon plaintiff

That it is not of such a character as to exonerate a subscriber to the stock from his obligation, the authorities cited in the brief of counsel abundantly show. See Barrett v. Alton & Sagamon Railroad Co., 13 Ill., 504; Peoria and Oqualoka Railroad Co. v. Elting, 17 Ill., 429; Sprague v. Illinois Railroad Co., 19 Ill., 17; Illinois Railroad Co. v. Zeinmer, 20 Ill., 654. The demurrer to this portion of the answer was properly sustained.

If under this charter the coporation should undertake the construction of a lateral branch largely increasing the cost of the enterprise, and bearing an undue proportion to the original undertaking, they might be enjoined from so doing at the suit of a stockholder. And if such design should be accomplished, a stockholder might be released from liability. But the mere conferring of authority to build a lateral branch, without more, which is all that appears in this case, should not, in our opinion, have that effect.

Other alleged errors, in the admission of evidence and the giving of instructions, were assigned and argued, but it is believed that the views herein expressed render a separate consideration of them unnecessary.

For the error before alluded to, the judgment is reversed and the cause remanded.

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Green, No. 1334—Three-story Brick Residence.

Bank, No. 18 Business Stand—Four-story Brick Store.

Market, No. 242—Very Valuable Business Stand—Four-story Brick Store.

Jacoby, No. 223—Three-story Brick Dwelling. Orphans' Court Sale—Estate of William S. Mason, dec'd.

Forty-fifth, above Silverton avenue—Two-story Brick Dwelling. Orphans' Court Sale—Estate of Valentine P. Foy, dec'd.

Forty-fifth and Silverton avenue, N. W. Cor.—Store and Dwelling—3 fronts. Same Estate.

Spruce, No. 722—Very Elegant Four-story Brick Residence, with Stable and Coach House. 24 feet 9 inches front, 250 feet deep—2 fronts. Orphans' Court Sale—Estate of Huston, Minors.

Thompson, (formerly Duke,) west of Palmer—Three-story Brick Dwelling. Orphans' Court Sale—Estate of Margaret Benner, dec'd.

Pine, No. 2528—Genteel Three-story Brick Dwelling and Stable. Orphans' Court Sale—Estate of Catharine Shields, dec'd.

Pine, No. 4107—Three-story Brown-stone Residence, with Side Yard. 40 feet front, 160 feet deep. Orphans' Court Sale—Estate of J. Thomas Elliott, dec'd.

Walnut, Nos. 3705, 3707, 3713 and 3715—4 Modern Three-story Brick Residences. Sale Peremptory.

Fourth and Master, N. E. Corner—Business Stand—Two-and-a-half-story Brick Tavern and Dwelling, and a Genteel Three-story Brick Dwelling, No. 1405 North Fourth street, adjoining the above.

Fifteenth, (South,) No. 1210—Three-story Brick Dwelling.

Fifth, (South,) No. 915, Camden, N. J.—Three-story Brick Dwelling.

Frankford road, No. 961—Business Stand—Three-story Brick Store and Dwelling.

REAL ESTATE SALE, OCTOBER 28th.

Will include—

Southampton avenue, Chestnut Hill—Lot. Executor's Peremptory Sale.—Estate of Owen Sheridan, Jr., dec'd.

Southampton avenue.—Lot. Same Estate.

Evergreen avenue, adjoining Fairmount Park—Large Lot, 11½ Acres. Same Estate.

Mount Vernon, No. 1623—Modern Three-story Brick Residence. Sale by Order of Heirs.

Tenth, North of Montgomery avenue—Valuable Business Location—3 Coal Yards, Large Lot.

Reed, Dickinson, Tasker and Twenty-ninth—Brick Yard, Very Desirable Building Lots. Orphans' Court Sale Estate of George M. Clark, dec'd.

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Ninth, (North,) Nos. 46 and 48—Valuable Business Stands—2 Three-story Brick Stores and Dwellings. Bulk windows, and all the modern conveniences. Executors' Sale—Estate of M. H. Harlan, dec'd.

Front, (South,) No. 229—Valuable Business Stand—Four-story Brick Store, extending through to Water street.

South, No. 722—Three-story Brick Lager Beer Saloon, with 4 Three-story Brick Dwellings in the rear, No 719 Alaska street, Orphans' Court Sale—Estate of Richard C. Krider, dec'd.

Swanson, No. 736—Four story Building and Large Lot, with a Three-story Brick Building and 2 Three-story Brick Dwellings in the rear on Lacon place—Same Estate.

Chestnut Hill—Large and Desirable Lot, 1¾ Acres, extensive fronts on the Chestnut Hill and Springhouse turnpike and Township Line road, near the railroad depot. Sale by Order of Heirs—Estate of John Yomer, dec'd.

Wallace, No. 1018—Modern Three-story Brick Residence. Executors' Peremptory Sale—Estate of Biddle Hancock, dec'd.

Lemon, Nos. 1019, 1021 and 1023—3 Three-story Brick Dwellings, with 4 Dwellings in the rear, forming a court. Same Estate.

Melon, No 1119—3 Brick and Frame Dwellings. Same Estate.

Geary, Nos. 829, 831 and 833—3 Three-story Brick Dwellings. Same Estate.

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Orphans' Court Absolute Sale.—Lancaster avenue. Business Stand—Three-story Brick Store and Dwelling, east of Forty-seventh street. Lot 16½ x 120 feet along a 40 feet street, 27th Ward. Estate of Dennis Heenan, dec'd.

Orphans' Court Absolute Sale.—Lancaster avenue. 2 Three-story Brick Stores and Dwellings, adjoining the above, east of Forty-seventh street, each lot 16 x 120 feet. Same Estate.

Orphans' Court Absolute Sale.—Silver Ground Rent $40 per annum, well-secured and promptly paid out of lot Lombard street, east of Fifth street. Irredeemable. Estate of Lavinia Sheed, dec'd.

Orphans' Court Absolute Sale.—Ground Rent, $60 well-secured and promptly paid, Lot Morris street west of Fifth street. Same estate.

Orphans' Court Absolute Sale.—Dauphin street. Three-story Brick Dwelling, east of Sixth street, 19th Ward. Lot 15 x 64 feet. $105 Ground Rent. Estate of Mary Pfeiffer, dec'd.

Orphans' Court Absolute Sale.—No. 525 S. Nineteenth street. Three-story Brick Dwelling and Lot 15 x 55 feet. Estate of Margaret E. Gordon, dec'd.

Peremptory Sale.—No. 1004 Brown street. Three-story Brick House, and Lot 16 x 62 feet. Sale by Order of the Devisees of Jenkins P. Tutton, dec'd.

Executors' Absolute Sale.—Hamilton street. Two-story Brick Factory Building and Valuable Lot 40 x 140 feet to Lynn street, east of Twenty-third street, 15th Ward. Estate of Fleetwood Lodge, dec'd.

Executors' Absolute Sale.—Camden, N. J. Large Lot of Ground fronting on Jackson and Webster streets, west of Broadway, South Camden, 120 x 191 feet. Same Estate.

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District Court of Philad'a

MEYER v. BASSON.

A seaman having shipped under an oral contract, in a German ship, upon his arrival at Philadelphia applied to the defendant, the master of the ship, for his discharge, whereupon he was put in irons and his discharge refused. He then had the defendant arrested for malicious imprisonment. On a rule upon behalf of the latter to quash the capias, the court made it absolute, holding that under the treaties between the United States and Germany, jurisdiction of the subject matter in dispute was in the German consul at Philadelphia, and not in the court.

Sur rule to quash capias.

The plaintiff, a Hollander, set forth in his affidavit, an oral contract to serve as able seaman, on board the German ship "Elena," during a voyage from Liverpool to Philadelphia.

He was put on board ship at Liverpool, by a shipping master of that port, on July 21st, 1873, just as the vessel was about to sail, and did not sign any articles. He made the voyage out, arriving at Philadelphia on the 17th of September, 1873. The following day he demanded of the defendant, the master of the ship "Elena," his discharge, which was refused by the captain, who put him in irons on board ship, and after keeping him in arrest an hour and a half, had him taken before the United States authorities, and subsequently, on the 19th of September, thrown in jail and detained there in custody until the 26th of September, 1873, when he was discharged.

A supplemental affidavit, filed before the hearing, set forth that the plaintiff's arrest was maliciously made by the defendant, who knew that he had no right to imprison the plaintiff, as he had ceased to be a member of the crew, and was entitled to his liberty. The assault was made with the design to kidnap the plaintiff, who was falsely and maliciously imprisoned by the defendant, and damages were laid at $3,000.

Upon these affidavits the application for the writ of capias to arrest the defendant was made to a single judge, whose *allocatur* was endorsed upon the petition, and by whom bail was fixed at $1,000.

The defendant was arrested on the 29th day of September, 1873, but put in bail on that day for the sum required by court, and was released.

On the 30th of September, 1873, the defendant filed an affidavit setting forth his answer to the plaintiff's accusations, and applied to a single judge for a rule to show cause why the capias upon which the defendant had been arrested should not be quashed. The judge granted the rule, and made it returnable on Saturday, October the 4th, 1873.

Depositions were taken by both parties, to sustain the writ and rule respectively. Upon the argument of the rule, however, the court refused to hear the depositions or the affidavit, which accompanied the rule.

The position taken by the defendant, was that the plaintiff's affidavit disclosed in the first place, a contract between the parties to this action. The agreement was to serve on board a German ship, and subjected the plaintiff to German law and to German regulations and discipline. Being a member of the crew, the plaintiff was bound to submit all disputes which he might have with his captain, or grievances against him, to the provisional adjudication of the German consul, and to abide by his decision. The terms of the agreement itself entered into by the plaintiff could be ascertained and settled only by the consul. The language of the treaty between Germany and the United States entered into on December 11th, 1871, is explicit: "Consuls . . shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall have the exclusive power to take cognizance of and to determine differences of every kind which may arise, either at sea or in port, between the captains, officers and crews; and *specially in reference to wages, and the execution of mutual contracts.** Neither any court or authority, shall on any pretext, interfere in these differences, except in cases where the differences on board ship are of a nature to disturb the peace and public order in port or on shore, or where persons other than the officers and crew of the vessel are parties to the disturbance," article xiii.

The grievances set forth by the plaintiff in his affidavit, arose out of a disagreement between himself and the defendant as to the terms of the contract entered into by them. This constituted a difference which would have ousted the jurisdiction of the American courts, even under the treaty with Prussia of May 1st, 1828. United States Statute at Large, 382, and the decisions under it, *Ex parte* Newman, 14 Wall. 152, and certainly under the more comprehensive terms of the present treaty. The putting of the plaintiff in irons for mutiny, was in the enforcement of the discipline on shipboard, and the plaintiff's redress would be by a complaint lodged with the German consul, and not by a resort to this court.

The imprisonment could have been effected only by a consular requisition to the United States authorities, and involved in it the fact that the German consul had exercised the jurisdiction which the treaty had made exclusive.

After consideration, on October 7th, 1873, the court made the rule absolute and quashed the writ.

J. Grier Rich, Esq., J. Warren Coulston, Esq., attorneys for plaintiff.

James Parsons, Esq., attorney for defendant.

*„Insbesondere Streitigkeiten, welche sich auf die Heuer und die Erfüllung sonstiger Vertragsbestimmungen beziehen," literally, "in particular differences which relate to wages, and the fulfilment of any kind of contract stipulations."

Court of Quarter Sessions, Philadelphia.

DERRINGER v. DERRINGER.

1. The court has jurisdiction over the custody of children, and as a consequence it has power to preserve its control over an infant by ordering that a bond be given conditioned that the infant shall not be taken out of the State.
2. Such an order is not *ultra vires*, nor is it in contravention of sec. 15, of art. ix., of the constitution which declares that emigration from the State shall not be prohibited.
3. Upon a review of the circumstances the court modified the bond so as to require the custodian of the child to produce the child in open court whenever any judge thereof may so order.

Habeas corpus for custody of an infant.

Rule to vacate the order of court requiring security to be entered in the penal sum of $2000 that the infant shall not be taken out of the State.

Opinion by FINLETTER, J. Delivered October 11th, 1873.

The petitioner's counsel contend "that "the bond is void, and the entry requiring it should be vacated because *ultra* "*vires*.

"That the question before the court "was one of custody of the child. The "court decided that question in favor of "the relator, and then went further and "ordered her to give security. She was "not a criminal; not even a defendant; "and to secure her child, she gave the "bond. This was the strongest case of "duress we can imagine."

Whilst this may be conclusive against the validity or the enforcement of the bond, it does not touch the question of the authority of the court to require the bond to be entered as a condition precedent, upon which the custody should be given to the relator.

The parties were not, in the ordinary sense, plaintiff and defendant. The one invoked the command of the court to the other, to bring the child within the protection of the court. The rights of the child were the subjects of inquiry. The custody was but an incident, or result, and of legal right belonged to neither party. The learned judge might have disregarded both, and given it to a stranger.

It is not easy to see how an order of court in any case can be such legal duress as would avoid a bond. If the bond under consideration be void for "duress" what becomes of the recognizance in a criminal case; or the security for an appeal, or stay of execution in a civil case?

The industry of counsel has furnished many authorities which may not be questioned, upon the points which they have decided. They are, however, all cases in which the *enforcement* of the bonds was resisted, because they contained provisions either against the law, or not allowed, or required by the law. In none of them is the authority to demand the bond contested or decided.

It was further agreed "that art. ix., § 15 of the constitution of Pennsylvania, declares that emigration from the State shall not be prohibited, and this is binding on the court; that courts of equity have power to grant writs of '*ne exeat regno*' in cases of equitable debts only."

All this may very well be conceded, without advancing the cause of the petitioner, inasmuch as the order of court in no wise interferes with her locomotion whithersoever she listeth.

It is also contended that the divorce of the parties changes their rights. It certainly changes the relations of the parties to each other, and in so far affects their relative rights. It does not however affect the rights of either, in reference to the child. The decree of divorce establishes as judicially ascertained the facts of the libel, and nothing more. As the authority of the court to make the order has been at least questioned by the argument, we propose briefly to examine that matter.

The writ of *habeas corpus* brings the infant into the custody of the court. Its present and future welfare, is the special concern of the court. The preservation of the rights of the parents is an incident of the proceeding merely, which may not however be disregarded. The order of the court is not *res adjudicata est*, and is intended only for the condition of things as they existed at the time of hearing. It may be revoked or modified, whenever required by a change of circumstances.

It is therefore the duty of the court to preserve, in some way, its control over the infant, so that it may be able to enforce its future decrees. It would be manifest error to deprive itself of this power, by permitting the infant to be taken beyond the jurisdiction, without some provision, for enforcing its return.

It may therefore, and should, couple with the transfer of custody, the condition either that the infant shall not be taken out of the jurisdiction, or that it should be returned to the jurisdiction, whenever the court shall so order. In either case this may be affected by the requiremen.

of a bond. If this be correct, it would follow that the order of court is strictly within the line of duty and authority.

Upon examination, this view will be sustained by the universal practice of the English courts. In DeMandeville v. DeMandeville, 10 Ves. 52, the Lord Chancellor said. "There is a fair suspicion of real danger that the child may be removed out of this country, and then according to Lord Macclesfield's opinion in the Shaftsbury case, the court must act upon the suspicion. *Some method must be taken* to secure to the court, that the person of the child shall remain in the country." An order was therefore pronounced, that the defendant and all other persons should be restrained from taking the child out of the kingdom; and he was afterwards ordered to go before the master and give security, not to remove the child out of the kingdom.

Such also is the practice of the American courts. In State v. Nathan, 1 Georgia Decisions, 93, we find the following, "It is further ordered that the said Anna King enter into bond by her friends, in the sum of $500, conditioned, that the child Emily King be not removed without the jurisdiction of this court."

It is however alleged that a condition of things has arisen, since the order was made, which requires a modification of it. The testimony shows that ever since that event, the child and its mother have been supported by the grandmother, whose means are ample, and who now has a permanent residence in Kansas. That the mother has no means of support. That her physical condition is such as to require her to reside in Kansas. That the grandmother has become greatly attached to the child; and in event of her death, without a will, her daughter would be her sole heir. That the father is without means, and dependent upon a small salary as clerk. That he has heretofore failed to provide for the child in any way; and has made no provision for its support hereafter.

The answer of the respondent shows no reason why the prayer of the petition should not be granted, save his affection for the child. It throws obloquy upon the child by averring that its maternal grandfather was a felon, and that its mother has had abortions committed upon herself which were advised by its grandmother. If these averments were true (and there is no evidence thereof), they were wholly needless, because they were passed upon when the order was made. They show, however, a malignity of heart, and a disregard for the future reputation and happiness of the child, entirely inconsistent with his profession of paternal love. In this connection, we may not forget that it is judicially established that his conduct to the mother was "cruel and barbarous," and "endangered her life." This is some indication of the nature and character of him, who now demands the guidance of the morals and culture of the infant.

There can be no doubt from an examination of the whole case, that the best interests of the child, in every respect, would be secured by granting the prayer of the mother.

Is there then any reason, legal or otherwise, which prevents us from promoting this desirable object?

The common law made the father the tyrant of the domestic circle. Whilst it left him free to exercise his will in all things; it made the mother and the child abject slaves to that will. It forbade her to make the simplest contract; and yet permitted her when requested by her husband, to divest herself of all interest in his estate. It is true, with grim irony, it required this to be done "of her own free will and accord, and without any compulsion on the part of her said husband." As if the true wife could have any "will" against the request of a husband, whom duty and affection alike compelled her "to love honor and obey." To still more firmly fix the grasp of the father upon the mother's "free will," the law gave him the custody of the child from the moment of its birth. No matter how low and debased he might become; no matter how notorious his debaucheries; or how openly he lived in avowed adultery, he could by legal force snatch the babe from the mother's breast; and the daughter, in the purity of her budding womanhood, from the sweet and holy councils of the maternal home. And this was called the father's natural right.

It is not to be wondered at, that noble, upright humane judges when compelled to enforce such "natural rights" proclaimed from the bench, that they were "ashamed of the law."

Catching the true inspiration of free institutions, we have enfranchised the mother and her child. We have denied the father's right to enslave either. When he claims the custody of the child, or attempts in any way to control that custody, he must show that it is consistent with the welfare and happiness of the child.

It should be remembered that upon a full hearing of the parties, the court awarded the custody to the petitioner. The order for security against asportation from the jurisdiction, was to preserve our control over the future of the child. It was not a response to the meritorious conduct of the father, or to any demerit in the mother.

Since that order was made, she has obtained a divorce from him, upon the ground of cruel and barbarous treatment. For three years and upwards she has supported her child without any aid from the respondent.

The adoption of mother and child, by the grandmother insures its support and education, and indicates expectations most advantageous to its future welfare. To permit the order to remain, is simply to deprive the mother of her adjudicated right to the custody of the child; and to subject its welfare to the precarious fortunes of a father, without means, and barely able to support himself.

We cannot allow his mere caprice to interfere with the welfare of the child. We are compelled to regard its interests, even against the claims of natural affection. We may not, in the exercise of our discretion, disregard its physical comforts and training; or its just and natural expectations of pecuniary or other advantage from its present position.

Even the sternness of the English law has been made to yield to the humanity of this principle. Lord Eldon said, "The court would not in general permit the father to disappoint the expectations of his children." "The father is not at liberty to say I will alter the course of education of my children by applying more scanty means to the purpose, and I will not permit them to have the benefit of that sort of maintenance and education which they have hitherto had; and in consequence of which their views in life are very different from what they would have been without it." Forsythe's Custody of Children, 24,

Whilst, however, we will revoke so much of the order as requires security that the child shall not be removed from the commonwealth, in order to preserve our control over its future we will require the mother to enter security in the sum of $2.000 to produce the child in open court, whenever any judge thereof may so order. Let a decree be entered accordingly.

Supreme Judicial Court of Massachusetts.

October Term, 1871.

(Submitted on a statement of facts.)

GODDARD v. MONITOR MUTUAL FIRE INS. CO.

1. The policy purported to insure the plaintiff "on his frame two-story building, occupied as a machine shop." It contained a provision that "the application for the insurance is a part of the contract," and that "whenever a building hereby insured shall be altered, enlarged, or appropriated to any other purposes than those herein mentioned, or the risk otherwise increased by the act or with the knowledge or consent of the insured, without the consent of the company first obtained in writing, this policy shall be void."
2. The building, at the date of the policy, and up to the time of the fire, was occupied as a manufactory of organs and melodeons, upon which it was agreed the risk was greater than upon a machine shop.
3. The policy was procured by an insurance broker, who had solicited the plaintiff to insure the building, and who without his knowledge prepared an application which he presented to an insurance agent, who acted for several companies and was authorized to receive and transmit applications and deliver policies for the defendants. The broker informed the agent that the building was used as an organ and melodeon factory, and that he believed a small part of it was to be used as a machine shop. The agent, however, in answer to a question in the application as to what was manufactured in the building, wrote "machinery."
4. The broker received the policy from the agent to whom it had been forwarded by the company, and delivered it to the plaintiff, who did not know of the application, or that the broker had taken any steps to procure the insurance. The plaintiff received the policy without objecting to its form or contents.
5. *Held*, That the representation was material, and that it makes no difference that the misrepresentation was accidental, unintentional, or without fraudulent intent, or that the party insured was ignorant of the fact that such a representation had been made, as in either case the ground of objection is the same; the insurers were misled.
6. *Held*, That the defendants never insured the plaintiff's organ factory, and that the minds of the parties never met upon it as the subject matter of insurance.
7. *Held*, That the court cannot alter the contract as expressed in the policy, and that as the plaintiff accepted the policy in its present shape, he cannot complain that he has been misled by it, and that in this view of the case the application becomes unimportant, as does also the question whether the broker was the plaintiff's or the defendants' agent.
8. *Held*, That it is decisive of the case that the policy which the plaintiff received without objection cannot be applied to the building destroyed. Judgment for the defendants.—*Ins. Law Journal.*

The policy was issued by the defendants under date of October 1st, 1869, and insured the plaintiff in the sum of $2,500.00, for one year from date, against loss or damage by fire, "on his frame two-story building, occupied as a machine shop, and situated in Worcester." The policy was expressed upon its face to be made and accepted upon the following express conditions, viz.: "That the application for the insurance is a part of the contract;" "that if the risk shall be increased by any means whatever within the control of the assured, this policy shall be void;" and "that whenever a building hereby insured shall be altered, enlarged, or appropriated to any other purposes than those herein mentioned, or the risk otherwise increased by the act or with the knowledge or consent of the insured, without the consent of the company first obtained in writing, this policy shall be void."

The case was submitted to the judgment of the court on a statement of facts, in which it was agreed that the building was destroyed by fire on March 22d, 1870, and that due notice of the loss was given to the defendants; but that at the date of the policy, and up to the time of the fire, it was occupied as a manufactory of organs and melodeons; that wood-shavings were made on the premises; that "the risk of the destruction by fire of an organ and melodeon factory is greater than that of a machine shop;" and that the building was so occupied with the knowledge and consent of the plaintiff, and without the defendants' knowledge or consent, unless it was to be inferred from the following facts:

David Gleason, an insurance broker, solicited the plaintiff to insure the building, and the plaintiff replied that he would not unless he could procure insurance thereon within a certain rate of premium. Gleason afterward prepared an application to the defendants, in the plaintiff's name, for insurance on the applicant's "frame two-story building" in Worcester, which contained a schedule of questions, and among them the following: "Question 4." What is manufactured, and of what material? Are wood-shavings made on the premises?" This application Gleason took to George J. Mowry, an insurance agent in Worcester, who filled up certain blanks in it, without making any personal examination of the building, from information furnished by Gleason, who had examined it. Among the blanks filled by Mowry, was the date, "October 1st, 1869;" the amount of insurance applied for, "$2,500.00," and the answer to Question 4, "Machinery." Before writing in this answer, Mowry asked Gleason what was done in the building, and Gleason replied that it was used as an organ and melodeon factory, but he believed that a small part of it was sometimes used as a machine shop. Gleason then signed the application, as follows: "Dorrence S. Goddard, applicant by David Gleason;" and Mowry wrote his own name upon the back of it, and forwarded it by mail to the defendants, who wrote the policy and sent it by mail to Mowry, without having any other information about the property than what was furnished by the application. Mowry gave the policy to Gleason, who delivered it to the plaintiff, and received from the plaintiff the stipulated premium of $50 00, out of which he paid $45.00 to Mowry, and Mowry paid $42.50 to the defendants.

The plaintiff did not see the application, gave no information from which it was

filled up, and did not know of its existence, except from the reference to it in the policy, until since the commencement of this action. And the first knowledge he had of the insurance was when Gleason brought the policy to him, and he paid the premium. On March 8th, 1870, the plaintiff procured of the defendants, at their office in Boston, an endorsement upon the back of the policy, making it payable, in case of loss, to the Worcester County Institution for Savings, from which he had obtained a loan on the property. He did not at that time disclose to the defendants the purposes for which the building was used, nor was there any circumstance calling or directing the attention of either party to that subject.

Gleason was accustomed to solicit applications for insurance from persons owning buildings, and to procure, either directly from the insurance companies, or through the intervention of agents, policies of insurance; and for so doing he received a certain amount of the premium paid by the insured to the company, as a commission for his services. He did not solicit in behalf of any particular company, but effected insurance in such companies as he saw fit, unless the party to be insured indicated a preference. He had no account with the defendants, his name not being on their books at all, and had never written to or received any letters from them.

Mowry acted as an insurance agent for several companies, and was authorized by the defendants to receive and transmit applications for insurance to them. He had no power to issue or countersign policies, and did not do so; but the policies were issued at the office of the defendants, in Boston, and were sent to him by mail, and by him delivered to the persons insured or those from whom he received the application. The premiums paid by the insured were forwarded by Mowry to the company, his commissions being first deducted. And this was the extent of his authority.

P. E. Aldrich, Esq., for plaintiff.

W. G. Colburn, Esq. (*C. Allen Esq.*, with him), for defendants.

AMES, J.

It is a fatal defect in the plaintiff's case that the policy professes to insure a machine shop, and that the building destroyed by fire was not a machine shop. It would be doing great violence to language to contend that a building in which organs and melodeons are manufactured can be correctly described as a machine shop. It appears by the report of the case, that the risk of destruction by fire is greater in the case of a building in which organs and melodeons are manufactured, than in that of one in which machinery is manufactured. The representation therefore was material, and it was untrue. It makes no difference that the misrepresentation was accidental, unintentional, and without any fraudulent intent, or even that the party insured was ignorant that such a representation had been made. In either case, the ground of objection is the same. The insurers were misled. They were willing to insure a machine shop, and supposed they were so doing; but they had never insured the plaintiff's organ factory, which was a different and more hazardous risk. The misrepresentation takes away the foundation of the policy, and as it was an affirmation of a fact as then existing, it is enough to prevent the policy from taking effect as a contract. The minds of the parties have not met upon the organ factory as the subject matter of insurance. Kimball v. Ætna Insurance Co., 9 Allen, 540; Sillem v. Thornton, 3 El. & Bl. (Am. ed.) 868, 88 9 note; Carpenter v. American Insurance Co., 1 Story, 57; Campbell v. New England Insurance Co., 98 Mass. 381; Wilbur v. Bowditch Insurance Co., 10 Cush. 446. The plaintiff sues upon the policy, and the court cannot alter the contract as therein expressed. Tibbetts v. Hamilton Insurance Co., 3 Allen, 569. However unfortunate this may be for the plaintiff, he accepted the policy in its present shape, and cannot well complain that he has been misled by it. Barrett v. Union Insurance Co., 7 Cush. 175.

In this view of the case the application becomes unimportant, as does also the question whether Gleason was the plaintiff's or the defendants' agent. It is decisive of the case that the policy which the plaintiff accepted without objection, or attempt to have any mistake corrected, cannot be applied to the building which was destroyed by fire.

Judgment for the defendants.

Recent Decisions.

PENNSYLVANIA.

[Head notes of cases to appear in 21 P. F. Smith's Reports. By courtesy of the Reporter.]

MORGAN et al. v. BROWNE.

1. Browne leased to Morgan a space of twenty-two feet east, &c., to be and remain open as a passage way, to be used by Morgan in common with Browne, and his other lessees, &c. In action for rent, defendants filed an affidavit of defence, and gave notice of special matter, concluding "the facts are more fully set out in copy of the affidavit of defence hereto annexed." A witness being called by defendant, plaintiff asked what was to be proved by him; the defendant answered, the matters contained in the notice and affidavit, but did not, on being asked, say which. The court rejected the testimony: *Held*, To be correct.

2. The party producing a witness may be asked to state what is to be proved by him, so that if the facts are irrelevant, they may be excluded.

3. It is an evasion of this rule for a party man when thus called on to refer to the affidavit of defence; it would bring before the jury the sworn *ex parte* statement of defendant without opportunity of cross-examination. Such practice is irregular.

4. On demand for the rent, the defendants wrote to plaintiffs, giving a reason for declining to pay; in the suit the defence was on a different ground: *Held*, That the letter was evidence to show that he then set up a different ground for not paying.

February 27th, 1872. Before AGNEW, SHARSWOOD and WILLIAMS, JJ. THOMPSON, C. J., at Nisi Prius.

Error to the District Court of Philadelphia; No. 9, to January Term, 1872.

SPERING'S APPEAL.

1. Directors in a stock corporation, as to stockholders, are not technical trustees, but are as mandatories, and are bound to apply no more than ordinary skill and diligence.

2. Directors are not liable for mistakes of judgment, although so gross as to appear absurd, if honest and within the scope of their powers: especially where acting under direction of legal counsel.

3. Directors are responsible to the stockholders for losses from fraud, embezzlement, wilful misconduct, breach of trust: gross inattention or negligence, by which fraud has been perpetrated, by agents, officers or co-directors.

4. The responsibilities of directors in a stock corporation considered in this case.

January 10th and 11th, 1872. Before THOMPSON, C. J., AGNEW, and SHARSWOOD, JJ. WILLIAMS, J., at Nisi Prius.

Appeal from the decree at Nisi Prius: No. 3, to July Term, 1867.

SPEAKMAN'S APPEAL. MORTON'S ESTATE.

1. An auditor's finding, if not supported by evidence, will be set aside or disregarded, but like a verdict, must stand unless clearly against the weight of evidence.

2. A widow, administratrix of her husband, married soon after his death; she made a contract for purchase of land for the second husband, to whom it was conveyed, she alleged the purchase money belonged to him: there was no positive evidence that it belonged to the decedent: the auditor found it did not belong to him: *Held*, that the administratrix was not chargeable with the money.

3. Prior to 1848 the wife's father gave her $25, with which she purchased fowls and materials for sewing; by sale of fowls, her labor on the materials and other work she accumulated money: *Held*, that the $25 and accumulations belonged to the decedent's estate.

4. She did not enter this money in the inventory or administration account, claiming it as her own: *Held*, not to be fraud, so as to prevent her from receiving $300 exemption.

5. The money was in gold; she was chargeable with its premium and $300 exemption was payable in currency.

6. The costs under all the circumstances in this case imposed on the accountant.

February 7th, 1872. Before AGNEW, SHARSWOOD and WILLIAMS, JJ. THOMPSON, C. J., at Nisi Prius.

Appeal from the decree of the Orphans' Court of Philadelphia: No. 271, to January Term, 1871.

KRAUT'S APPEAL.

1. Fox conveyed a lot to Kraut, with a passage, without defining it, over his "remaining ground" to convey the filth from Kraut's privy; part of his "remaining ground" was vacant and part occupied by a house in which Fox lived, he conveyed the vacant part, with special warranty, to Craig, without any reservation, and afterwards opened for the purpose through his house a passage, which Kraut used twice. Fox's heirs were bound by this location and could be restrained from preventing Kraut from using the passage.

2. Although the construction of the grant might be that the vacant part was intended for the passage, the parties might define the limits by subsequent agreement, use and acquiescence.

3. The presumption was that Fox intended by his deed that Craig's lot should be discharged from the easement, and that it should be fixed on Fox's improved lot.

February 14th and 15th, 1872. Before AGNEW, SHARSWOOD and WILLIAMS, JJ. THOMPSON, C. J., at Nisi Prius.

Appeal from the decree of the Court of Common Pleas of Philadelphia: In Equity. Of July Term, 1871, No. 68.

EVANS v. CHEW.

1. The 67th sect. of act of February 24th, 1834, confines powers extended t administrators c. t. a. to those given to executors *virtute officii*, and not to a power of sale collateral to their duties as executors or unconnected with them.

2. A general power to sell will be presumed to be for the payment of debts.

3. A purchaser is not required to call for an account, or an inventory of personalty, or list of debts.

4. A power to sell for the purpose of distributing the proceeds amongst persons named in the will, is a power belonging to the executor, *virtute officii*, as well where the power is discretionary as where the direction is absolute.

5. Ross v. Barclay, 6 Harris, 179; Waters v. Margerum, 10 P. F. Smith 39, explained.

Februry 9th 1872. Before AGNEW, SHARSWOOD and WILLIAMS, JJ. THOMPSON, C. J., at Nisi Prius.

Certificate from Nisi Prius: No. 404, to January Term, 1871.

EVANS et al. v. WALN et al. Executors

1. Waln employed Markoe, a broker in Philadelphia, to sell stock; Evans, a broker in New York, sold the stock by order of Wister, another Philadelphia broker under Markoe, with assent of Waln, without naming the owner; before the proceeds were remitted by Evans, Wister failed, in debt to Evans. *Held*, that Evans could not retain the debt from the proceeds.

2. After Wister's failure Evans asked Markoe to send certificates and he would remit to Markoe less Wister's debt; Markoe answered, the stock was a customer's; Evans answered, send stock in any event, "will give you net balance to-morrow." Markoe sent the stock. *Held*, that "net balance" meant proceeds after deducting expenses of sale.

3. Evidence that it was the custom of brokers, in their dealings with brokers of other cities to put all transactions between them into one account and settle for the general balance, was inadmissible.

4. Such custom would not have authorized defendants to credit Wister's account with the proceeds of the stock.

5. The action for the amount retained by Evans, was properly bought in the name of Waln.

6. An action for the proceeds of property sold by one agent by orders of another can be maintained by the owner against seller.

February 15th, 1872. Before AGNEW, SHARSWOOD and WILLIAMS, JJ. THOMPSON, C. J., at Nisi Prius.

Error to the District Court of Philadelphia: No. 119, to July Term, 1871.

LEGAL GAZETTE.

Friday, October 17, 1873.

JOHN H. CAMPBELL,
EDITOR.

THE UNITED STATES JURIST.

We regret to see by an announcement on the cover of this periodical that its present editor, Mr. James Schouler, is about to retire from its management. Notwithstanding the professional favor with which Mr. Schouler's efforts in this line have been received, we suppose that the superior remuneration which the success of his efforts in the authorship of text books on the law, and in office practice (to which, rather than to forensic efforts, his inclinations appear to lead him) may be the cause of what is thus stated. We regret the matter because we have thought that we could see in the United States Jurist, of which Mr. Schouler was the founder and sole conducter, the more than "seminal principle" of a thoroughly independent and valuable law journal. It began with no flourish of trumpets and no external exhibitions, perhaps rather unimpressively. But we early observed in it the marks of an original, fearless and thoughtful editorship; and of a pen guided at once by high legal attainments and a very careful consideration and analysis of every subject which it passed upon. The paper on Chief Justice Chase, in the number of last July, impressed us as one of the very best, perhaps the only thoroughly good characterization of the chief justice which has appeared. It was cordial and strong; dictated obviously by a thorough understanding of the chief justice's judicial labors, and by warm intellectual respect for them and for the late magistrate personally, yet marked by discriminations and drawbacks expressed with delicacy indeed, but with clear meaning and with indubitable truth. We had marked the whole paper for extract into these columns; but the proceedings of our Constitutional Convention, embracing the topic of the organization of the courts, so interesting to our readers, excluded it. We still, however, refer to it as worthy of attention.

We wish Mr. Schouler success in whatever new field, if any more new than legal authorship is about to tempt him, he may enter on; though we should be happy to find that the author of the work on the Domestic Relations and on Personal Property is about to follow in this respect, in a former track rather than engage in new ones. *Good* text books are ever valuable and ever welcome.

We ought to add, that though Mr. Schouler retires from the management of the Jurist, the magazine itself will be continued under the former publishers, and, we can hardly doubt, with credit and usefulness. Every thing that the Morrisons touch in this way, is certain to be well done.

EASTERN DISTRICT OF PENN'A.

United States Circuit Court.

SUMNER et al. v. THE CITY OF PHILADELPHIA.

1. Quarantine officers may act wisely in detaining an entirely innocent ship, if for any reason, by permitting her to come up, there would be a chance of a panic arising; but it cannot be doubted, that the municipality, whose servants took this responsibility, would be bound to compensation.
2. The board of health of the city of Philadelphia are ministerial, not judicial officers. The discretion vested in them as quarantine officers, is a reasonable, not an absolute one, and that whether the detention of a vessel was proper or not must be gathered from the facts of the case.
3. The vessel in question having been detained an unreasonable length of time, damages against the city are awarded.

Report of referee, confirmed October 6th, 1873, by McKENNAN, Circuit Judge.

This is an action on the case brought by the owners of the brig Home against The City of Philadelphia, wherein damages are claimed for the alleged illegal detention of said brig by the board of health at quarantine during the summer and fall of 1870, and other alleged injuries growing out of the same matter. Under an agreement made by counsel, May 21st, 1872, the case was referred to me, with the provision that my opinion and judgment in the case should have the same force and effect as a judgment on a special verdict.

No questions arise for my determination in the pleadings, as it was agreed that any possible objection to the form of action on the one side or to the giving in evidence of matters of justification under the general issue on the other, should be waived and the case heard on the merits irrespectively of the pleadings.

Much evidence was produced before me on both sides orally, and depositions taken on behalf of plaintiffs under a commission, were also submitted. The case was ably and carefully argued by Messrs. Henry Flanders, and D. W. Sellers, for plaintiffs; and Messrs. George D. Budd, and C. H. T. Collis, city solicitor, for the city. There was, however, no serious conflict of testimony, though from the necessary circumstances of the case there is some contradiction in the evidence on certain points. Except in one particular, however, these contradictions are unimportant, and I have little difficulty in determining what are the actual facts of the case so far as the history of the transaction is concerned.

The determination of some questions, however, which are quasi matters of fact, has been more difficult, involving, as it does, an examination from the scientific testimony, &c., adduced, an investigation into the cause and nature of the infection of yellow fever, especially in the particular epidemic of that disease at the quarantine station in 1870. In determining these matters I have felt some doubt, from the nature of the case, and from the widely varying opinions of medical men on the subject, but I think that it will be found that my conclusions on this question sufficiently approximate the truth for the special matters involved in this case, even if I be in error in some of the general views reached.

The questions of law arising upon the facts present still more difficulty, but my decision of them will be the subject of review, and will be doubtless corrected should I err.

First. As to the facts.

The brig Home arrived in the Delaware river about the 26th of June, A. D. 1870, and at the Lazaretto, the quarantine station of the port of Philadelphia, on the 29th of June, 1870. She was a vessel of two hundred and sixteen tons register, hailing from New York, but arriving from Black river, Jamaica. Her cargo consisted of logwood, but she had besides on board, but not on her register, thirteen bales of sail clippings. These appear to have been the private property of the master. The vessel was then about thirteen years old, built in Nova Scotia, her class No. 2. She had been refitted some three or four months previously, but was in a very filthy condition at the time of her arrival. She had no bill of health; the master, Thomas H. Phillips, had died on board on the 24th June, 1870. Notwithstanding the denials made by the crew, I am entirely satisfied he died of yellow fever, and so decide. The steward had also been sick of the same disease, but had recovered. The crew, at sailing, consisted of nine men, one colored boy, and a passenger from Kingston, Jamaica.

Of this number, three—Griffiths, second mate, and Elliott and Pierre of the crew—were taken down with the yellow fever within a few days of the arrival of the Home at quarantine.

Griffiths absconded from quarantine June 30th, the day after his arrival, and died at his home, in Philadelphia, on July 6th. Elliott was taken sick at quarantine on July 2d, and recovered. Pierre was taken sick July 8th, after release from quarantine, and died in the municipal hospital in Philadelphia.

Besides, the pilot, Stephen Bennett, who had been five days on the Home (from June 25th to 30th), was taken sick at Wilmington, on his way to the breakwater, July 2d, and died in Philadelphia, whither he came, on July 6th. These cases were, undoubtedly, yellow fever, and were seen and examined by competent physicians, and I cannot see that there can be a possible doubt that in each case the disease was contracted from the Home. This makes it a matter of absolute certainty that she was an infected ship.

By orders of Dr. Thompson, the Lazaretto physician, the vessel was put in quarantine, and, by resolution of the board of health, ordered to be cleaned, fumigated, and disinfected. She took up, at first, a position about four hundred yards from the quarantine landing. The diagrams accompanying the report of the board of health (which was by both sides agreed to be given in evidence) show very satisfactorily the several positions of the vessel. In the disinfection of the vessel, the removal of the cargo was necessary. As the cargo consisted of logwood, which appears to be a substance not capable of retaining or propagating infection, and is so classed in the quarantine laws, hereinafter to be referred to, it was ordered to be unloaded in barges or lighters. About the 11th of July three barges or lighters came down to the Lazaretto, and discharge of cargo commenced. The first lighter (name unknown) received the deck load of logwood, and on July 13th left, without permission, for the city (for the quarantine authorities claimed the right of detaining the lighters also), and came up to the logwood wharf on Windmill island, opposite the city. No sickness seems to have affected her crew, or to be traceable to this lighter or her crew or cargo.

On the 13th or 14th of July the hatches of the vessel were opened for the removal of the cargo, and on the 15th Dr. Thompson permitted her to be brought up to the government wharf, lying somewhat lower down the river than the quarantine wharf, to facilitate unloading. This second position is also well shown by the diagrams attached to the report of the board of health.

This government wharf adjoins a government store house, and about one hundred and forty yards to the northwest of it is a public house known as Pepper's; at about four hundred yards, and further to the west, is the house known as Miller's. The quarantine buildings lie some two hundred yards to the northeast of this second position of the Home, and Dr. Thompson's house some hundred and fifty yards from it in the direct line from the Home to the hospital building. The prevailing wind was from southwest, blowing directly from the Home towards the quarantine buildings.

The Lazaretto had been unhealthy during the spring and early summer; ... low and is surrounded in great measure by marsh. There had been unusual overflows also, and resulting thereform, considerable malaria, and consequently intermittent fever, mostly of a mild type, had prevailed that season in the vicinity of Lazaretto. Up to this time, however, the yellow fever had been confined, as before mentioned, to the crew and pilot of the brig Home. At this time, however, the disease suddenly appeared among the crews of the barges moored alongside of the brig, the inhabitants of Pepper's house, and of the Lazaretto. This outbreak seems clearly not to have been due to any contagion with the crew of the Home; they had mostly scattered before this, and no case can be traced to contact with either those who themselves had or had not yellow fever; besides, the general view of medical experts seems to be that yellow fever is not contagious in any degree whatever, and this view, of which the learned Dr. La Roche, recently deceased, was the celebrated exponent, is entirely borne out by all the facts of this epidemic. Nor can this epidemic, in my opinion, be attributed to local causes at the quarantine grounds.

The overflows had passed, and the persons who had suffered from malarious fever, improved, nor is there any evidence of outbreaks of yellow fever in this latitude from any such indigenous cause, except in a few alleged cases in large cities, where there were other distinct elements of foulness and infection apart from mere malaria; even these cases are somewhat doubtful, but granting, as seems indeed probable, that the outbreak of yellow fever in Swanson street in this city in the end of August, 1870, was owing to local causes, no analogy can be found between the condition of Swanson street and the Lazaretto. The Lazaretto is well and carefully and neatly kept in order and scrupulous cleanliness. The population of the vicinity is in the neighborhood of one hundred souls; and while from the location it is liable to ordinary malaria, there is absolutely nothing to render it a place where yellow fever could be generated. But we do not have to look far for the cause of this outbreak of disease. The hatches of the Home were opened about the 13th or 14th of July; by this, the confined, foul, infected air accumulated in the hold of the vessel since it left the West Indies, was let loose, and slowly blew and spread over the quarantine grounds and vicinity. The evidence is strong of the distinct, powerful and fetid effluvia perceived by the witnesses to proceed from the brig when passing to leeward of her. The first victims were the persons employed in the barges moored alongside the brig, and who were actually employed in unloading the logwood from the hold; five out of six of these persons had the fever. These persons also lived and slept on the lighter until removed to quarantine hospital. Next were the inmates of the Pepper House, situated nearest to the second position of the Home, although not directly in the course of the prevailing wind from the vessel, which blew rather directly over quarantine; the earliest taken of this family, however, had been down to see the vessel at the wharf, or had passed directly across the current of air blowing from her on their way to and from quarantine. Lastly, the inmates of the quarantine grounds were attacked. I am entirely satisfied from the evidence, that this yellow fever epidemic came entirely from the foul, infected air in the hold of the Home, forced by the prevailing winds on the adjacent shores, and I so decide. This is in entire accordance with Dr. La Roche's view of the usual course of yellow fever infection. The discharge of the cargo was finished July 19th, and the disinfection and cleansing of the vessel was proceeded in, under the direction of the authorities of quarantine. The bundles, called "filthy rags," by Dr. Thompson, but which other witnesses speak of as clean sail clippings, were seized by the United

States custom house authorities as not in the manifest. They were regarded as dangerous, as having been in the cabin of the captain who had died of yellow fever, and were therefore burned on the government wharf by order of the board of health.

The cargo of the brig, as above mentioned, had been discharged into the three barges or lighters above mentioned. One, name unknown, had gone up into the city, and no ill consequences seem to have prevailed among her crew, probably owing to the portion of cargo taken by her being the deck load, and her having left before the opening of the hatches. The other barges the quarantine authorities assumed the right of detaining there, were the Kirkpatrick and the Madison. Most of their crews had yellow fever; they were treated at the quarantine hospital; the plaintiffs were obliged to pay their board, &c., at the hospital; also demurrage, &c., to the owners of the lighters; to recover these amounts is part of plaintiff's claim.

While this epidemic was running its fatal course at the Lazaretto, the cause of the infection, the Home had been under Dr. Thompson, the Lazaretto physician's directions, cleansed and fumigated. This, of course, could not be done until discharge of cargo. From the nineteenth July, the date of the accomplishment of this, until August 4th, when, by a mistake as to the orders of the board of health, she was permitted to come up to the city, covers therefore a period of some fifteen days for her disinfection.

We now come to the circumstance of the release of the brig Home, and of her being permitted to come up to Philadelphia, and then sent back to Lazaretto by the board of health. This seemed, at the first blush, a very important element in the case; but, as will be seen from the light afterwards thrown upon it, has not materially affected my decision. I am entirely satisfied that this permission of the vessel to come up was an error, on the part of the quarantine officers, based on a supposed order of the board of health which had no real existence. The minutes of the board of health make it clear there was no such order. Both the quarantine master, Gartside, and Dr. Thompson were then sick, and died shortly afterwards of the fever. One of them said, or was understood to say, that an order had come down. From their illness, and the confusion at quarantine caused by the ravages of the fever, no search was made for the order; but Dr. Taylor, who had just come down to take charge, permitted her to go up. Whether an order for the release of one of the barges was mistaken for an order to release the brig, or whether the mistake occurred from the commencement of the delirium of the fever, seems doubtful, but there can be no doubt it was a mere mistake.

When she reached Windmill Island, August 5th, 1870, the board of health ordered her immediate return to quarantine. The consignees and captain of the vessel declined to do this, and the board of health, by John E. Addicks, the health officer took possession of the Home, and took her back to quarantine on August 8th, 1870. Here she was anchored at a point somewhat higher up the river than the Lazaretto, and well out in the stream. The consignees and master threatened and spoke of abandonment in consequence of this seizure, but certainly as a matter of fact no abandonment took place, for somewhat later the consignees sent a watchman down to the vessel, and afterwards a second watchman. After her return to quarantine, the vessel seems to have been again whitewashed, and her pumps cleansed with carbolic acid. The yellow fever prevailed for some short time longer at quarantine, but in its new position no infection can be traced to the Home, except one case, hereafter to be mentioned. No infection seems traceable to her while at Windmill Island, but all the evidence is that the outbreak of yellow fever in Swanson street in the latter part of August was entirely sporadic. When the Home first moved down to her new position above the Lazaretto, she was in charge of two men placed on board by the board of health. Kugler testifies that both these men, Smith and Wilson, were sick, but neither appear to have had distinctively yellow fever. Mr. Addicks attributes this to their not being allowed to go below deck. The watchman sent down by consignees succeeded them about August 18th, when they became sick. About the same time a man named Carpenter, a new nurse at the Lazaretto, was sent aboard to help pump; he was taken with yellow fever; but his disease may have been contracted possibly from a new focus of infection at the Lazaretto, which Dr. Taylor thinks was established there, by the number of cases there treated and not from the Home. While in the charge of the watchman sent by the consignees, the Home was robbed. She had, besides her own ropes, &c., a great deal of extra hawser and some extra canvas. All this was stolen. How the robbery occurred seems doubtful. We have a second-hand account given to Kugler by the watchman, that he had been violently boarded up in the cabin by the robbers. In any event this watchman was promptly discharged by Cook, the captain of the Home, and a new one employed. For this loss the plaintiffs claim damages. As to the condition of the vessel when returned to Lazaretto, there seems some conflict of testimony. Dr. Taylor thinks she had ceased to be an infecting cause, though prudence demanded her longer detention; but Dr. Goodman perceived a peculiar odor from her hold, and considered her not clean. On the whole, I am not satisfied that she was on the 4th or 8th of August properly cleansed and disinfected. In fact there had been up to that time but some fifteen days from the discharge of her cargo to clean her.

The Home was then detained at quarantine in spite of repeated appeals for her release, until November 2d, when her discharge was order, nearly three months. She was at last released, November 7th. When this occurred she was found to have sustained serious damage from opening of seams, &c., from exposure to the sun, which necessitated recaulking. It was in evidence that this might have been prevented by constant washing of the deck or by spreading tarpaulins. There was no evidence before me as to how much of this damage occurred prior to, and how much after, August 4th, the date prior to which plaintiffs admitted the detention to be lawful, and there was no satisfactory evidence as to the condition the vessel in this respect on her arrival. Kugler, the steward, describes her as very rusty when she reached quarantine. During the whole period of the detention the plaintiffs engaged a new master, Captain James Cook, who remained in Philadelphia, urging her release, and making, daily visits to quarantine, to see after the vessel; for his wages and expenses here plaintiffs claim to recover, as also, for Mr. Currier's expenses in a journey to Philadelphia to see after his brig. During her entire detention application seems to have been made almost daily for her release, and no definite refusal given or period fixed, but the plaintiffs seem to have been in constant expectation of an immediate liberation during all this time. During this period an application was made by plaintiffs for permission to take the vessel up to port Richmond, load her with coal, and then take her north, the plaintiffs pledging themselves not to stop at the city or to delay the loading. This application was made formally in writing, and was met with a verbal refusal. Mr. Currier testifies that he then applied for permission to take in coal or ballast from lighters at the Lazaretto and sail north. This request appear to have been verbal and informal, and was informally refused, Mr. Currier says. Mr. Steele, the chairman of Lazaretto committee, does not remember this request, and thinks such an application as the last mentioned would have been granted. But I think the weight of the evidence is that such an application was made, and either refused, or more probably, neglected. As before mentioned before the vessel was finally released the owners were compelled to pay bills for hospital, &c., for lighters, crews, watchmen, provisions, towage of vessel to Windmill Island, &c., for which, as paid under compulsion, plaintiffs claim to recover.

This closes the history of the facts. With regard to the application of the law to them, it may first be premised that it seems undisputed that the board of health are the servants of the city of Philadelphia, entrusted by acts of 1854 and 1855 with the same functions, as by the acts of 1818, &c., the former independent board of health had. The act of 1859, making the board non-elective, makes no change in its relations to the city. There is therefore no question but that the action is well brought against the city of Philadelphia, and if the old board as a body politic would have been liable, the defendants are liable here.

On the other hand, there is no allegation of malice, or corruption, or improper motive, against the board of health, and if they have erred they have done so honestly.

Further a decision in plaintiffs' favor by no means implies that the board of health have not on the whole acted wisely and for the public good. Public officers must often take the responsibility of acting outside of law in cases of emergency, and their action may cause private injuries which rerequire compensation in damages, and yet their action may be highly commendable in a public point of view. The blowing up of buildings to stop conflagrations, and many other takings of private property for public use, are familiar illustrations of this; and it can well be conceived that in view of the excitability of the public mind, and the panic that readily arises on any apprehension of the approach of pestilence, quarantine officers might act wisely in detaining an entirely innocent ship, if for any reason, by permitting her to come up, there would be a chance of panic arising; but it cannot be doubted in any such case, the municipality whose servants took this responsibility would be bound to compensation.

It was contended, however, for the city, that under the act of 1818 (June 29th), City Digest, pp. 19 & 20, the Board of Health have an unlimited discretion in all cases where their jurisdiction attaches (as it cannot be fairly disputed it did to the Home in this case); that the words of the act, "shall be detained such further time as the board of health may deem necessary," gave them an absolute discretion in the matter, for an abuse of which they would be individually liable, but the city in no event responsible. The counsel for defendants also argued, by way of illustration, that the board of health could not be restrained by injunction from detaining a vessel. No authority was cited to sustain this position, and in my view it is untenable. The board of health are ministerial, not judicial officers; and as well argued by counsel for plaintiffs, the analogy to this case is truly found in those cases in which powers are given to municipal bodies with responsibility for its mode of exercise—avoidable damage requiring compensation; such as: Commissioners of Kensington v. Wood, 10 Barr, 95. An action for damages resulting from the grading and paving of Penn street, because the arrangement of level caused a flow of water on plaintiff's premises. Erie City v. Schwingle, 10 Harris, 385; Gas Co. v. N. Liberties, 2 Jones, 318; Pittsburgh v. Grier, 10 Harris, 65.

Were these quarantine authorities the servants of the commonwealth, they would be personally responsible for injuries to private property, but being the servants of a municipality, that body is liable for their acts. If the doctrine of eminent domain or the right of taking property for public use is called in to justify defendants, it requires, in all such cases, compensation; and their being no special method of obtaining redress prescribed, a common law action in the case is appropriate. As counsel for the plaintiff very ably argued, if it is claimed that the act authorizes without compensation, the detention of vessels or taking of property (which such detention clearly amounts to), further than the necessity of quarantine requires, just so far would the act be unconstitutional, as taking private property for public use without compensation. No such construction, however, should be put on the law, for it is clear to me it is intended to authorize detention, so long as it shall reasonably be deemed necessary. See U. S. v. Russell, 13 Wallace, 628. Bishop v. Mayor, 2 U. S. Law Mag. 150.

Quarantine proper, the detention of a foul or infected vessel, and the proper disinfection and cleaning of her, is eminently beneficial for the individual trader, as well as for the public. But if we go beyond this and allow that the quarantine officers should have an absolute discretion not subject to revision or responsibility, save in case of misfeasance there is strong danger of the rights of the individual being sacrificed to an imagined public necessity. The trader would be placed in a most unhappy position, and there would be practically no restraint upon the most arbitrary and unreasonable detentions. Nor would this construction be even beneficial to the defendants: it would certainly be far better for the city's commerce to have it known that though in certain cases where suspicion existed, vessels would be detained at quarantine, yet in all cases where injustice was done, it would be compensated, than for vessel owners to be under apprehension of an arbitrary and unlimited detention by an irresponsible board. I decide therefore, that the discretion vested in the board of health, is a reasonable, not an absolute one, and that we must upon the evidence, judge whether or not the detention was in fact proper, or rather when, if at any time, it ceased to be so. Now to apply my conclusions as to the law, to the facts as I have ascertained them.

First, I am entirely clear that plaintiffs are entitled to recover for the detention of the lighters and every expense resulting to them from this detention. Also, for the board, &c., of the crews of the lighters at the quarantine hospital, which they were compelled to pay. The act of Assembly gives no right whatever to detain lighters, even if infected. The learned counsel for the city endeavored to show that the lighter coming down to Lazeretto from the city, and proposing to return, should be treated as a "vessel from a domestic port," but this is certainly a very strained construction, and by examining the act on the question of discharge of cargo, it is easy to see the meaning. It is provided that if the cargo be of a nature not capable of retaining infection, "it may be conveyed immediately to the city in lighters."

Logwood is included in dye-wood and is defined in the act as non-infectious. Now under this act it was either absolutely the duty of the board of health, if the act be mandatory, to allow the logwood constituting the cargo to be transferred to the city in lighters, or if the words are permissive merely, they might have refused to allow the cargo to be placed in lighters, and ordered it to be unloaded on the dock at the Lazaretto. But when it once was in the lighters, they had lost their entire control of it, and of the lighters, it is hard to see how they ever acquired jurisdiction. I must, therefore, treat the detention as entirely unauthorized, and allow the plaintiffs' claim for demurrage paid by them to the owners of the barges; there is no reason to suppose that this is more than was justly due, and having been actually paid by plaintiffs, the onus was on defendant to show that it was excessive, which

has not been done. In deciding that this detention of the lighters was unauthorized. I must not be understood as condemning the action of the board of health in the matter, although the evidence is strongly preponderating that yellow fever is not contagious in any degree, and that the cargo discharged in the lighters was non-infectious, yet in view of the illness and death of so many of the lighter's crew, and of the unreasoning panic which might have prevailed, had these barges with their crews sickening from the infectious wind blowing from the Home, to which they had been exposed, come up to the city; I am not prepared to say that the board did not act wisely in detaining them, but then this must clearly be allowed for as a taking of private property for public use, and compensatory damages given to the plaintiffs. As to the expenses of the crews of the lighters, it is not denied the plaintiffs were compelled to pay these bills before the vessel was released; the case, therefore, stands as if the city were suing the owners of the Home for the board, expenses, &c., of the crews of these lighters at quarantine hospital; this claim would be for damages of the most indirect character. There certainly is no obligation of the kind implied in the chartering a lighter, and if the city can make the owners of the Home pay for the nursing, &c., of these men because they caught yellow fever while unloading her, it is hard to see why an infected vessel should not be bound for every damage or injury which could result to any one whom the disease might attack. This could not be set up unless it was held that owners of vessels who were so unfortunate as to have been attacked by disease, became thereby tort feasors if their ships were brought into port. Even if the men themselves could have sued the owners of the Home for damages, it could not be argued that the action could be maintained by a hotelkeeper, with whom a person who had caught the infection had lodged, and who had not paid his board. I must, therefore, allow this claim as presented by plaintiffs. The sixth section of the act of 1818, allowing claim for expenses clearly only applied to the crew of the vessel.

Of course, the bills plaintiffs were compelled to pay for provisions supplied to the lighters, by the board of health, during the detention, must follow the same rule, the detention being unlawful. Counsel for the city stated also, and one of the witnesses, Mr. Steele, testified that the city had sustained great damage from the epidemic of yellow fever at the Lazaretto, contracted from the Home, but it seemed rather thrown in as a make-weight than intended to be set up as a set-off to plaintiffs' claim, and, in fact, was too indefinite in shape to call for any decision from me upon it. And in no event could such a claim be maintained; disease must, unless under very exceptional circumstances, be viewed in law as the act of God, and when a vessel so unfortunate as to be infected comes to a quarantine station, she comes just where she ought to come. A claim could as well be maintained by a hospital for damages by reason of its nurses, &c., contracting disease from a patient.

I have stated already that from the evidence I am satisfied that the release of the brig Home on August 4th was a mistake merely, and is to be simply treated as such, and ought not to prejudice the defendant's rights. It is clear, however, that as it was a mistake solely of the city's officers, the expenses directly incurred by plaintiffs in consequence thereof, must be refunded. These are the expenses of towage of the vessel to the city paid by plaintiffs, and the expenses of towage back to Lazaretto, which plaintiffs were, to procure the release of the vessel, compelled to refund the city. I therefore allow to the plaintiffs these amounts as claimed.

To return now to the main question, as to the plaintiffs' claim for damages for the detention of their vessel after August 4th, I have stated my view, that this is to be decided on its merits, that the board of health are ministerial not judicial officers, and that their discretion is a reasonable, and not an absolute one, but as to the fact whether the detention of the vessel after August 4th, was reasonable, I cannot go so far as plaintiffs claim., I concede to plaintiffs that the detention of vessels must be for cleansing, and that a detention for a longer period than is required for the proper purification of a vessel and a reasonable period of delay to test the fact of her being clean, would not be justifiable; but I am not prepared to say that a period of three weeks can be laid down as a limit within which vessels must be cleansed, nor will the custom of other ports have any but an indirect bearing on this point. The evidence shows that the time required for purification depends upon the age and condition of the vessel; that a ship as old and filthy as the Home required a long period to clean, and probably could never be pronounced absolutely clean; her purification would be but relative at best. Then there were actually but fifteen days from the discharge of her cargo until her mistaken release on August 4th. There is also positive evidence, Dr. Goodman's, that she was not a clean, unoffending vessel on her return to Lazaretto, August 8th, and there are further several doubtful cases of sickness arising after that time, and one clear case of yellow fever, that of Carpenter, who was taken sick August 18th, but who may have contracted the disease at quarantine. I must, therefore, decline to consider the Home as entitled to be released August 4th, and her detention, thereafter, unlawful. This detention actually lasted, however, up to November 7th. The resolution was passed November 2d, but she was detained until the bills were paid, November 7th, a period of nearly three months. Now, on the same principle, I am bound to decide that the detention of the Home during so long a period was unnecessary as an unreasonable exercise of discretion, and therefore unlawful, and to be compensated in damages. In fact, it does not appear that any real danger could have been apprehended from the Home for so long a period, certainly nothing was done to cleanse her after the whitewashing, &c., done when she first came back to the Lazaretto. Her detention would seem rather to have been a matter of policy, that inasmuch as she was publicly known as infected with yellow fever, it was more prudent not to permit her up until, from the lateness of the season and the disappearance of the Swanson street epidemic (which, as before mentioned, was proved to have arisen from sources unknown, but entirely distinct from any traceable to the home), in the end of September, the public fear of yellow fever had died away. In fact, Dr. La Roche says, in his report on the yellow fever in 1870, p. 23, "she was, though apparently clean and disinfected, as a matter of precaution, ordered back to the quarantine station, where she was taken by the health officers, and remained at a proper distance from the buildings and under strict surveillance till the close of the quarantine season, when she was released."

Now, it must be conceded that, however wise as a matter of public policy, it may have been to detain a clean vessel, yet such a detention cannot, as regards the owners of the vessel, be treated as a reasonable one within quarantine powers, but must be treated as a taking for public use, for which compensation is due. On evidence given before me, I have considered that the detention for a period beyond August 8th was justifiable, and it is somewhat hard to fix a point where, in this view, it ceased to be so. Allowing, however, a week after the return to Lazaretto, for the fresh cleansing, and some two weeks longer for a reasonable delay to test her condition, I think it may fairly be said that on the 2d of September she should have been released. If Charpenter's and the other reputed slight cases were due to infection from the brig, they would seem, from their appearing from 15th to 18th, to have been contracted from 8th to 12th, the time she was being whitewashed and having pumps cleaned. This would make two weeks delay from 18th appear reasonable. I therefore allow the claim for demurrage from September 2d, until her release, November 7th, including the five days during which she was detained, after the order for her release was given, to compel the payment of the bills which I have decided were not justly due. This decision makes it unnecessary for me to discuss at length the question of the liability of defendants for demurrage, &c., during the period from refusal of the board of health to permit her to take in ballast from lighters at Lazaretto; but I am clear that on this ground, also I must award the plaintiffs demurrage, &c., from the date of the application. The words of the act, on this point, are: "Provided, That such ship or vessel, after she shall have been thoroughly cleansed and purified, if no malignant disease appear on board, may be allowed to take in freight at the Lazaretto by means of lighters, and proceed to sea." From their connection, following the clause that the vessel shall be detained to such further time as the board deem necessary, I am disposed to consider this proviso as mandatory, and as giving the vessel this as a privilege or right.

As I have held in my review of the evidence, I am satisfied that Mr. Currier made the request to members of the board verbally, and was verbally refused. There is nothing in the act to require a formal written application. The request which Mr. Currier made formally was informally refused; he was simply told that the board would not consent, and there does not appear any formal entry of this refusal even on their minutes. Mr. Currier does not seem to have received any intimation that to secure this permission he should make formal application in writing. The other application, to go up to Port Richmond to take in coal and go immediately to sea, would seem to have been a sufficiently reasonable one, in view of the "apparently clean condition" of the vessel in the end of August or beginning of September, but was not within the peremptory words of the act; in any event, had a formal reply been made to this letter by the board of health, offering permission for the brig to be loaded from lighters at the Lazaretto, the city would have been freed from liability on this ground. The period of this request and refusal is not definitely ascertained, but it is not far, I think, from September 1st, so that I think I am, on this ground, also right in fixing that as a period for the beginning the allowance of demurrage.

The view I have taken of the detention with regard to the claims for demurrage applies with the same force to expenses necessarily incurred by plaintiffs in care of their vessel during the same period. I therefore allow their claim for the wages and support of watchmen from September 2d. Also for captain's wages and board; some question was made as to the captain's rate of board at Arch street House being too high, but no evidence was offered in support of this point, and it was shown that it is a usual place for masters of vessels to stop. I can see no reason why the expenses of the master's trips to and from Lazaretto to Philadelphia during the same period should not be allowed; it was necessary he should be, from time to time, in both places, to see after the vessel at Lazaretto, and to urge her release with the health officer and board of health here. From much of these charges the board of health could have freed themselves, had they made up their mind how long the vessel was to be detained. Had they told the owners in the end of August, the vessel must remain two months longer, the master's board and wages during those two months, and his travelling expenses might have been saved. The claim for expenses of owners coming to the city in August and November, are not allowed. I have held that in August the vessel was rightly detained, and Mr. Currier's journey in November was induced by her release, not by her detention, and there is no evidence he would not have come on at whatever time she was released. Besides, the city is already charged with a master's wages expressly engaged to look after the vessel. No evidence was given to support the claim for "commission $38," and it is disallowed. Three points remain still open. The claim for value of rags destroyed on the government wharf; the claim for sails, rope, &c., stolen, and the claim for damages to the vessel from exposure to sun.

First, as to the rags, I must disallow this claim on several grounds; first, the rags appear not to have belonged to the owners of the vessel, but to have been the private property of the deceased Captain Phillips. Secondly, they were seized by the United States custom house officers as not on the manifest, and even if they had not been on this ground confiscated, they were subject to a duty of an amount, not shown in evidence, which might have absorbed their value. The evidence is doubtful as to their character; some witnesses called them clean clippings. Dr. Thompson, filthy rags. Rags are materials capable of retaining infection, and almost impossible to disinfect. Dr. Thompson considered their destruction necessary, and although there is no provision in the act of Assembly for the destruction of infected articles, yet I think it cannot be maintained that infected rags would have any value, so that damages could be obtained for their destruction. Dr. Thompson considered them infected, and they had been certainly in the cabin of the captain who had died of yellow fever.

Second, as to the robbery of the sails, hawsers, &c. The plaintiff's claim is for an amount of upwards of twelve hundred dollars expended to replace the lost articles, &c. This amount would seem, in any event, somewhat too large, as not making sufficient allowance for the probably deteriorated condition of the articles stolen; but as I propose to reject the claim, it is unnecessary for me to go into that question.

I am entirely satisfied that there was no abandonment. It is true that the consignees and master threatened to abandon when the board of health sent the brig back to quarantine; but it clearly appears that this intention was reconsidered and never carried into effect, since, at the notification of the board of health, the consignees sent down a watchman to take care of the brig. That the facts on which my conclusion that there was no abandonment is based may clearly appear, I insert, as requested, copies of the resolution of the board of health as to the request to the consignees to send a watchman and of the notice sent to the consignees by Mr. Addicks, the health officer. The resolution was as follows:

Resolved, That the health officer be directed to notify the consignees of the brig Home that he returned her safely to the Lazaretto on Saturday night; that she is there at their risk, and that they be requested to send a person or persons to take care of and watch her, in lieu of two men stationed on board by the health officer for that purpose."

Passed August 9th, 1870.

The letter of Mr. Addicks is as follows:

PHILADELPHIA, August 9, 1870.

MESSRS. KNIGHT & SON,

No. 120 North Delaware avenue:

GENTLEMEN:—As consignees of brig Home, I hereby inform you, as I told you on Saturday, the 6th inst, at the custom house, that on that day I had received from the board of health instructions to have the brig taken to the Lazaretto forthwith; both you and the captain declined to obey my order to do so. I found the brig at east side of Windmill Island, abandoned. I placed a pilot and four men aboard, and towed her down to the Lazaretto, at which

place she was anchored at about 9 o'clock, P. M. I further placed two men aboard as watchmen. All the expenses incurred are charged to you and the owners of the brig Home. I now further notify you, by direction of the board of health, that you send down at once proper persons to take charge of the vessel, as she now remains at the Lazaretto at your risk, or all persons concerned as her owners.

Respectfully,
JOHN E. ADDICKS,
Health Officer.

The watchman was sent down, in compliance with this letter. This act seems to me distinctly a waiver of the threatened abandonment and a resumption of charge of the brig.

It was during the period while the brig was under the care of this man, sent by the consignees, and after the departure of the two men placed on board by the health officer, that the loss occurred. The manner of its occurrence is certainly doubtful; the watchman related that he had been forcibly boarded up in the cabin while the vessel was robbed; the captain engaged by the owners, Cook, however, concluded to remove him and replace him by another immediately upon the loss occurring; this would certainly argue that he thought there had been at least negligence on the part of this watchman. There was no reason to doubt that the owners might have placed additional force on board the vessel for its protection, if they desired; in fact, they were notified to send a person or persons, and it was well argued for the city that as the owners employed a master and one watchman, with whose wages and expenses they charge the city, it was for them to employ also such other servants as to make their property secure. On the other hand, counsel for plaintiffs contended that the rule of quarantine forbidding persons going on board the brig from coming to Philadelphia, rendered it impossible for the consignees or master to visit the brig and ascertain what was necessary; that it was the act of the board of health placing the brig in this situation, and it was their duty therefore to see she was properly protected. They sought also to apply the analogy of tow-boat cases, where the tug, having the guidance and direction, is made responsible to the towed for accidents befalling them. It seems to me this analogy is unsound, because in this case there was not, in fact, an absolute resignation or giving up the management of the brig to the board of health by its owners; on the contrary, a certain care and superintendence of it was still taken by them; to make the analogy apply, the injury to the towed vessel would have to be by robbery or something similar, which its own crew might fairly be expected to provide against. It seems to me, on the whole, a case of concurrent negligence. Without denying that perhaps the negligence of the board of health was greater than that of plaintiffs, since they were acquainted with the state of the river as to police, &c., and should have made proper provision for the protection of vessels detained by them; yet I cannot but impute some negligence to plaintiffs, through their servants and agents, the consignees and master and watchman.

First, in plaintiffs' injudicious choice of a watchman.

Second, in not sending a sufficient number of watchmen to properly protect their vessel, or applying for leave to send them.

Third, in the watchman, in negligently keeping his watch and suffering himself to be boarded up in the cabin while the brig was robbed. In this I may be in error, but the master was certainly of this opinion, since he dismissed the watchman. Were this case in admiralty, the rules of maritime law would compel an apportionment of the damage according to the degree of negligence proved against each party; but as it is in a common law court, contributory negligence shown in the plaintiffs precludes their recovery. I believe the robbery occurred during the period when I have considered the detention justifiable; but that does not alter the position of the parties in this particular, since, though defendants would, if the detention were unjustifiable at the time of loss, be held to a stricter rule of diligence; yet, in either event, in an action *on the case*, contributory negligence on the part of plaintiffs conducing to the loss would prevent their recovery. The plaintiffs' claim for reimbursement for the loss of the sails and hawsers must, therefore, be disallowed. No proof was given for the item 28, bending sails, and I do not see how it could be allowed if proved.

The remaining claim is for damage to the vessel by the opening of the seams, by reason of exposure to the sun at quarantine, which necessitated recaulking, at an expense of $200. There was a further claim for $47.35 for damage to the boat, which, however, was excluded, as not being shown in any way to be the consequence of the detention. It was contended against the allowance of the claim for caulking, that this damage could have been prevented by frequent washing of the decks or spreading of tarpaulins. The first was impossible, without there had been a larger force on board, and the second became impracticable after the sails were stolen. Besides, the rule of the quarantine, which prevented the master from visiting the vessel, rendered it impossible for him to judge properly what ought to be done to guard against this evil, and a watchman, sent down from the city, would probably be ignorant of what measures were necessary for the purpose; and if a larger force had been employed on board the vessel, the wages and expenses I would have allowed them would probably have been as much as this claim for scraping and caulking. It is more difficult to say how much should be allowed, and to adjust the amount of injury of this kind, due to the detention I have held unlawful. On the whole, I decide to allow half the amount claimed, or $100, treating the rest of the injury as resulting during the voyage and the lawful detention. To sum up, therefore, I award the plaintiffs:

Bill of expenses to get the vessel back to Lazaretto	$62 50
Hospital, T. White	7 75
" T. Doggett	5 00
Watchman, 66 days, September 2d to November 7th, at $1.50.	99 00
Proportion of provisions bill for watchman	34 83
Hospital, Elliott and Sylvester.	14 80
" Carminter and Houghton	39 06
Hospital, Thomas Doggett, Jane Doggett	27 00
Towage to the city $15, labor 4 men $16.80	31 80
Captain's wages, from September 2d to November 7th, 2 months and 5 days, at $80	173 66
Board of captain 9½ weeks, at $12	114 00
Travelling expenses, proportion, say two-thirds	13 96
Demurrage from September 2d to November 7th, 2 months and 5 days, on 216 tons, at $2.50 per ton per month	1,170 00
Amount paid owners of lighters for demurrage of barges	384 00
Caulking	100 00
	$2,273 36

Interest from November 7th, 1870, is allowed on this amount.

I presume that costs follow the report. These I compute as follows:

Attorney fee and writ	$22 40
Clerk	7 25
Crier	1 00
Commission	6 00
Certificate of record to referee.	10 00
Referee's fee, as suggested by counsel	250 00
Printing report	49 70
	$346 35

R. L. ASHHURST,
Referee.

M. THOMAS & SONS, AUCTIONEERS

Nos. 139 and 141, late 67 and 69 S. Fourth St.

REAL ESTATE SALE, OCTOBER 21st.

Will include—

Green and Johnson, N. W. Corner, Germantown—Modern Two-and-a-half-story Stone Residence.

Green, No. 1334—Three-story Brick Residence.

Bank, No. 18 Business Stand—Four-story Brick Store.

Market, No. 242—Very Valuable Business Stand - Four-story Brick Store.

Jacoby, No. 223—Three-story Brick Dwelling. Orphans' Court Sale—Estate of William S. Mason, dec'd.

Forty-fifth, above Silverton avenue—Two-story Brick Dwelling. Orphans' Court Sale—Estate of Valentine P. Foy, dec'd.

Forty-fifth and Silverton avenue, N. W. Cor.—Store and Dwelling—3 fronts. Same Estate.

Spruce, No. 722—Very Elegant Four-story Brick Residence, with Stable and Coach House. 24 feet 9 inches front, 250 feet deep—2 fronts. Orphans' Court Sale—Estate of Huston, Minors.

Thompson, (formerly Duke,) west of Palmer—Three-story Brick Dwelling. Orphans' Court Sale—Estate of Margaret Benner, dec'd.

Pine, No. 2528—Genteel Three-story Brick Dwelling and Stable. Orphans' Court Sale—Estate of Catharine Shields, dec'd.

Pine, No. 4107—Three-story Brown-stone Residence, with Side Yard. 40 feet front, 160 feet deep. Orphans' Court Sale—Estate of J. Thomas Elliott, dec'd.

Walnut, Nos. 3705, 3707, 3713 and 3715—4 Modern Three-story Brick Residences. Sale Peremptory.

Fourth and Master, N. E. Corner—Business Stand—Two-and a-half-story Brick Tavern and Dwelling, and a Genteel Three-story Brick Dwelling, No. 1405 North Fourth street, adjoining the above.

Fifteenth, (South,) No. 1210—Three-story Brick Dwelling.

Fifth, (South,) No. 915, Camden, N. J.—Three-story Brick Dwelling.

Frankford road, No. 961—Business Stand—Three-story Brick Store and Dwelling.

Rosehill street—Two-story Brick Dwelling.

Seventeenth, (South,) No. 211—Modern Three-story Brick Residence.

REAL ESTATE SALE, OCTOBER 28th.

Will include—

Southampton avenue, Chestnut Hill—Lot. Executor's Peremptory Sale.—Estate of Owen Sheridan, Jr., dec'd.

Southampton avenue.—Lot. Same Estate.

Evergreen avenue, adjoining Fairmount Park—Large Lot, 11½ Acres. Same Estate.

Mount Vernon, No. 1623—Modern Three-story Brick Residence. Sale by Order of Heirs.

Tenth, North of Montgomery avenue—Valuable Business Location—3 Coal Yards, Large Lot.

Reed, Dickinson, Tasker and Twenty-ninth—Brick Yard, Very Desirable Building Lots. Orphans' Court Sale Estate of George M. Clark, dec'd.

West Market, West Chester, Pa.—Handsome Modern Three-story Stone Residence, 1½ Acres.

Westmoreland, East of Twenty-first—2 Three-story Brick Dwellings.

Delaware, in the rear of the above—2 Three-story Brick Dwellings.

Spruce, No 723—Modern Four-story Brick Residence.

Ninth, (North,) Nos. 46 and 48—Valuable Business Stands—2 Three-story Brick Stores and Dwellings. Bulk windows, and all the modern conveniences. Executors' Sale—Estate of M. H. Haflan, dec'd.

Front, (South,) No. 229—Valuable Business Stand—Four-story Brick Store, extending through to Water street.

South, No. 722—Three-story Brick Lager Beer Saloon, with 4 Three-story Brick Dwellings in the rear, No 719 Alaska street, Orphans' Court Sale—Estate of Richard U. Krider, dec'd.

Swanson, No. 736—Four story Building and Large Lot, with a Three-story Brick Building and 2 Three-story Brick Dwellings in the rear on Lacon place—Same Estate.

Chestnut Hill—Large and Desirable Lot, 1¾ Acres, extensive fronts on the Chestnut Hill and Springhouse turnpike and Township Line road, near the railroad depot. Sale by Order of Heirs—Estate of John Yomer, dec'd.

Lemon, Nos. 1019, 1021 and 1023—3 Three-story Brick Dwellings, with 4 Dwellings in the rear, forming a court. Same Estate.

Melon, No 1119—3 Brick and Frame Dwellings. Same Estate.

Geary, Nos. 829, 831 and 833—3 Three-story Brick Dwellings. Same Estate.

Grove, Nos. 1732, 1734 and 1736—3 Three-story Brick Dwellings. Same Estate.

Sixteenth, below Market—Lease, Buildings, &c. Same Estate.

JAMES A. FREEMAN & CO. AUCTIONEERS.

No. 432 WALNUT STREET.

REAL ESTATE SALE AT THE EXCHANGE, OCTOBER 22d.

On Wendesday, at 12 o'clock noon.

Orphans' Court Sale.—No. 1618 Pine street. Business Stand—Four-story Brick Store and Dwelling, and Three-story Brick House in rear, No. 1621 Helmuth street. Lot 16 x 100 feet. $60 ground rent. Estate of Sailer minors.

Orphans' Court Sale.—No. 1630 Pine street. Four-story Brick Store and Dwelling, and Three-story Brick House in rear, No. 1623 Helmuth street. Lot 16 x 100 feet. $60 ground rent. Same Estate.

Orphans' Court Sale.—No. 332 Dugan street. Three-story Brick Dwelling above Pine street, 7th Ward. Lot 16½ x 53 feet. Same Estate.

Orphans' Court Sale.—No. 330 Dugan street. Two-story Brick Dwelling, adjoining the above. Lot 16½ x 63 feet. Same Estate.

Orphans' Court Sale.—No. 226 Vandeveer street. Three-story Brick House and Lot 14 x 30 feet, south of Locust and east of Tenth street. Same Estate.

Orphans' Court Absolute Sale,—No. Catharine street. Genteel Three-story Brick Dwelling, with back building and conveniences, Three-story Brick House in rear fronting on St. Paul's avenue. Estate of Charles McDonough, dec'd.

Orphans' Court Absolute Sale.—Eleventh and Federal streets. Valuable Property—Three-story Brick Tavern and Dwelling, at S. E. corner. 2 Three-story Brick Dwellings adjoining, fronting on Federal street, and 3 Three-story Brick Houses fronting on Eleventh street, and a Building Lot on Naylor street. Lot 51 feet on Federal street and 100 feet on Eleventh street and 51 feet on Naylor street. Same Estate.

Orphans' Court Absolute Sale.—No. 733 Federal street. Three-story Brick House and Lot 16 x 65 feet. Same Estate.

Orphans' Court Absolute Sale.—No. 735 Federal Street. Three-story Brick Dwelling and Lot 16 x 55 feet. Same Estate.

Assignees' Absolute Sale.—"Flushing Mills" Coal and Lumber Yard, Steam Engine, Boiler, Dwellings, Barn, Two and a half acres, &c. Neshaminony Creek, Bensalem Township, Bucks Co., Pa. Estate of Boileau & Tyson, bankrupts.

Assignees' Absolute Sale.—No. 1532 Marshall street. Modern Three-story Brick Dwelling with side yard. Lot 23 x 74 feet. $3,500 may remain.

Assignees' Absolute Sale.—No. 2016 Howard street. Modern Three-story Brick Dwelling, with back buildings, above Norris street. Lot 18 x 156 feet. $2,700 may remain.

Assignees' Absolute Sale. Nos. 2018 and 2020 Howard street. 2 Modern Three-story Brick Dwellings, with back Buildings, each 18 x 108 feet. $2,700 may remain.

Assignees' Absolute Sale.—No. 1935 N. Second street. Business Stand—New Three-story Brick Store and Dwelling, above Berks street. Lot 81 x 68 feet. Has all the conveniences.

Assignees' Absolute Sale.—Palethorp street. Neat Two-story Brick House, above Berks street, in rear of the above. Lot 15 x 41 feet.

Peremptory Sale.—No. 2112 Waldron street. Desirable Neat Four story Brick Dwelling, 9th Ward. Lot 16 x 32 feet. $1,500 may remain. Immediate possession. Keys at the Auction Store.

No. 239 S. Front street—Business Property. Four-story Brick Store and Dwelling, below Walnut street. Lot 12 x 35 feet to Water street. Terms easy.

Thirty-eighth and Elm streets.—Two-story Brick Church Building at the S. E. corner. Lot 60 x 100 feet, 24th Ward. $2,500 may remain on mortgage.

Washington avenue and Fifteenth streets.—2 Coal Yards with offices, sidelings, S. W. corner. Lot 93 x 110 feet to Lukens street. 3 Fronts. $9,409 may remain.

Receiver's Peremptory Sale.—Kensington avenue, above York street. Stock of a Wheelwright and Blacksmith: Wagons, Spokes, Wheels, Iron Work-benches, Tools, Lumber, Horses, Carriages, &c. On Thursday Morning, October 23d, 1873, at 10 o'clock, will be sold by order of John F. Belsterling, Receiver, the entire Stock and Tools of a Wheelwright and Blacksmith Shop, 40 new and second-hand light and heavy Wagons, Wheels, Spokes, Platform and Spring Wagons, Platform Gears, Tires, Axles, Oak, Pine and Poplar Lumber, Iron, Bellows, Tools, Work-benches, Vices, &c., &c.

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Legal Gazette.

VOL. V. PHILADELPHIA, FRIDAY, OCTOBER 24, 1873. No. 43.

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[Our thanks are due to Josiah H. Bissell, Esq., of Chicago, official reporter, for the following cases to appear in Vol. 2, Bissell's Reports.]

NORTHERN DIST. OF ILLINOIS.

United States District Court.

IN ADMIRALTY.

THE SKYLARK.

1. The District Court in admiralty has the right to exercise equity powers in the distribution of a surplus arising from a sale under decree to the parties entitled to such surplus, whether by Federal or State law; and it is immaterial whether these parties have maritime liens.
2. The reason is, because there is a fund in court which cannot be taken out except by its order, and parties having rights in the vessel can only exercise them by coming into this court.
3. A purchaser under execution from a State court has no rights as against a decree in this court enforcing a maritime lien.
4. If he became the purchaser, the amount which he bid must be applied on his debt, and the balance only can be proved as a claim in this court.
5. *It seems*, that no claim would be valid as against a mortgage duly recorded under the act of July 29th, 1850, except the lien by bottomry therein excepted.
6. *Also*, that a State Legislature, by declaring a claim to be a lien upon a vessel, cannot override a mortgage duly recorded according to the law of Congress.

The Skylark belonged to the Lake Michigan Transportation Company in 1868, during which season various claims against the vessel were created. On the 15th of October, John Barker sued out an attachment against her in the State court at Chicago, obtained judgment, and at the sale under execution, bought her in for about $300.

Subsequently a libel for wages of seamen was filed in this court, upon which a decree was obtained, and on the 14th of March, 1869, she was sold for $4,150, the money brought into court and all the maritime claims paid.

Barker then filed a claim to the surplus as owner of the vessel, and other parties filed claims as material men, for supplies, &c.

DRUMMOND, J. These claimants, it is conceded, have not what are termed maritime liens. Their liens are under the laws of the State—either of Illinois or of Michigan. The question of distribution came before the court at a former day, between Barker, the purchaser under the attachment, and the assignee in bankruptcy of the company—the original owner of the vessel. The question arose whether the vessel belonged to Barker or to the assignee. The court held that as between these two parties Barker was the owner, because he had purchased at a sale on a final process, issued before the commencement of the proceedings in bankruptcy, and that he had acted in good faith so far as the court could see, and, therefore, his right was paramount. The present, however, is not a controversy between two parties claiming to be owners of the vessel, but between two parties claiming a right to the surplus remaining after sale under a decree which overrides all other rights, as well claims under the State law, as under the attachment at the instance of Mr. Barker.

There can be no doubt of the right of this court exercising equity powers, as a court of admiralty always exercises them in a proper case, to distribute the surplus to the parties who are entitled to it, either by Federal or State law, and it is immaterial whether the parties thus claiming the surplus have maritime liens or not. It is not on that account that the court exercises this power as a court of admiralty, but because there is a fund in court which cannot be taken out of court except by its order. Parties having rights to this vessel cannot exercise them, except by coming into this court. The vessel has been sold under a paramount right, and the party who holds under the sale in admiralty, has, of course, a perfect title; therefore, they must come into this court that their rights may be adjudicated.

The point is, what are their claims upon this fund. It is insisted that because the court held as it did, between Barker and the assignee, that it must now hold, these parties having no maritime liens—that Barker's right is superior to theirs. It by no means follows. That was a question between two parties claiming to be owners. This is between creditors; and Barker as against this decree has no right whatever. It is also insisted that as this court decided in the case of the proceeds of the Grace Greenwood, *ante*, that a mortgagee holding a ship under a mortgage recorded in conformity with the act of Congress of July 29th, 1850, had a prior right as against parties who had claims declared to be liens by the State law, that therefore the court must hold that Barker has a prior right. That is a *non sequitur* for the reason already stated. The question in that case was whether claims for supplies created after the mortgage was recorded, should override the rights of the mortgagee. In the absence of any special equities in favor of those claimants, it was held that the mortgage was a superior right.

The language of the act of 1850 is, that "no bill of sale, mortgage, hypothecation or conveyance of any vessel or part of any vessel of the United States shall be valid as against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bills of sale, &c., be recorded in the office of the collector of the customs where such vessel is registered or enrolled: *Provided*, That the lien by bottomry on any vessel created during her voyage by a loan of money, &c., shall not lose its priority, or be in any way affected by the provisions of this act," 9 U. S. Statutes at Large, 440. Bearing in mind the language of the Supreme Court in the Reed case, Pratt v. Reed, 19 Howard, 359, which is familiar to all admiralty lawyers, it is doubtful whether any claim, except in the character mentioned in this proviso, would be valid as against a mortgage properly recorded under this act of Congress.

I wish it distinctly understood that I shall not hold, unless told so to do by the Supreme Court of the United States, that every claim which a State Legislature may declare to be a lien against a vessel, shall override a mortgage properly recorded under the law of Congress. These were the reasons that produced the decision in the Grace Greenwood case, to which decision I adhere.

These parties stand, so far as their claims in equity are concerned, upon an equal footing. Barker bid in the Skylark at his own risk, obtaining no other title than the judgment, execution and sale gave him, and, as against the decree of this court, no title whatever. As a creditor, he has no superior right to these claimants. If the judgments obtained by him were for supplies, so are these claims for supplies. It is simply a question of how this fund is to be distributed, and what are the equities operating upon its distribution. I believe the sum bid for the vessel by Barker was much less than the amount of the judgment. The amount for which he obtained his title, of course, must stand as a satisfaction upon the debt, but the balance, provided it has the same equity that the claim of these other parties have, shall be treated in the same way. The claim of Mr. Stevens will be disallowed altogether. He was a stockholder in the company, and superintendent in the management of its business, and in the running of its boats. I think it would be unjust that he should have the same advantage as third parties, who furnished supplies on the faith of his contracts. I shall allow Barker to come in, and if he is on the same footing as the rest, I shall order the balance to be distributed among them *pro rata*.

Decree accordingly.

[Notes by the reporter.]

See The John Richards, volume 1 of this series, 106, and cases there cited, also Ashbrook v. The Golden Gate, 5 American Law Register (O. S.), 148.

That a State law cannot impair a maritime lien, see decision of Wells, J., District of Missouri, in case last above cited.

In the case of Marsh v. Brig Minnie, District of South Carolina, reported in 6 American Law Register (O. S.), 328, Magrath, J., held that a maritime lien for repairs in a case of necessity must be preferred to a mortgage duly recorded, but that the mortgagee's lien was prior to all other parties.

That seamen's lien for wages is not divested by sale of vessel on execution against owner, see Foster v. Steamboat Pilot, 1 American Law Register (O. S.), 403.

A general maritime lien cannot be divested by the Legislature of a State. An admiralty sale alone can judicially pass the title to a vessel, discharged of liens. Hill & Conn v. The Golden Gate, 6 American Law Register (O. S.), 273.

Where a vessel was mortgaged in Maine, and afterward went to New Orleans, where she was attached by an ordinary creditor, and the mortgagee intervened and claimed the vessel under his mortgage, *held* the attachment should be set aside, the suit dismissed, and the mortgagee declared the owner.

Dobbin v. Hewett, 19 Louisiana Annual Reports, 513.

See The N. W. Thomas, volume 1 of this series, 210, and authorities there cited.

NORTHERN DIST. OF ILLINOIS.

United States Circuit Court.

MARSHALL v. WILLIAMS.

1. A commission merchant is liable to his principal if he sells goods contrary to instructions, or is guilty of negligence in the sale.
2. The receiving without objection accounts of sales made on credit, is a waiver of a previous instruction to sell for cash, and the merchant may afterward presume that he has the right to make further sales on credit.

The defendant, George F. Williams, while acting as the agent of the plaintiffs in selling oil on commission for them, sold on fifteen days' credit, on the 18th of January, 1867, ninety-two barrels to McCormick and Callender, who soon afterwards failed, whereupon plaintiffs brought this action to recover the value of the oil.

On the 16th of August, 1866, the plaintiffs had by letter instructed the defendant in selling oil for them to sell according to the "net cash rule." Nevertheless the oil subsequently sold by the defendant for the plaintiffs was sold not for cash, but on credit, sometimes more than fifteen days, sometimes less—and returns made accordingly.

Case tried before DRUMMOND, J., without a jury.

George Willard, Esq., for plaintiffs.

S. A. Goodwin, Esq., for defendant.

DRUMMOND, J. The defendant is accountable, in the first place, if he has sold the oil contrary to the instructions of the

plaintiffs, and secondly, if he has been guilty of any negligence in the sale by which they have been damnified.

The testimony introduced as to the commercial meaning of these words, "net cash rule" is not of such a character that the court can place any stress upon it; the result seems to be that the language is interpreted according to the notion of each particular merchant. Some construed it in one way, and some in anothe There is no general understanding among commercial men applicable to the use of such language, therefore the court must place a legal construction upon it, which is that the oil was to be sold for cash. If the case stood upon that alone, then perhaps there would be no doubt that the plaintiffs could recover. But the subsequent transactions show that if that was the purport of the instructions, it was waived, and the business was done upon a different basis.

The credits given from time to time on sales by the defendant, were known to the plaintiffs, and if it was their intention to hold defendant up to the cash rule, they should have at once notified him that such sales were contrary to their instructions and that they must sell for cash. But having accepted without objection the accounts of sale made from time to time by the defendant, and drawn for and received the balances, it must be considered that their letter of the 16th of August was modified by these subsequent recognitions of the credits given by the defendant. Accordingly the presumption is that defendant had the right to sell to McCormick and Callender on fifteen days' credit in the same way as he had previously sold to other parties.

This is the construction that must be placed on the conduct of the plaintiffs unless it was the understanding and contract that the defendant was selling on a guaranty of the sales made. If that was so, and the plaintiffs were warranted in believing that it was so understood by the defendant, as a matter of course the change from cash to credit would not be objected to; but I doubt whether the plaintiffs could have so understood it. These sales and reports were made from time to time at the usual commissions charged. Now can it be possible that the defendant believed he was selling on a *del credere* commission and guaranteeing every sale that he made?

I cannot so interpret the conduct of the parties. I do not know what the facts may be in the commercial world. It may be that commission merchants are so anxious to get business that they may guaranty sales if they receive the property, and have the right to sell it, taking the ordinary commissions, but I did not suppose, and certainly it cannot be inferred from the testimony in this case that such practice prevails in Chicago; and therefore I cannot infer that that construction is to be given to the plaintiffs' conduct.

The only remaining question is, did the defendant act with reasonable diligence and good faith in the sales. Some things had occurred, undoubtedly, calculated to throw suspicion upon the commercial standing of McCormick and Callender, but it cannot be claimed in this case that those circumstances were known to the defendant, or to his agent. The agent who transacted the business expressly states that so far as he knew, he believed that McCormick and Callender were in good standing, and a suspicion as to their position seems not to have been known to a large number of the merchants engaged in the same kind of business, and of course may not have been known to the defendant.

It would be hard merely because a whisper is circulated among men affecting the standing of a merchant, that another should be held accountable for the fact, if it has been indicated to others, and not to himself. So that taking all the testimony together, I cannot say the defendant was guilty of any negligence in the sale of this property to McCormick and Callender. The weight of evidence is that their standing in the community was good at the time of this sale.

This is a hard case undoubtedly on plaintiffs, but somebody has to lose his money. It is a question whether it shall be lost by the defendant or plaintiffs. If the sale was at the owner's risk, then the owner should lose; if at the risk of the defendant, he should lose.

Plaintiffs by permission of the court took a nonsuit.

[Notes by the reporter.]

A sale by a factor contrary to the order of his principal, may be afterward affirmed by the receipt of the proceeds. Morse v. Smith, Dudley (S. C.), 248.

Where a commission merchant from time to time sends an account of sales to his principal, who makes no objection and draws for the balance of account rendered, it is a ratification of the sales, and the principal cannot recover for any alleged violation of instructions as to the terms of sale. Woodward v. Snydam, 11 Ohio, 360.

TWENTY-FIRST JUDICIAL DIST.

Court of Common Pleas of Schuylkill County.

THE GOVERNMENT NATIONAL BANK v. LUCAS & CO.

1. Under the provisions of the 57th section of the act of Congress, approved 3d June, 1864, relative to national currency, the State courts have concurrent jurisdiction with the Federal, for suits for penalties incurred for a violation of the said act.
2. Damages sounding in tort, unconnected with the matter in suit, are not admissible as a set-off in an action *ex contractu*.

Rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence.

Opinion by WALKER, J. Delivered September 1st, 1873.

This is a suit brought for the recovery of two prommissory notes, one dated 15th July, 1872, for $2,500, and the other dated 26th September, 1873, for $4,000, each at four months, and a check for $3,000, dated 8th October, 1872, and payable 1st November, 1873, amounting in all to $9,500, drawn by Geo. J. Richardson to the order of the defendants, who endorsed the same and had them discounted by the plaintiffs, the proceeds of which the defendants received, less some eighteen per cent. discount. In addition, the affidavit alleges that within two years the plaintiff received $3,000 in excess of legal interest on other paper, and the defendants' claim, under the 30th section of the act of Congress of the 3d June, 1864, relative to national banks, double that amou in the nature of a set-off, as a penalty for the violation of the statute.

Two questions are raised:

1. As to the jurisdiction of the State courts under this act of Congress.

2. Whether the penalty given in this act (not growing out of the con act in this suit and which is in the nature of a tort), can be set off against the plaintiffs' claim in an action *ex contractu*.

Under the 9th section of the act of Congress of 24th September, 1789, called the judiciary act, the District Courts of the United States have exclusive original cognizance of all suits for penalties and forfeitures under the laws of the United States. U. S. Statutes at Large, vol. 3, 245.

By the 1st section of the act of Congress, approved 3d March, 1815, jurisdiction is conferred on the respective State and county courts, within or next adjoining a collection district, to take cognizance of all complaints, suits, and prosecutions for taxes, duties, fines, penalties, and forfeitures under any of the acts of Congress. Troubat & Haly Prac., vol. 1, part 1, 139.

The acts of 8th March, 1806, relative to revenue; of 21st February, 1793, relative to patents; and of 3d March, 1825, regulating the post office department, confer concurrent jurisdiction upon the State courts. Troubat & Haly, vol. 1, part 1, 140, 141; U. S. Statutes at Large, vol. 4, p. 113.

The act of 28th February, 1839, authorizes all pecuniary penalties and forfeitures under the laws of the United States to be sued for in the State or District Court wherein the action arose or the offender may be found. Kent's Com., vol. 1, p. 452 and notes.

The jurisdiction of the State and Federal tribunals, in cases arising under acts of Congress and otherwise, is ably and exhaustively discussed by Chancellor Kent in the first volume of the Commentaries, star page 388 to 405.

The rule seems to be that Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States, although, the State courts *may* exercise jurisdiction in cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the Federal courts. Kent's Com., vol. 1, 446.

In Priggs v. Comth. of Pa. 16 Peters, 539, the court say that the State magistrates might, if they choose, exercise powers conferred upon them by acts of Congress, unless prohibited by State legislation. That is, the State courts are not bound, in consequence of an act of Congress, to assume and exercise jurisdiction, but may do so. See Wadleigh v. Veser, 3 Sand. 165; Houston v. Moore, 5 Wheaton, 1.

The 57th section of the act of 3d June, 1864, above referred to, provides that suits, actions, and proceedings under the act may be had in any Circuit, District or Territorial court of the United States, or in any State, county or municipal court in the county or city in which said association is located. This clearly establishes the jurisdiction of the State courts.

2. The penalty incurred by the act is here sought to be set-off against the plaintiffs' claim. Can this be done? Or, in other words, can a tort not growing out of the transaction, be set-off in an action of assumpsit? The plaintiff admits that $438.75 were received as discounts on the notes and checks in question, and now asks judgment for the claim less this amount. As this excess of legal interest was received in discounting *these particular notes and checks* the affidavit as to this part is clearly sufficient.

The real question arises upon that part of the affidavit that alleges that $3,000 have been paid within two years in excess of the legal interest, and whether the defendants, under the act of Congress referred to, are entitled to a set-off in double that amount, it being *admitted* that these discounts were received in *other transactions* and on *different notes*.

Under the 2d section of the act of 28th May, 1858 (Purd. Dig. 803, P. L., p. 622), regulating the rate of interest, the excess above six per cent. per annum can be deducted from the debt by the borrower, but no action to recover back such excess of legal interest voluntarily paid can be sustained, unless the same shall have been commenced within six months from and after the time of payment. This act expressly repeals the first and second sections of the act of 2d March, 1723, the penal features of which are entirely omitted in the act of 1858. Under the old statute, as under the English statutes, usury consisted in taking more than the legal interest for a loan of money, and was, in some sort, a public offence, punishable by an action, "*qui tam*." Fitzsimmons v. Baum, 8 Wr. 32; Campbell v. Sloan, 12 P. F. S. 481. There is no doubt that this act of Congress is a penal statute, and an action of debt is the proper remedy. Harrisburg Bk. v. Comth. 2 Casey, 451. Since our act of 1858, case or assumpsit is the remedy for the excess of interest paid on usurious contracts. Heath v. Page, 12 Wr. 130, per Woodward, C. J.

The excess of interest over six per cent. is evidently the money of the borrower or debtor, which, when received by the creditor, he cannot retain, but holds for the use of the debtor, and for which an action of assumpsit *lies*. "*It has no cast of a penalty.*" Heath v. Page, 13 P. F. S. 121, per Agnew, J.

If the affidavit alleged that the $3,000 were paid in excess of the legal interest, within six months, then under the authority of Thomas v. Shoemaker, 6 W. & S. 179, it would constitute a good defence. But the act of Assembly authorizing a set-off, does not comprehend matters of a tortuous nature. Kechlein v. Ralston, 1 Y. 571; Kechlein v. Mulhollin, 2 D. 237. And one tort cannot be set-off against another, 4 Tenn. Rep. 74. An action of tort cannot be maintained in connection with a mere contract, unless the misrepresentations be wilful. White v. Merritt, 3 Seld. 356. One trespass cannot be set-off against another consequent upon it. Waterman on Set-off, Deccupment and Counter Claim, 149 to 164. See also as bearing on same subject, and holding the same doctrine. Gibbs v. Mitchell, 2 Bay. 351; Lightner v. Martin, 2 McCord, 214; Slyback v. Jones, 9 Ind. 470; Douahew v. Henry, 4

E. D. Smith, 162; Crum v. Dresser, 2 Sandford, 120; Pattison v. Richards, 22 Barb. 143; Steven v. Blen, 39 Maine Rep. 420; Drake v. Cochroft, 4 E. D. Smith, 34; Wilson v. McElroy, 8 Casey, 82; Gogle v. Jacoby, 5 S. & R. 117; Fairman v. Fluck, 5 Watts, 516; Murry v. Williamson, 3 Binney, 135; Dunlop v. Speers, 3 Binny, 169; Warner v. Caulk, 3 Wharton, 193.

This set-off is for a penalty incurred in another and different transaction. In an action for work and labor, the defendant may defalcate damages for unskilful or careless work,, but he cannot set-off damages which plaintiff may have done to him in another and independent transaction. Charlton v. Alleghany City, 1 Grant, 208.

In an action of assumpsit by a housekeeper for services, the malfeasance of the plaintiff is inadmissible by way of set off, but may be received under a plea of non assumpsit as being connected with the contract. Heck v. Shearer, 4 S. & R. 267; Sleighman v. Jeffries, 1 S. & R. 477. Chief Justice Tilghman says, in Gogel v. Jacoby, 5 S. & R. 121, "No case at common law has been shown where the defendant has been permitted to deduct from the plaintiff, damages on account of an injury done to him by the plaintiff in a matter unconnected with the cause of plaintiff's action."

But a penalty for a breach of a statute is not, when sued for, within the defalcation acts, nor subject in any manner of set-off. Bank of Chambersburg v. Com., 2 Grant, 384.

The conclusion to which we have come is, that evidence of damages sounding in tort, unconnected with the contract in suit, is inadmissible as a set-off in an action *ex contractu*, but when the damages arise out of the particular contract in dispute, they may be given in evidence under the plea of non assumpsit. The remedy, therefore, of the defendants is an action of debt for the penalty under the act of Congress.

The rule is, therefore, made absolute, and judgment entered for plaintiff's claim, less the sum of $438.75, received by plaintiff.

George R. Kaercher, Esq., for plaintiffs.

David A. Jones, Esq., and *Hon. James Ryon*, for defendants.

Recent Decisions.

PENNSYLVANIA.

[Head notes of cases to appear in 21 P. F. Smith's Reports. By courtesy of the Reporter.]

THE INSURANCE COMPANY OF PENNSYLVANIA v. THE PHŒNIX INSURANCE COMPANY.

1. An insurance company executed to Trask a marine policy on a ship, "for account of whom it may concern, loss if any payable to assured or order;" no assignment of the policy to be valid "unless the consent of the insurers be first obtained." He mortgaged the ship to Bell, and covenanted to keep her insured, assigned the policy in blank and delivered it to Bell as collateral; a partial loss having occured, *Held*, that Bell was entitled to recover from the insures in preference to a subsequently attaching creditor of Trask.

2. The transaction was an equitable transfer of the right to receive the money, not an assignment of the policy. Per Hare, P. J.

3. The relation of insurer and insured is one of confidence; a stranger cannot become a party to the agreement without the insurer's consent. Id.

4. The premium note was not paid by Trask, and after the loss the insurer settled with Bell; the amount of the note being allowed to be set off, the condition against assignment which was for the insurer's benefit was thus waived.

5. No exception being taken below to a point reserved, the presumption was that it was assented to as a true statement of the facts.

6. If a judge in a reserved point, state facts without agreement, the objection must be made and exception taken at the time.

February 8th, 1872. Before AGNEW, SHARSWOOD and WILLIAMS, JJ. THOMPSON, C. J., at Nisi Prius.

Error to the District Court of Philadelphia: Of January Term, 1871, No. 348.

SPRINGES, with notice, v. PHILLIPS, Alienee, &c.

1. A ground rent was reserved to Parry, the grantee covenanting, for himself and his assigns, to pay to Parry, his heirs and assigns, the principal after ten years. *Held*, that an alienee of Parry, after the ten years, might maintain covenant against the alienee of the grantee.

2. After the ten years, the owner of the rent continued to receive it, the right to demand the principal did not thereby lapse and the rent become irredeemable after that time.

3. Such rent will not be held irredeemable unless the intent of the parties to the deed is very clear to make it so.

4. The policy of the law is to unfetter lands and make them freely alienable.

5. Parry covenanted that on the payment of the principal the rent should be extinguished, &c., and that he, his "heirs and assigns," would at the cost of the grantee, "his heirs and assigns execute" a release and discharge of the rent to the grantor, "his heirs and assigns." *Held*, that the release was to be prepared by the grantee and tendered for execution to the owner of the rent.

6. The action for the principal was a demand; the owner should prepare the release and bring the money into court; his rights would there be protected by a proper order.

7. In this case the Supreme Court, in affirming the judgment below for the principal of the rent, directed that the owner of the land have leave to file in court a release, to be executed by owner of the rent and be delivered to the owner of the land on payment of the principal, and on failure to file the deed in thirty days, execution might issue.

February 12th, 1872: Before AGNEW, SHARSWOOD and WILLIAMS, JJ. THOMPSON, C. J., at Nisi Prius.

Error to the District Court of Philadelphia: No. 27, to July Term, 1871.

WEIST AND MYERS v. GRANT.

1. Weist without inspection, bought from Hickcox and Coryell, the owners, silver mines, upon their representation that they would yield a certain amount; the contract to be void if Weist should not approve the report of a selected assayer. After his report, Weist paid a large part of the purchase money; on working the mines by Weist, the product was only one-third of the representation *Held*, that Weist was liable for the remainder of the purchase money, unless the misrepresentation was intentional.

2. Weist having bargained for the report of an assayer before being bound by the contract, and having acted on it, and there being no collusion or fraud, he was estopped from alleging misrepresentation in the inception of the contract.

3. Weist was garnishee in a foreign attachment against Hickcox; in the *scire facias* on the attachment, there could be a recovery without first ascertaining the specific interest of Hickcox.

4. Prima facie the interest of the vendors was equal.

February 19th, 1872. Before AGNEW, SHARSWOOD and WILLIAMS, JJ. THOMPSON, C. J., at Nisi Prius.

Error to the District Court of Philadelphia: No. 157, to July Term, 1871.

TAYLOR v. YOUNG.

1. Barnet made a mortgage and died in 1868: in April and May 1869, a *scire facias* and alias were issued on a mortgage: both were returned "*nihil*;" in June the death of Barnet was suggested; in July judgment was entered on the two "*nihils*," the land was sold under a levari without warning the personal representatives of Barnet. *Held*, that the sale passed a good title to the mortgaged premises.

2. Two returns of "*nihil*" to successive writs of *scire facias* on a mortgage are equivalent to "*scire feci*," whether the mortgagor be living or dead.

3. The death of the mortgagor cannot be averred against the judgment.

4. The maxims "*In fictione juris existit æquitas*," and "*utile per inutile non vitiatur*," applied.

5. Under 33d sect. of act of February 24th, 1834 (decedents), notice to the personal representatives of decedent is not necessary after judgment on a mortgage, before issuing execution.

6. Cadmus v. Jackson, 2 P. F. Smith, 295; Chambers v. Carson, 2 Whart. 365; Wood v. Colwell, 10 Casey, 92; remarked on.

February 19th, 1872. Before AGNEW, SHARSWOOD and WILLIAMS, JJ. THOMPSON, C. J., at Nisi Prius.

Error to the District Court of Philadelphia: No. 143, to July Term, 1871.

NORRIS'S APPEAL. BROWN'S ESTATE.

1. After 21 years from the grant of letters, an administrator or executor may answer to a citation to account or distribute, the lapse of 20 years since he was liable to account, &c.; but the presumption of settlement may be rebutted by proof that *in fact* he has neither accounted nor distributed. Per PAXSON, J.

2. *Distribution* is no part of an executor's account. Id.

3. Letters were granted to an executor in 1842; in 1865, a citation was issued under which he filed an account, showing receipts and payments in each year, and that part of the estate remained in specie. *Held*, that the presumption of settlement was rebutted. Id.

4. Balances remained in the hands of the executor from year to year, the money being deposited in bank to his private account, and used for his private purposes. *Held*, that he was chargeable with simple interest. Id.

5. Under act of March 29th, 1832, sect. 17, compound interest connot be charged to an executor, administrator or guardian. Id.

6. An accountant may be charged as profits with more than compound interest when he has used the money; and be punished by disallowing commissions, &c. Id.

7. An executor invested money of the estate in his own name, in stock at a low rate; the stock rose in price. *Held*, that he was liable for the dividends received, and the market value of the stock at the time of the decree. Id.

8. The purchase constituted the executor a trustee of the estate, and his possession was that of the cestui que trust. Id.

9. Such possession of the stock by the executor was not adverse, the executor having done no unequivocal act, denying the right of the cestui que trust, and the statute of limitations did not apply directly or by analogy. Id.

10. Investment of trust funds in a trustee's individual name is concealment. Id.

11. Imperfect information from a trustee as to funds invested in his name, if calculated to give a false impression, is concealment. Id.

12. Where a trustee speculates with trust funds, he may be held to profits if the investment has been successful; interest if disastrous. Id.

13. When trust funds can be traced into a particular investment, it belongs to the cestui que trust if he so elect. Id.

14. An executor with funds of his own and of the estate purchased stocks; when the investment with trust funds could not be discriminated, the cestui que trust might select the most profitable investments as having been made for this estate. Id.

15. Principles upon which commissions and costs are disallowed to a trustee discussed in this case.

February 23d and 24th, 1872. Before AGNEW, SHARSWOOD and WILLIAMS, JJ. THOMPSON, C. J., at Nisi Prius.

Appeal from the decree of the Orphans' Court of Philadelphia: No. 17, to January Term, 1872. In the estate of William Brown.

NEW HAMPSHIRE.

[Head notes of decisions of Supreme Court of New Hampshire to appear in vol. 52, N. H. Reports. By courtesy of John M. Shirley, Esq., State Reporter.]

PAUL v. REED AND TRUSTEE.

The trustee purchased of the defendant a hog which he took into his possession, some sugar which he mixed with his sugar, and other articles, the prices of all which were agreed upon, and took out his wallet to pay for them, but the writ was served upon him before he could deliver the money, and he did not deliver it; whereupon the defendant reclaimed the property. *Held*, that this was a sale for cash, and that the title did not pass until paymant, and so no debt was created, and (the articles being exempt from attachment) the trustee was discharged.

LEGAL GAZETTE.

Friday, October 24, 1873.

JOHN H. CAMPBELL,

EDITOR.

THE CHIEF JUSTICESHIP.

We published, in the spring, as a communicated article, a paper signed M., in which the writer presented certain reasons that commended themselves to *him*, why Judge Samuel F. Miller should be appointed to fill the place made vacant by the death of Chief Justice Chase. Although the article was from a most respectable source, one of our own citizens, well known at the bar, and who to our knowledge was in intimate relations with some of the best constitutional lawyers, and most upright and able statesmen of the country, we gave the article, as we have said, under no responsibility but that of the author himself. We were unwilling, without more information than we then had, to assume an editorial insertion of it. In such a matter we felt an obligation of conscience; and that nothing on so important a subject should come from the *editorial* chair but what had been well investigated, well pondered on, thoroughly believed, and which could stand all criticism. We had not any personal relations, and were not likely to have any with any individual, whose name had been mentioned or was likely to be mentioned for the vacant place. We had no partialities, no *pre*-judgments in the matter; and our object and our determination was to examine, inquire and weigh till the time was at hand, and then fully to express our honest opinions. Such examination and inquiry we have made. We have listened to much; we have read, we believe, all that has been publicly said. We have made private inquiry from the best sources, and we have weighed all. We now give our own judgments in the matter.

And first we must admit that the names from which a good selection may be made, are more than in such a case is common. There is Benjamin Robbins Curtis, who has already given proofs of splendid ability on the bench, of very various attainments in the law; great as a constitutional lawyer; equally great as a commercial lawyer; versed as few men at this day are versed in the subtle doctrines of tenures and conveyancing; unsurpassed, unless by a Harding, in those departments of mechanical, chymical, textile and agricultural inventions, which, with other learning contribute to make up the difficult subject of the law of patents; a lawyer *totus, teres atque rotundus;* a man of education, refinement and reserve. But there are objections to Mr. Curtis. He is not physically what he has been. His time is passed or soon to become past. His promises for the future are not wholly encouraging.

Then there is Hoar, an honest man, and a true judicial mind if ever there was one; who will say on the bench as he always speaks at the bar, and say just as much as he ought and never one word more. But his mind is less distinguished by scope than by acumen. He has been bred too *technically*, we think, for a chief justice of this *great* court. He is too purely of New England. Besides, his manners are constitutionally bad. With integrity unimpeachable, and a heart thoroughly good, he will be always hated by a large class of all about him; wherever he may be, and whatever he may do. His appointment we can hardly doubt, would be odious to every member of the bench, where he would preside. As an associate he will do; and when Justice Clifford retires, let *him* succeed. But we must, to his appointment, as chief justice, say NAY.

Then comes Mr. Evarts. We doubt not that Mr. Evarts is a very practiced advocate, a superior *nisi prius* lawyer; nay more, we will concede that he is quite an able and a fairly learned lawyer, and perhaps something even above that. Yet in nothing that we have ever read of his or heard from his lips, have we perceived sufficient foundation for the reputation which he probably has. We rather fancy that it is because he has been at the New York bar, and that whatever is now at New York *radiates* throughout the country, that his reputation stands so very high as, in the estimation of some, we really believe it does. But if he were more confessedly the man for the place than *we* can quite think him, can President Grant ever appoint *him?* Can he appoint the attorney general, the confidential adviser, the defender through thick and thin, of Andrew Johnson, the man who stigmatized and sought to destroy the President as a liar? We rather think that Grant's right hand will first "forget its cunning." Certainly, he will have to have a profound conviction that there is no one other man fit for the place, and then rise to a degree of Christian grace not found often upon earth.

To Mr. Williams, the attorney general, we are free to concede a mind of parts sufficiently strong; nothing wonderful however. But since we are speaking for the sake of truth, and under the obligation of duty, we must say that he does not possess that high degree of education, a want of which, parts of *great* vigor sometimes largely supply, but which if not *so* supplied, or else given originally by schools, is too great a want to be disregarded in considering the present matter. A chief justice characterized by want of sufficient general education, will not do. As a speaker on the hustings, Mr. Williams was undoubtedly a superior person; as a debater and committee man in the Senate he was valuable; as an attorney general he does well; but the chief justiceship,—"that strain is of a higher mood."

We have as yet said nothing about Mr. Conklin? And why? Because we sincerely believe that it would be simply to secure his own unhappiness for the rest of his life, that he would go into the place we speak of. Mr. Conklin is an able man no dobt; not a bad lawyer either. He has had a large acquaintance with public affairs in the United States, a matter very important for one who is going to be a chief justice of the Supreme Court. But more, a great deal more, than all this is required of the man who presides in that court. Most of the questions in it are, after all, questions of *law;* many of them of pure law, very difficult law too; not a few of them points of practice. He is to *regulate* on the spot, arguments before him by acute, practiced, zealous and often angry men. If he is in the least deficient in any one of the departments of *law*, where is he? He can sit in court indeed, and not open his lips; and though every one of his associates may be saying to himself, "Why don't the chief justice do this?" "Why don't he do that?" and all feel that he is incompetent for his place—a kind of private distinction rather unenviable—still to the public view—in the estimation of gazers, who go in and out of the court room—he *may*, in a kind of way get along. The late chief justice, with his noble mien, did so, well. But how will such a president be in the conference or consultation room, where the judges after the arguments at the bar, meet to consult, argue and *decide?* There he must really preside. However complicated the case, in whatever manner counsel have confused it, or his brethren have misunderstood it; whatever heats may arise—and even in the consultation room, great heats sometimes *do* arise,—*he* must be morally and intellectually above all. What his associates may tangle, he must disentangle: and however dark, questions may appear to them or to any, he must

"Sit in the centre and enjoy bright day."

To do all this a man must be a great man, great in his faculties, great in his attainments, great in his self-control. Of course, in the consultation room, he is weighed at once, and if found wanting, miserable is his condition! If he is not a *real* head of the court, he is despised by all the associates. Every associate seeks to control him. The nominal head and the real head will not be the same person. Jealousies spring up on the bench, and everything in the court soon gets at sixes and sevens. Now Mr. Conklin will encounter on the bench, as now constituted, really able men; pretty rough men some of them too. Such men as Field, Miller, Bradley, Strong and others are athletes. He must fight them and must be able to vanquish them unless he means to knock under. The late Chief Justice Chase was deeply blamed for his carrying on to the bench the unchastened fervors of political zeal. Undoubtedly he herein committed a grave fault, as grave as any man in his place could commit. But why did he do so? "Sir," said a friend to him one day talking in free converse, "I wonder that you, who already possess for life the really first office of the government, should disturb yourself about the glittering bauble of the presidency." "Sir," replied the chief justice pathetically, "if I felt myself thoroughly fit to discharge the duties of my place, I should be content with it. But I am not Marshall, I am not Taney. I have been too long in public life now to be a really first-rate lawyer." Yet Chief Justice Chase was a man of massy powers and of splendid gifts, and splendid accomplishments also. Nature had done much for him. Dartmouth College, repaid by his dying benefactions, has sent forth few more finished scholars. He had studied law in earlier life with diligence; he never wholly abandoned its study. And all his other mental training was high and thorough. He was indeed calculated in every way to be a leader among men. Yet he never led his own court; and he was radically unhappy from the time when he went there till the day when sudden death took him from the world. Would Mr. Conklin's fate be different? Is he a better lawyer than Mr. Chase? Does he *love* the law more? Are his natural parts or his education better than Mr. Chase's? Would he be more able to govern his court? Would he be the *head* of it? With great respect for his abilities of all kinds, we don't believe that he would. Let him ponder well before he accepts the office of chief justice. The way is "irremeable." Could the shade of Chase address him, it would say to him or to any other man from political life who thinks to succeed him,

"Mark but *my* fall and that that ruined me."

We can hardly think that such reflections as these will not present themselves to the President; and if they do, he ought surely not to appoint Mr. Conklin, even for Mr. Conklin's own sake, were the sake of the court and the bar and the law of the land nothing.

We speak of the four distinguished gentlemen whom we have spoken of (though in our high respect for all, perhaps too freely), because the Albany Law Journal refers to it as a fact (where or by whom stated it does not say), "that the number of probable nominees had dwindled down to these four." Expressing its high dissatisfaction at this, *it* still puts Judge Miller at the head of its nominees (four also in number, Judge Miller, Dillon, Woodruff, or Chapman), and says (carrying the matter a little far perhaps), that if the President shall determine "to pass by such tried judges, and select a man unused to the bench, however able as a lawyer, the advocates of an elective judiciary will have a new argument in their favor."

The United States Jurist also says that if the nomination is to be made from the bench, "the voice of the bar is *still* for Mr. Justice Miller," as it had announced it in July to be.

How then stands the case with regard to Mr Justice Miller? It is a striking fact that though Judge Miller left the country before Chief Justice Chase died, and has been absent till now, every man's thoughts, on the announcement of the sad event, were more or less and at once turned towards him. His name came spontaneously to many mouths as the name of that man, whom the bar from one end of the country to the other would on the whole prefer. There was nobody, that we have heard of, working in Judge Miller's interest. It was the mere case of a man's superiority asserting its natural rights, its proper social place; in other words, the law of social gravitation. Different local regions, particular organizations of the bar, would suggest Evarts, Curtis, Hoar or others. But every one would admit that after *his* particular friend, he would prefer Miller; while over and above local influences and the preferences of friendship, the name of Miller has been "spreading undivided" and still "operates unspent." We see it now generally stated that he is the

"coming man." We are content; and if it is so, we think that we shall have a good chief justice. These are our reasons.

Judge Miller is at this time probably the man of the best natural abilities on the bench. He was so recognized to be from almost the hour that he came there (for Grier soon afterwards began somewhat to decline), and though Judge Strong and Judge Bradley excited and have *well* fulfilled high public expectation, they have not put Miller from that eminence which he had when they came there. All admit his very superior natural powers; strong, discriminating, steady, sound. Weight does not oppress him; variety does not confuse him. He grasps the comprehensive; he can descend to the minute. And though well learned in pleading and all the techinal parts of the law, his mind is not technical in form or tastes. He never puts things on tecl nical grounds, except such grounds are the plain grounds of justice.

In addition to this he is thoroughly versed in the whole Federal jurisprudence. No one can read his opinions and not see that the first thing that he must have done on coming to the bench twelve years ago, was to profoundly study all the great organizing statutes of the court, and—as explanatory of them, and of other great early statutes—all the decisions of Cranch and Wheaton; reporters now not often systematically studied, though continually looked into to serve occasion.

With very able and upright men beside him on that side of the question, he has been perhaps the head of the republican portion of the court, and, in the face of the plain influence which the venerable Justice Nelson exercised over the late chief justice, it is said that before Strong and Bradley, JJ., came on, Miller kept things from drifting, as otherwise they might have gone. A pretty strong will has doubtless had something to do with all this; but in a chief justice who is right, a pretty strong will is a very requisite quality.

He is an upright man, pecuniarily, personally, politically. His domestic purity and excellence are acknowledged. He is a man, who though free and open in manners, has ever been strictly temperate in every enjoyment; not a distinction universal in the Federal metropolis. He is a thoroughly good business man; methodical, prompt, practical, no one ever found him embarrassed by the claims of interfering duties. He is a popular man in his manners; dignified enough, not stately; and courteous, without appearance of condescension. Everybody likes Judge Miller; and it is an affection of which respect and esteem is the basis; though his mere manners, as we have said, are winning also. Through all this, deep principle,—deep sense of duty—pervades his character; he is a strict man in the business of his court; he takes no holidays; he is ever punctual, steady and attentive. When you see him on the bench, you recall what was said of another judge once there, "His carriage becomes perfectly his station, not by assuming height, or erectness, or breadth, or sternness, but, as if everything was removed from his consciousness but the duty before him, and he was to perform that under the eye and inspection of Justice herself."

His years and physical health are in his favor. He is, we suppose about fifty seven; and obviously a man of vigorous constitution. These are important matters; for changes in the head of the court are, in themselves, undesirable.

He is a thoroughly national man. There is nothing narrow, coarcted or contracted about him. A Kentuckian by birth and early life, identified by eight years' practice of medicine with Kentucky, he seems to have taken much of his politics from the statesmen of New England and New York. A longer devotion to the bar, among the people of the fresh and growing State of Iowa made him, in maturer life, "a man of the West." Fitly to crown domiciles belonging to different regions, he has at last fixed his home in the national metropolis.

Finally, whatever promise others may give, the friends of Judge Miller can point to performance. Others may give hope. He has given fulfilment. He came on the bench twelve years ago. Through the most dreadful war that can be conceived of, when Washington was a beleaguered city, and the court itself seemed to be tumbling to pieces, he has been in the judicial post, calm, steady, able, faithful; a bright ornament to the court and country, invaluable (as we have always heard) in the conference, a teacher and master on the bench, respected by the country, admired and loved by the bar. If any man in the country has *better* titles than these, our paper is open to hear them asserted.

"Tros Tyriusve nullo discrime agetur."

There are several other names that we have heard and some—like that of Judge Cooley of Michigan, a man certainly of fine judicial powers—that we have not heard, to whom a respectful consideration—a very respectful consideration—is due. But we cannot stop to consider them. No one, in our judgment, combines quite so well *all* the many requirements, as Mr. Justice Miller.

We need hardly advert to certain points which have been suggesed; one being that the President could not properly elevate Judge Miller, over the heads of Judge Clifford and Judge Swayne, two judges who have been longer on the bench. Why not? In the army and navy there are ranks. But on the bench there is no rank, except that the chief justice is chief justice. He presides in court and in the conference, is the head of the court, and gets $500 more a year than other judges. But as respects the associates, one ranks as does another. They must come into court and sit when they are there in some order, and so the oldest in commission comes first; but they read opinions in just a reverse order; the youngest begins. As respects this particular case, conceding to the two senior justices every other qualification, their years alone would be a bar. Justice Clifford attained his three score years and ten, in August last, and Justice Swayne will do the same (if a biography of him in the law almanac of 1870 is correct), in December of the coming year. This is conclusive; for Congress has fixed the age of seventy, as that in which the members of *this* bench may reasonably yield to the claims of age and forever retire. The President could not nominate a man in the face of such a law. In this matter, therefore, these excellent judges are as though they were not.

To appoint, indeed, a mere circuit or district judge over judges of the Supreme Court, would be to put a person of inferior *rank* over one of superior; though if the Circuit or District Courts had a man really superior to every judge on the bench of the Supreme Court, we should be desirous to see him so put up. He would be going into his right place. But there is no such man on the bench of any Circuit or District Court in the country. Some of them may be great men in the places where they are. But the places where they are, are, compared with where they would be, but small places.

Neither is there a good reason in our country. why, if an associate is *pre-eminently* fit, he shall not be made chief justice. President Washington nominated William Cushing (then an associate) to be chief justice, and the Senate confirmed him; though just before they had rejected John Rutlege, who was not then on the bench at all. And most of our modern State constitutions, expressly provide that the associate justices shall pass in rotation into the office of chief justice. The thing has some advantages. Is it not obvious that a man like Judge Miller, who has been for twelve years on the bench studying the *practice* of the court (a *very* important part of the knowledge requisite for a chief justice), will be vastly better qualified to decide the many constantly arising cases of practice, than a man taken from Congress or from any bar, not the bar of the Supreme Court itself?

But independently of this matter of practice, there is, too, considerable foundation for the Albany Law Journal's opposition to the President "passing by such tried judges as Mr. Justice Miller, and selecting a man unused to the bench, however, able as a lawyer." Such an experiment would no doubt be dangerous. It may go right. It may go very wrong. The Supreme Court of the United States itself early gave a signal proof of what we say. One of the most eminent lawyers of the United States in old times, was James Wilson, of Pennsylvania, known over the country both as a signer of the Declaration of Independence, and of the Constitution of the United States. His fame at the bar induced President Washington, on the organization of the Federal judiciary in 1789, to elevate him to the bench. But expectation was disappointed. The late William Rawle, himself, an ornament of the old bar of our country, and well acquainted with both its bar and courts, thus describes him in 1823. (Address to the Associated Members of the Bar.)

"Perhaps few of these now present can recollect Wilson in the splendor of his talents, and fulness of his practice. . . . His views were luminous and comprehensive. His knowledge and information always appeared adequate to the highest subject, and justly administered to the particular aspect in which it was presented. . . . *But it must be confes ed that Mr. Wilson on the bench, was not equal to Mr. Wilson at the bar;* nor did his law lectures entirely meet the expectations that had been formed."

Many other similar cases could be cited.

In taking Miller, therefore, the President can hardly fail to go right. Miller's true field of distinction is the bench. And we are inclined to think that the view of the Albany Law Journal and others of our contemporaries, that he would shine even more as a chief justice, than he has done as an associate, is a correct one. At any rate such we think is the impression, somewhat generally, of the bar.

[Our thanks are due to Josiah H. Bissell, Esq., of Chicago, official reporter, for the following cases to appear in Vol. 2, Bissell's Reports.]

NORTHERN DIST. OF ILLINOIS.

United States Circuit Court.

NAT. PARK BANK v. NICHOLS.

1. It is the duty of a shareholder in a company to examine his certificate, and ascertain his actual position and liability.
2. Circumstances which make a shareholder liable for previously contracted debts and effect of misrepresentations by agent.
3. Though a sub criptiou be obtained by fraud, the stockholder may waive it by assuming its advantages.
4. If a shareholder assumes the benefits and advantages of a partner, he cannot, when called upon to respond for the contracts of the corporation, deny his liability.

This was an action at law to charge the defendants, nineteen in number, as partners in a joint stock company known as the Butterfield Overland Dispatch Company. The cause of action was an indebtedness of this company, accruing at various times in the year 1865.

The company was organized in March, 1865, under the laws of New York relating to joint stock companies. It was conceded that the legal effect of such organization was to make the associates copartners. In July, 1865, an agent of the company made application to the defendants to take stock, stating that the company was organized for the transportation of material across the western plains under a charter that would exempt the subscribers from personal liability, and that its capital stock was to be $3,000,000, one-half of which was to be paid in cash.

The defendants engaged to take stock amounting in the aggregate to $250,000, and paid to the agents of the company fifty per cent. of the sum subscribed. In September, certificates of stock were forwarded to the agent of the company in Chicago, and delivered to the defendants. These certificates referred to the articles of association in general terms, and, it was claimed by the plaintiff, were sufficient to put the defendants upon inquiry as to the mode of organization of the company. On the other hand, it was claimed by the defendants that, supposing that the certificates were in pursuance of the contract of subscription, they did not, in fact, examine them.

It appeared that on November 3d, 1865, all the defendants except Nichols, whose letters where relied on as equivalent, executed a power of attorney, as associates, authorizing the organization of the Butterfield Overland Dispatch Company into a corporation, under the laws of Kansas. It was, however, insisted by the defend-

ants that at this time they supposed the company was organized as a corporation.

In the spring of 1866, the company failed, owing very large sums of money, and transferred its assets to the Holliday Overland Mail and Express Company, and issued circulars to its stockholders announcing that they were legally liable to pay in full, as partners, the debts of the concern, calling an assessment of thirty-three and one-third per cent. on the subscriptions, and giving to the subscribers the alternative of taking stock in the Holliday Overland Mail and Express Company, or paying the assessment. All the defendants except Walker, Faucet, Scammon and Martin subscribed and paid for stock in the Holliday Overland Mail and Express Company, under this circular. All the defendants claimed that they had no knowledge, in fact, of the mode of organization, or that there existed a danger of personal liability, until the receipt of this circular, and declined to pay.

It was claimed by the defendants:

1. That they were induced to subscribe by fraudulent representations.

2. That their subscription was, in any event, upon condition that the company should be organized under a charter, and with a fixed cash capital.

3. That they could not be made liable by relation upon contracts made or debts accruing prior to their coming into the association.

On the part of the plaintiff it was insisted that if there was fraud in procuring the subscriptions, or if conditions were attached to them, yet,

1. The fraud or condition had been waived.

2. That the defendants, by their acts, were estopped from setting up such fraud or breach of conditions.

3. That the defendants, in legal effect, became partners by relation to the date of the articles of association.

The facts relied upon as a waiver or estoppel were:

1. The receipt and retention by the defendants of the certificates with their recitals.

2. The execution of the power of attorney, with its recitals authorizing the organization of the company under the laws of Kansas.

3. The receipt of the stock of the Holliday Overland Mail and Express Company.

4. Various letters from several of the defendants, which, it was claimed, admitted their membership.

S. A. Goodwin and *I. N. Arnold, Esqs.*, for plaintiff.

Charles Hitchcock, Wirt Dexter, Corydon Beckwith, and *Geo. C. Bates, Esqs.*, for defendants.

DRUMMOND, J., charged the jury as follows:

This is an action by the National Park Bank of the city of New York, against the defendants, as partners in a joint stock company called the Butterfield Overland Dispatch Company; and the question is, whether as such partners they are liable for the claim of the plaintiff, consisting of moneys advanced to that company during the year 1865. The advances commenced on the 21st of April, and ended in November. It depends upon the fact whether these defendants were members of that company in such a way as to make them liable as partners of the company for the whole or for any part of these advances.

You will remark, that the plaintiff was not a party to many of the transactions which have passed in review before us in the evidence; that has related chiefly to the connection of the defendants with this company, and the manner in which they were induced to give it their names and money. With that it does not appear that the plaintiff as a corporation had anything to do. That was an act, apparently, of some of the members of the company called the Butterfield Overland Dispatch Company, and as between them and these defendants it must be admitted that there have been faults on both sides.

The leading fault with those in New York connected with the Butterfield Overland Dispatch Company, and one which cannot be excused, was the concealment of the fact that they, on the 20th day of March, 1865, commenced the formation of this joint stock company, and completed it by signing and acknowledging the articles of association, on the 12th day of April, 1865, containing stipulations by which they were bound and by which it appeared it was an association under the sanction of the laws of New York.

Now it was the duty of all these men, or any of them, in seeking for associates, to let them know distinctly what had been done, and what was the compact to be entered into by any one who was to become a party to the association called the Butterfield Overland Dispatch Company; and if they sought subscribers to their articles of association in Chicago, it was their duty to make known to these subscribers what their articles of association were. The primary thing to be established was their connection with the association; it was, therefore, indispensable that all who were to be connected with it should know its nature and character. But the various gentlemen who approached these defendants upon the subject of becoming parties to this company, did not communicate to any one of them, so far as we know, that there were articles of association signed, and which became operative by their terms, and which recognized that they were entered into with relation to the laws of New York. These gentlemen, so far as the evidence shows, were Mr. Nichols, Mr. Sturges, and Mr. Butterfield. I believe that no intimation was given by any of them that articles of association had already been subscribed, constituting the Butterfield Overland Dispatch Company. On the contrary, the propositions made were entirely inconsistent with this leading fact. If we believe the declaration of the defendants (and they have not been affected by any statements, so far as I know, introduced on the part of the plaintiff), the motives held out to them to induce them to become parties to such an association, were entirely different from those the actual state of facts would warrant.

Here was a company already organized, the parties to which were personally responsible for the debts of the concern, which may have been very large at the time. Of course, the action of the defendants under such a state of facts, if they had been communicated to them, might have been entirely different from what it was.

The first question, therefore, is, whether defendants became parties to this association, as partners, with a knowledge of the circumstances of its existence at the time, and with good faith exercised to them by those who induced them to become parties. If they did, of course they are bound by the position of affairs at the time. But this is not claimed, as I understand, by the plaintiff, for if the testimony which has been given by the defendants can be relied upon, the contract entered into and the money that was paid by these defendants was upon an entirely different supposition from that justified by the actual state of affairs. And, therefore, I think, if this testimony can be relied upon (of course you are to judge of the testimony), there can be no original liability on the part of these defendants on the ground of their knowledge of the condition of the Butterfield Overland Dispatch Company at the time that they became parties; and it is certainly a significant fact that Mr. William Sturges, who was the main instrument and agent by which these defendants were induced to subscribe and pay their money, has not been called by the plaintiff to affect in any degree the testimony of the defendants.

If, however, they were not parties in consequence of not understanding the position of affairs, misrepresentations being made to them of facts, it does not follow that they may not have become parties by subsequent acts of their own, with knowledge of the facts. And the next question is, have they so become parties? In order to determine this, you are to take the facts that are applicable to all the defendants, not those applicable to one or more of the defendants less than the whole; because if you find the defendants liable at all, you have to find them all liable, and you have only to apply the facts which have been proved as to all. If there have been facts proved as to some, not as to others, you have only to take those which apply to all, and determine whether they convince you that the defendants have become parties to the articles of association.

The defendants were applied to, I think most of them, and subscribed and advanced their money in the summer of 1865. As I have already said, if we believe their testimony, they did not know at that time that the company had been organized under the laws of New York, and that there were large liabilities against the company which they might be called upon to assume. Have they done so since by any acts of their own? Have they become liable as partners?

In August, or in the early part of the fall of 1865, certificates of stock were made out and forwarded by the officers of the Butterfield Overland Dispatch Company to the subscribers and stockholders here, and they were received, as I understand, by the defendants. These certificates of stock (most of them) have been introduced, and it is admitted that they are all similar in character. Now, the certificate of stock which each of the defendants received, bore on its face that the holder was entitled to a certain number of shares of stock in the Butterfield Overland Dispatch Company, and also that the holder was subject in the future to the payment of such assessments as might be made in case of loss or other necessity, and to all the obligations and liabilities of the company, and also entitled to all the privileges of a member as fully as if he had signed the articles of association.

We have spoken of the faults of the gentlemen of New York; we must now refer to what must be considered a fault of the defendants.

Many of the defendants say that they received the certificates of stock without examining them. They certainly knew what they were. They purported to represent their interests in a company or organization, for which they had subscibed or paid their money, It is presumable, I think, that if the company had earned profits, they would have claimed the profits under this evidence of their interest in the company.

It certainly was, therefore, their duty to examine the document which they had received, indicating the interest they had in the company and the money they had paid. It may be true that men do not always examine certificates of stock, and yet there never has been known, I believe, an instance of a man who became a member, in this way, of a company, who, if the company realized profits, did not claim them by virtue of such certificate. Then, that being so, there would be a natural inference that, claiming the advantages and profits he must bear the burdens and losses. But the only effect of this, in this case, is as to the conclusion to be drawn against the defendants by the circumstance that the certificates contained certain language that they were shareholders in the Butterfield Overland Dispatch Company, and that they were subject to the payment of assessments for losses or from other necessity, and entitled to all the privileges of the association, as if they had actually signed the articles.

Now, if these had been given to the defendants, without any previous representation having been made, the effect of this might have been stronger than it was under the conceded state of facts.

Because it is quite possible that those who did look at the certificates of stock might have regarded them under the influence of the representations which had been made by the agents who applied to them for subscriptions and for their money, and therefore they might not draw the same inference or conclusions from them that they would, had they been uninfluenced by such representations; and all that I can say to you, if you believe this testimony, is simply this: that if he examined these certificates of stock, it would seem to have been the duty of every stockholder to make some inquiry as to his relation with this Butterfield Overland Dispatch Company; to know, in other words, where he stood, what his responsibilities were as a member of the company, and if, in point of fact, he found himself in a different position from what he supposed he was from the representations that were made, to repudiate that

connection, to disavow it at once, and have nothing more to do with it. That nothing of this kind was done was, I think, a fault on the part of some of the defendants, and, I must say, one not very creditable to their character as business men. But I cannot say that you can disregard, in connection with this aspect of the case, the bearing and effect of the representations that were made as inducements to them to become parties to the company. Because it is indispensable, I think, in order to make out a liability against these defendants, that they should be possessed of full knowledge of the circumstances of their connection with the company which was then organized; and if they accepted this stock with this full knowledge of the circumstances, then they were bound, as prudent and discreet business men, to follow up the intimation given in this certificate of stock, and to ascertain the position in which they stood, and are to be visited with all the consequences of partners in this association, but not otherwise.

Again, if they did become members of this association with the full knowledge of the circumstances connected with the position of the Butterfield Overland Dispatch Company, what is the measure, under the facts of the case, of their liability to this plaintiff? That is another and distinct question.

It is conceded that no one of these defendants was a member of the association at the time the contract was made between the company—the Dispatch Company—and the plaintiff for a loan of the money, on the 21st of April, 1865, by which it was agreed that the plaintiff should advance to the company $100,000, in sums as they might be wanted; and, in fact, on that day $10,000 were advanced, and on the 1st of May $55,000, and on the 2d of May, $20,000, and on the 3d of June, $5,000—$90,000, advanced before, as I understand, any of these defendants became connected with this company.

Now, to say nothing of the $20,000 advanced in November, are these defendants responsible for the money which was advanced before they became connected with the company? Of course the only ground upon which they are liable is, that they associated themselves with the company, either by express declaration or by acts which admit of no reasonable doubt that they assumed, as members of the company, all the liabilities of the company at that time. It is only in that way, by relation back of the position of the company at the time they connected themselves with it, if they ever did, that they could become liable for the $90,000 advanced to the company before that connection. Of course, if with full knowledge of the facts they did become parties, either expressly or by implication, to this joint stock company, from the beginning, they are as responsible for the debts of the company as those who were original parties to articles of association, but not otherwise. They must have become parties with full knowledge of the facts, understanding their position and relations to the company.

As to the $20,000 advanced on the 15th of November, that would depend, of course first, upon the fact whether they were partners, and secondly, whether, as such partners, they reaped the benefit of the advance that was made, and enjoyed its fruit. If they did, then I think they are estopped from asserting they are not liable. If they, at the time the $20,000 were advanced, were partners of the association, and had as such the full benefit of the advance, they would be liable equally with their associates for the advance. You will see, therefore, there are three questions which the court submits to you.

In the first place, whether these defendants became subscribers, and advanced their money to the company with full knowledge of the circumstances of its existence at the time, and with the exercise of good faith, and true statements and representations made to them by the agents of the company when they subscribed their names and advanced their money. If you shall believe they did not become partners by that act, by anything that was done, then the next question the court submits to you is whether with full knowledge of the facts they have become partners since. It may be true that bad faith was used towards them at the time their subscriptions and money were obtained. It may be true that fraud was practiced; but it was competent for them, with knowledge of all the facts, to waive the fraud, and if they did—if they assumed the advantages of members and partners of the association—they cannot, when they are called upon to respond for the contracts of the association, be heard to deny their liability.

Thirdly, if they were partners and members of the association, what is the measure of their liability, and whether for the whole or only a part of the advance made by the plaintiff?

It is to be observed that this is not an action by the Overland Dispatch Company against these defendants for assessments made against them, as shareholders, by the company. It is not a bill in equity calling upon the defendants to respond to the creditors of the company for advances which have been made; but it is an action at law against these defendants, as members of the association—partners—liable as partners for the debts of the company, and their liability must be measured by the rules which are applicable to a partnership concern, under which one member of a firm is liable for the debts of the firm; and in this aspect of the case, of course, the whole question turns upon the fact whether they were partners and members of the company.

[Notes by the reporter.]

For a further discussion of the liabilities of stockholders, consult Upton, Assignee, &c., v. Hansbrough, and Same v. Burnham, January, 1873, to appear in subsequent volume of these Reports, and cases there cited.

NOTICE IS HEREBY GIVEN THAT AN APPLIcation will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE AMERICAN EXCHANGE BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to three million dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLIcation will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the conferring of the powers of a Bank of Deposit, Discount and Issue upon the Philadelphia Banking Company, incorporated in accordance with the Act of Assembly approved March 11th, 1870, and an increase of capital to five million dollars. jul 4-6m

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REAL ESTATE SALE, OCTOBER 28th.

Will include—

Southampton avenue, Chestnut Hill—Lot. Executor's Peremptory Sale.—Estate of Owen Sheridan, Jr., dec'd.

Southampton avenue.—Lot. Same Estate.

Evergreen avenue, adjoining Fairmount Park—Large Lot, 11½ Acres. Same Estate.

Mount Vernon, No. 1623—Modern Three-story Brick Residence. Sale by Order of Heirs.

Tenth, North of Montgomery avenue—Valuable Business Location—3 Coal Yards, Large Lot.

Reed, Dickinson, Tasker and Twenty-ninth—Brick Yard, Very Desirable Building Lots. Orphans' Court Sale Estate of George M. Clark, dec'd.

West Market, West Chester, Pa.—Handsome Modern Three-story Stone Residence, 1½ Acres.

Westmoreland, East of Twenty-first — 2 Three-story Brick Dwellings.

Delaware, in the rear of the above—2 Three-story Brick Dwellings.

Spruce, No. 723—Modern Four-story Brick Residence.

Ninth, (North,) Nos. 46 and 48—Valuable Business Stands—2 Three-story Brick Stores and Dwellings. Bulk windows, and all the modern conveniences. Executors' Sale—Estate of M. H. Harlan, dec'd.

Front, (South,) No. 229—Valuable Business Stand—Four-story Brick Store, extending through to Water street.

South, No. 722—Three-story Brick Lager Beer Saloon, with 4 Three-story Brick Dwellings in the rear, No 719 Alaska street, Orphans' Court Sale—Estate of Richard C. Krider, dec'd.

Swanson, No. 756—Four story Brick Building and Large Lot, with a Three-story Brick Building and 2 Three-story Brick Dwellings in the rear on Lacon place—Same Estate.

Chestnut Hill—Large and Desirable Lot, 1¾ Acres, extensive fronts on the Chestnut Hill and Springhouse turnpike and Township Line road, near the railroad depot. Sale by Order of Heirs—Estate of John Somer, dec'd.

Wallace, No. 1018—Modern Three-story Brick Residence. Executors' Peremptory Sale—Estate of Biddle Hancock, dec'd.

Lemon, Nos. 1019, 1021 and 1023—3 Three-story Brick Dwellings, with 4 Dwellings in the rear, forming a court. Same Estate.

Melon, No 1119—3 Brick and Frame Dwellings. Same Estate.

Geary, Nos. 829, 831 and 833—3 Three-story Brick Dwellings. Same Estate.

Grove, Nos. 1732, 1734 and 1736—3 Three-story Brick Dwellings. Same Estate.

Sixteenth, below Market—Lease, Buildings, &c. Same Estate.

Frankford road, No. 961—Business Stand—Three-story Brick Tavern and Dwelling, with a Three-story Brick Dwelling in the rear, fronting on Innis street.

Eleventh, (North,) No. 603—Handsome Modern Four-story Brick Residence. Has the modern conveniences. Immediate possession.

Vine, No. 1113—Modern Three-story Brick Residence.

Green and Harvey, N. E. Corner, Germantown—2 Modern Three-story Stone Residences. Sale Absolute.

Ninth, (North,) No. 912—Three-story Brick Dwelling. By Order of Heirs.

Tenth, (South,) No. 811—Two-and-a-half-story Brick Dwelling, with a Three-story Brick Dwelling in the rear on Stewart street, No. 808.

Orianna, No. 2039—Two-story Brick Dwelling.

9 Bonds and Mortgages, $2,100 each. For account of whom it may concern.

REAL ESTATE SALE, NOVEMBER 4th.

Will include—

Woodbine, No. 1247—Two-story Brick Dwelling.

Master, No. 2442—Genteel Three-story Brick Dwelling.

Tenth and Tasker, N. E. Corner—Three-story Brick Tavern and Dwelling.

REAL ESTATE SALE, NOVEMBER 11th.

Will include—

Buttonwood, No. 521—Modern Three-story Brick Residence. Executors' Sale—Estate of Mayer Arnold, dec'd.

Somerset and Kayser, N. W. Corner—3 Lots. Same Estate.

Third, (North,) No. 111—Five-story Brick Store, and a Five-story Brick Building in the rear. Same Estate.

Lancaster avenue and Mica, N. W. Corner—Lot. Orphans' Court Sale.—Estate of John P. Sloan, dec'd.

Lancaster avenue, N. W. of Mica—Lot. Same Estate.

Lancaster and Westminster avenues—Lot. Same Estate.

Forty-fifth, south of Westminster avenue—3 Lots. Same Estate.

Howard, No. 2103—Modern Double Three-story Brick Residence.

East Cumberland, No. 939—Three-story Brick Dwelling.

Second, (North,) No. 503—Valuable Business Stand—Four-story Brick Store.

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REAL ESTATE SALE AT THE EXCHANGE, NOVEMBER 5th.

On Wendesday, at 12 o'clock noon.

Orphans' Court Absolute Sale.—No. 1740 north Fourth street. Neat Three-story Brick Dwelling, and Large Three-story Brick Manufacturing Building, Cadwalader street above Columbia avenue. Lot 34 x 74 feet, Estate of George Kessler, dec'd.

Orphans' Court Absolute Sale.—No. 1735 north Fourth street. Three-story Brick Dwelling and Brick Shop on Hale street. Lot 15 x 102 feet. Same Estate.

Orphans' Court Absolute Sale.—Sixteenth and Cabot streets. Three-story brick Lager Beer Saloon and Dwelling, at S. W. corner. Lot 18 x 70 feet, 20th Ward. Estate of Francis Kielcon, dec'd.

Orphans Court Absolute Sale.—Paschall street. Two-and a-half-story Stone House near Lancaster avenue, 24th Ward. Lot 28 x 94 feet. Estate of Paul Phy, dec'd.

Orphans' Court Absolute Sale.—Tacony. Frame House and one acre of ground, 23d Ward. Estate of Sarah Duffield, dec'd.

Peremptory Sale.—Melon street, Large Brick Building, suitable for a manufactory or stable, west of Twelfth street. Lot 50 x 80 feet. Subject to $265 ground rent. Immediate possession.

Orphans' Court Absolute Sale.—No. 325 South street. One-sixth interest in Brick Store and Dwelling. Lot 16½ x 87 feet. Estate of James Cornish, dec'd.

Orphans' Court Absolute Sale.—Ground rent, $42 per annum. One-sixth interest in silver ground rent, well secured. Same Estate.

Assignees' Peremptory Sale in Bankruptcy.—Valuable Factory and Large Lot. Nos. 1076 and 1078 Beach street, west of Shackamaxon street, 18th Ward. Estate of John Derbyshire, bankrupt.

Assignees' Peremptory Sale in Bankruptcy.—Large and Valuable Three-story Brick Residence, with side yard, No. 1080 Beach street. Same Estate.

Executors' Sale.—No. 802 Buttonwood street. Genteel Two-and-a-half-story Brick Dwelling, west of Eighth street. Lot 17½ x 90 feet. Three fourths may remain. Estate of William Drum, dec'd.

Executors' Sale.—Buttonwood street, Nos. 808, 810, 812, 814 and 816. Five Two-and-a-half-story Brick Dwellings, each Lot 18 x 60 feet. Will be sold separately. Same Estate.

Executors' Sale.—No. 818 Buttonwood street. Two-and-a-half-story Brick Store and Dwelling, corner of Garden street. Lot 26 x 60 feet. Same Estate. Over three-fourths may remain on each of the above.

No. 1236 Ellsworth street.—Genteel Three-story Brick Dwelling with back Buildings, and every convenience. Lot 19 x 72 feet. Immediate possession.

316 Gaskill street.—Desirable Two-and-a-half story Brick Dwelling, 5th Ward. Lot 17½ x 64 feet. $2,000 may remain.

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VOL. V. PHILADELPHIA, FRIDAY, OCTOBER 31, 1873. No. 44.

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[From 21 Ohio State Reports.]

Supreme Court of Ohio.

UNITED LIFE, FIRE AND MARINE INSURANCE CO. v. FOOTE.

1. A policy of insurance against fire excepted from the risk any loss by an explosion. In an action upon the policy, it appeared that an explosive mixture of whiskey vapor and atmosphere had come in contact with the flame of a gas jet, from which it ignited, and immediately exploded, whereby a fire was set in motion, which destroyed the insured property: *Held*, That in such case it cannot be said that the destruction was caused by a fire within the meaning of the policy, but, on the contrary, that the loss was by fire occasioned by the explosion.
2. In construing such policy wherein the exception embraces "any loss or damage occasioned by, or resulting from, any explosion whatever," the exception must be taken and held to include all loss and damage occasioned by any fire of which an explosion was the efficient cause.
3. Where such exception provided that the underwriter would not be liable for "any loss or damage occasioned by, or resulting from, any explosion whatever, whether of steam, gunpowder, camphene, coal oil, gas, nitro-glycerine, or any explosive article or substance, unless expressly insured against, and special premium paid therefor," and the property insured is destroyed by fire occasioned by the explosion of one of the explosive substances named, and notwithstanding it is made to appear that at the time of taking the risk, such explosion, from the nature of the property insured, was in the contemplation of the parties, such loss falls within the purview of the exception, unless the particular peril by which the property was destroyed was expressly insured against, and a special premium paid therefor.

Messrs. *Lincoln, Smith, Warnock* and *Stephens*, for plaintiff in error.

Messrs. *Matthews, Ramsey* and *Matthews*, for defendants in error.

MCILVAINE, J.

This proceeding is prosecuted to reverse a judgment rendered by the Superior Court of Cincinnati, at General Term, reversing a judgment rendered at Special Term.

The original action was brought, by the defendants in error (who were plaintiffs therein), against the plaintiff in error (defendant therein), to recover its amount of a policy of insurance, issued by the defendant to the plaintiffs, on the 9th of March, 1867, for a year, upon a stock of merchandise contained in a building of the plaintiffs', situate in the city of Cincinnati, which, together with the building, was destroyed by fire on the 11th day of April, 1867.

By the terms of the policy it appears that the plaintiffs were insured against "loss or damage by fire to the amount of five thousand dollars on their stock of merchandise, consisting principally of liquors, fixtures, tools, and office furniture, contained in their brick building, situate on the southwest corner of Congress and Kilgour streets, Cincinnati, Ohio, and occupied by them as a liquor store, with privilege of rectifying and manufacturing fine spirits by steam not generated in the building."

The principal defence arose under one of the conditions of the policy, which is in these words:

"VII. This company is not liable for loss or damage by lightning or tornado, unless expressly mentioned or insured against; but will be responsible for loss or damage to property consumed by fire occasioned by lightning. Nor will this company be responsible for any loss or damage to property consumed by fire happening by reason of, or occasioned by, any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, nor where the loss is occasioned or superinduced by fraud, dishonesty, or criminal conduct of the insured, *nor to any loss or damage occasioned by, or resulting from, any explosion whatever, whether of steam, gunpowder, camphene, coal oil, gas, nitro-glycerine, or any explosive article or substance, unless expressly insured against, and special premium paid therefor.*"

The plaintiffs counted upon the undertaking in the policy, and stated the loss to be by fire.

The answer set up the above condition for a *first* defence, and averred that the said fire, loss, and damage referred to in the petition, were solely occasioned by, and resulted from, an explosion caused by some explosive substance, and that the same was not expressly insured against, nor was a special premium paid therefor, and it denied any loss within the terms and meaning of the policy.

The answer also set up, for a *second* defence, that the plaintiffs did, after the issuing of the policy and before the loss, carry on and exercise *within* the building, up to the time of the fire, the trade and business of distilling and manufacturing spirits by steam generated *in* the said building, contrary to the provision of the policy which is set out; and by an additional answer, filed by leave of court, the defendants, for a *third* defence, pleaded that the plaintiffs had in operation in the building, up to the time of the fire, three large stills, which greatly increased the risk, and that these stills were concealed from them, and that they had no knowledge of the same. Replies were filed to these answers, putting the same in issue.

The issues of fact arising upon the defences, set up by the defendant below, were tried, upon submission, by the parties, by the judge at Special Term, who found in favor of the defendant upon the first defence, and in favor of the plaintiffs upon the second and third defences.

A motion to set aside the finding, and for a new trial was made on behalf of the plaintiffs, and overruled. A bill of exceptions was then taken, setting out all the evidence, and judgment was rendered for the defendant.

A petition in error was filed in the General Term, and the judgment was reversed.

To reverse this judgment of reversal, and restore the judgment at Special Term in favor of the defendants below, it prosecutes the present petition in error. If it prevails, the litigation is ended by a final judgment; if it fails, the cause will stand for a new trial.

The main question for decision by this court is, whether the Superior Court in General Term erred in law in reversing the judgment at Special Term.

And that question may be stated in this form: Did the facts proved on the trial at Special Term, when considered in connection with the terms of the eighth condition to the policy fairly construed, clearly sustain the finding of the court in favor of the defendant upon its first defence?

I do not propose to repeat in detail the testimony set out in the record, but will content myself in stating the conclusions of fact, which in our opinion are clearly drawn from the testimony. It is proper to say, however, that the testimony in this case is remarkably free from contradictions. The only doubt that can possibly arise upon the evidence, is as to the proper inferences to be drawn from facts clearly proven; but these inferences, we think, are quite evident.

The testimony shows that, at the time of taking out the policy, and until the time of the fire, the plaintiffs were engaged in the business of rectifying whiskey, and manufacturing fine spirits by the use of steam, in the building occupied by them as a liquor store, and in which the insured stock of merchandise, consisting principally of liquors, &c., was kept. The size of the building was sixty by one hundred and eighty feet, and was four stories high. There was communication between the stories through open stairways and hatches. The business of rectifying was carried on in the basement story, where the stills—large metallic vessels—were located. The upper stories were chiefly used for storage of liquors and cooperage. The process of rectifying was conducted as follows: The raw spirits or liquor was conveyed by means of pipes, called leaders, from tubs situate in the upper stories to the stills below; when the stills were thus charged, the liquor therein was converted into vapor by means of steam which passed through the stills in copper pipes called worms; the vapor thus evolved was conducted by other pipes to a condenser, where it was reduced to a liquid state.

The vapor evolved in the process of rectification is an inflammable substance. It readily mixes with the atmosphere, and when so mixed in certain proportions is explosive, and when such mixture is brought into contact with flame it explodes. On the morning of the fire a large still was being charged through a leader about two inches in diameter, which passed into its still through a *vacuum valve* (an apperture in the still near its top), the diameter of which was about four inches. At the same time steam was passing through the worm, converting the liquor in the still into vapor, which escaped through the vacuum valve into the still room, and thence no doubt in other parts of the building. The process of thus charging the still, accompanied with the discharge of vapor, had continued for some time—perhaps an hour preceding the fire. During the progress of this process, two jets of gas were burning in the still room, one a distance of three or four feet from the vacuum valve, and the other in another part of the room. There was no other fire or flame in the room or in the building at the time.

Such being the circumstances, and explosion took place in the still room. A sudden and violent combustion of the vapor, accompanied with a noise—described by one witness as being like the crack of a gun; by another as if a bundle of iron had been thrown on the pavement; by another as a crash; and by another as a gush of fire, and at the same instant the flame was driven through a doorway into another building, whereby a witness was badly burned. Immediately after the explosion, a flame was discovered escaping from the still through the vacuum valve, and at the same time the building was discovered to be on fire throughout the several stories.

From these facts and circumstances we think it was clearly shown that the fire, by which the building and stock of merchandise insured were consumed, was occasioned by, and resulted from an explosion of spirit vapor mixed with atmosphere, and that the explosion was caused by the mixture coming in contact with the burning gas jet.

1. The first question which we notice particularly is this: Was the explosion, which in fact occurred, such, in degree of violence, as was contemplated by the parties to the policy?

The word "explosion" is variously used in ordinary speech, and is not one that admits of exact definition. Its general characteristics may be described, but the exact facts which constitute what we call by that name, are not susceptible of such statement as will always distinguish the

occurrences. It must be conceded that every combustion of an explosive substance whereby other property is ignited and consumed, would not be an explosion within the ordinary meaning of the term. It is not used as the synonym of combustion. An explosion may be described generally as a sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. But the rapidity of the combustion, the violence of the expansion, and the vehemence of the report, vary in intensity as often as the occurrences multiply. Hence, an explosion is an idea of degrees, and the true meaning of the word, in each particular case, must be settled, not by any fixed standard or accurate measurement, but by the common experience and notions of men in matters of that sort. In this case, although the building was not rent asunder, or the property therein broken to pieces, there was a sudden flash of flame, a rush of air, and a report like the "crack of a gun," which certainly brings the occurrence within the common meaning of the word as used in many instances. "Any explosion whatever" is the phrase used in the condition to the policy, and it is qualified by the context only to the extent that it must be an "an explosion" of some "explosive substance, and of sufficient force as to result in loss or damage to the property insured." And the characteristics we have found to exist in the occurrence that resulted in the loss of the insured property.

2. It is claimed that the fire which destroyed the property insured did not result from the explosion, but, on the contrary, that the explosion was incident to and caused by the fire, which, if there had been no explosion, would have accomplished the whole loss and damage; or, at least, that such inference may be drawn from the facts in the case as fairly and as legitimately as contrary inferences.

The proof unquestionably shows that the origin of the fire and the explosion was simultaneous. It may be true, in a strictly scientific sense, that all explosions caused by combustion are preceded by a fire. The scientist may demonstrate, in a case where gunpowder is destroyed by fire, or in any case where the explosion is caused by or accompanies combustion, that ignition and combustion precedes the explosion; but the common mind has no conception of such combustion, as a fact independent of the explosion, where they concur in such rapid succession that no appreciable space of time intervenes. The terms of this policy must be taken in their ordinary sense; and we are satisfied that the proofs show, according to the ordinary sense and understanding of men in reference to such matters, that the explosion occasioned the fire which destroyed the property insured; or, in other words, that the loss resulted from an explosion within the true intent and meaning of this policy.

It is true that the explosion was caused by a burning gas jet, but that was not such fire, as contemplated by the parties, as the peril insured against. The gas jet, though burning, was not a destructive force, against the immediate effects of which the policy was intended as a protection; although it was a possible means of putting such destructive force in motion, it was no more the peril insured against than a friction match in the pocket of an incendiary. The conclusions of fact to which we thus arrive, are mere inferences from other facts,—facts, however, about which there was no conflict in the testimony,—yet they are so manifestly true, that we think it was error of law, under our statute, to reverse the judgment rendered thereon at the Special Term of the Superior Court, upon the strength of contrary inferences drawn from the same facts by the reviewing court.

3. The next question arises upon the terms of the policy, and is one of construction purely. Was it intended, by the provisions of the seventh condition, to exempt from the risks assumed by the policy losses *by fire* occasioned by an explosion?

It is claimed that the clause exempting losses by explosion taken alone, or constructed in connection with other clauses in the condition, does not show such intention. It is true that the words "by fire," or their equivalent, are omitted in this clause, though expressed in some of the former clauses. The foundation point, however, in construing this condition, is found in the general undertaking of the policy. It will be observed that the underwriter undertook to insure against loss and damage by fire only; but, nevertheless, against loss and damage by fire generally, and the maxim, *causa proxima, non remota, spectatur*, applies. Now, we think, without doubting, that the purpose of inserting this condition was to relax the rigor of this maxim, and exempt from the general risk of the policy certain losses, which would otherwise fall within its scope and meaning. The first clause of the condition provides that "this company is not liable for loss or damage by lightning or tornado, unless expressly mentioned or insured against." If this were the whole of the clause, and it were not understood that the loss and damage referred to were such as might result from *fire occasioned by lightning or tornado*, it would be utterly meaningless and nugatory, for the reason that the underwriter had not undertaken to insure against lightning or tornado. So far, the construction is plain enough, but a difficulty arises from the conclusion of the clause, to wit: "but will be responsible for loss or damage to property consumed by fire occasioned by lightning." The exception to the rule of exemption from loss by lightning appears to be as broad as the rule itself. But I apprehend that a case might arise in which effect and operation could be given to all of the terms of this clause, including those which are applied as well as those expressed. At all events, it is perfectly clear that loss and damage by lightning and tornado are not within the expressed risks of the policy, unless a fire supervenes; nor is there anything in the policy from which such risks can be implied.

The condition continues: "Nor will the company be responsible for any loss or damage to property consumed by fire happening by reason of, or occasioned by any invasion, insurrection, riot, or civil commotion, or any military or usurped power." The exemptions here provided for are expressly limited to losses within the terms of the general risk of the policy. But if such limitation had not been expressed, it would have been implied.

The next clause is as follows: "Nor when the loss is occasioned or superinduced by the fraud, dishonesty, or criminal conduct of the insured." There is no pretext for holding that the loss here contemplated is other than loss by fire, although no such qualification is expressed. Then follows the clause in question, which to all intents and purposes, is framed like the preceding one: "Nor to any loss or damage occasioned by or resulting from any explosion whatever, whether of steam, gunpowder, camphene, coal oil, gas, nitro-glycerine, or any explosive article or substance, unless expressly insured against, and special premium paid therefor."

Unless there is something in the subject matter of this clause that indicates that the words "by fire" were omitted for the purpose of showing a design and intention to adhere to and continue the general risk in case an explosion should result in a fire, we think that they or their equivalent should be supplied by implication or construction.

Is such purpose indicated by any fair use of the terms employed?

That a loss, other than combustion, results from an explosion, when the explosion itself is caused by a destructive fire already in progress, comes within the general risk of a policy against fire only, is a doctrine not only reasonable in itself, but is sustained by authority. (Waters v. La. Mer. Ins. Co., 11 Pet. 225; Scripture v. Low. Mut. Fire Ins. Co., 10 Cush. 357; Millauden v. N. O. Ins. Co., 4 La. Ann. 15.) And it is quite clear that a loss by fire, which if occasioned by an explosion, is within the like risk. Now, the express terms of this clause are "any loss or damage occasioned by, or resulting from any explosion whatever." These terms are certainly comprehensive enough to include both descriptions of loss, whether lost by the explosive force, or loss by superinduced combustion. And that such is their legal effect has been directly decided in the case of Stanley v. Western Ins. Co., Law Reports, 1868; 3 Exchequer, 71. It is not necessary at this time to either approve or disapprove, to the whole extent, the doctrine in Stanley's case, as in this case no damage was sustained from the explosion without the intervention of a fire, nor, indeed, was the explosion caused by a fire within the meaning of the policy. But we can find no good reason for doubting that loss and damage by fire, resulting from an explosion, was intended to be exempted by this condition from the general risk of the policy, and are of opinion, therefore, that this clause properly construed should read, "nor any loss or damage by fire occasioned by, or resulting from any explosion whatever."

4. It is claimed by defendants in error, that the peril by which the property insured was destroyed was within the exception to the seventh condition; that is, it was "expressly insured against, and special premium paid therefor;" or, in other words, was excepted out of the exception.

The reasoning by which this proposition is sought to be maintained is thus stated:

"The body of the policy covered loss by fire on liquors, &c., with the privilege of rectifying and manufacturing fine spirits by steam not generated in the building. The property insured was whiskey, as well in the process of rectification and manufacture as manufactured—whiskey in the still as well as spirits in the barrel—the whiskey vapor itself, while passing through the colnmns to the cooler, or wherever else it might make its way. If it was in this form an *explosive substance or article*, such as is intended by the language of the condition, or if, in the process of manufacture allowed by the policy, it was likely to become such by escape and mingling with the air in the building, then the insurance was upon it, as an agent known to be explosive under certain circumstances likely to happen, and with the express assent of the company to the carrying on of that process, in the course of which its explosive nature would naturally and probably be developed."

The principle sought by this argument to be applied is announced in Harper v. New York City Insurance Co., 22 N. Y. 441; Fitton v. Accidental Death Insurance Co., 17 Com. Bench, N. S. 112.

In the case of Harper v. New York Insurance Co., the condition exempted the company from liability *for loss occasioned by camphene*. The fire was occasioned by a workman's throwing a lighted match into a pan upon the floor containing camphene. The risk was upon a printing stock, privileged for a printing office, camphene not being expressly enumerated. But it was shown that that article was a usual part of such a stock, and its use was therefore authorized. For this reason alone, because it was implicitly insured, it was held that the exception did not apply.

The following extract from the opinion expresses its doctrine:

"A policy can be so framed as to allow the presence of a dangerous article, and even so as to insure its value, while, at the same time, it might exempt the insurer from loss if occasioned by the presence or use of the article. But I think it would need very great precision of language to express such an intention. When camphene or any hazardous fluid is insured, and its use is plainly admitted, the dangers arising from that source are so obviously within the risk undertaken, that effect should be given to the policy accordingly, unless a different intention is very plainly declared."

In answer to this claim, we say:

1. That the spirit vapor, having escaped from its confinement, are passed into the still room, where it became mixed with atmosphere so as to form an explosive substance, under circumstances that preclude all possibility of reclaiming and utilizing it was no longer a part of the stock of merchandise insured, and was not under the protection of the policy.

2. If, from the nature of the property insured, the parties, at the time the risk was taken, might reasonably have anticipated the peril by which it was afterwards destroyed, it is reasonable to suppose that such peril was in contemplation at the time, and that they contracted in reference to it. Hence, if the general risk of the policy was expressed in terms broad enough to include the peril, it must be

presumed that they intended to do so; and on the other hand, if an exception to the risk was made in terms which fairly and plainly took such particular peril out of the general risk, it must be presumed that they intended to exempt such particular peril from the risk. Again, if it be claimed that there was an exception to such exemption, whereby the particular peril was saved from the exemption and left under the general risk, it is reasonable that the terms of exemption should be at least as explicit as the terms of exemption. How is it in this case? The risk was against all loss by fire. The exception from the risk was "any loss or damage occasioned by an explosion of steam, gunpowder, &c." The exception to this exemption was "unless expressly insured against, and special premium paid therefor." Therefore, it only remains to be said, that no loss or damage occasioned by an explosion of any of these substances named was expressly insured against, nor was any special premium paid for any such special risk.

It follows, therefore, that the judgment of reversal rendered at general term must be reversed, and the judgment rendered at special term must be affirmed.

EASTERN DISTRICT.

U. S. Circuit Court of Mo.

In re BRENT.

1. A creditor who has consented in writing to the discharge of the bankrupt under the fifty per cent. clause, and whose consent has been acted upon and filed, has no *absolute right*, to withdraw or cancel it, though such right be claimed on the day fixed for the hearing.
2. Section 29, as to what frauds upon the bankrupt act will disentit e the bankrupt to a discharge, considered.—*St. Louis Law News.*

Bankrupt act—fraudulent preference; withdrawal of consent to discharge.

In Bankruptcy.—Petition for review, under section 2 of the bankrupt act.

The facts are stated in the opinion.

Edmund T. Allen, Esq., for the opposing creditors.

Wm. C. Marshall, Esq., for the bankrupt.

Opinion by DILLON, Cir. J. March Term, 1873.

I. This is a petition to review the action of the District Court in refusing to allow certain creditors to withdraw their assent to the discharge of the bankrupt, and in overruling their specifications of the grounds of their opposition to such discharge.

Due steps were taken by the bankrupt to procure his discharge under section 29 of the act, and a time was appointed for the hearing of the application, and notice given to the creditors to appear and show cause, if any they had, why a discharge should not be granted, The assets not being equal to fifty per cent. of the claims proved against his estate, the bankrupt set about to procure the written assent to his discharge of a majority in number and value of his creditors who had proved their claims. The written assent of the requisite number was procured and filed by the bankrupt at the time fixed for the hearing of the application for discharge. At the time fixed for the hearing two creditors who had signed their assent to the bankrupt's discharge, appeared and objected to the discharge, and filed petitions to withdraw such assent, or have it held for naught. The petition to withdraw their assent was urged upon two grounds: First, as a matter of right, irrespective of any fraud practiced upon them in granting it; second, that the assent was procured by fraud, and given under a mistake of fact.

The second ground is not established by the evidence; and as to the first ground, I am of opinion that when a creditor has once given his assent in writing, and the bankrupt has acted upon it, and other creditors have given theirs and presumptively been influenced by each other's action in this respect, and the assent of the requisite number in value and amount is obtained and filed at the hearing, that a creditor thus assenting has no *absolute right* even on the day fixed for the hearing, to withdraw or cancel his assent in writing, I see no error in the order of the District Court in refusing the prayer of the opposing creditors in this respect.

II. It is urged by the opposing creditors that the District Court erred under the proofs in overruling their objections to the bankrupt's discharge. The grounds of their objections were certain payments whereby it is alleged a portion of the creditors were preferred.

The bankrupt was a country merchant, usually carrying a stock of several thousand dollars.

The evidence to establish the alleged fraudulent preferences mainly consisted of the examination of the bankrupt before the register. In that he says he first discovered his insolvent condition on the 6th day of March, which was after the payments were made, now claimed to have been fraudulent. It is urged by the opposing creditors that the bankrupt was insolvent before this, and that he knew or had good reason to know it, and that payment made to creditors under such circumstances, though not made in contemplation of becoming a bankrupt, and though there was no actual design to prefer, deprive him of the right to a discharge. Without going into the evidence, it must suffice to state that it does not appear that the payments in question were made by Brent in contemplation of becoming a bankrupt. I think they were made in just the opposite contemplation—when he was carrying on business, and in good faith expecting or hoping to keep along in it. These payments with one exception of the trifling sum of $26, to his nephew, were made from time to time in December, January and February, to his business creditors or on account of his business paper.

On reviewing the bankrupt's examination, it must be admitted that they were made when in point of fact his assets were not worth in cash the amount of his liabilities, and when he could not pay in money or otherwise than by borrowing all of his liabilities as fast as they became due. But in this manner, that is by part payments and by getting extensions, and by borrowing and by the proceeds of sales and collections, he had for some time been keeping afloat; and I find that he made the payments in question to these various creditors in the *bona fide*, though as it turned out, erroneous expectation that he could keep along, and with no actual design to favor or prefer those to whom such payments were made. Among the very last payments thus made was a payment on account of creditors who are actively opposing the discharge.

There is some difficulty in construing the twenty-ninth section of the bankrupt act in respect to the kind and degree of frauds upon the act which will disentitle the bankrupt to his discharge.

But I am not prepared to hold that merely for taking too hopeful a view of his affairs, and for making payments in the course of his business with the *bona fide*, though mistaken, expectation that he can keep along without going into bankruptcy, there being no actual design to favor or prefer, the intention of Congress was to deprive the party of the right to his discharge, if otherwise entitled to it. I therefore perceive no error in the action of the District Court.

Affirmed.

Recent Decisions.

PENNSYLVANIA.

[Head notes of cases to appear in 21 P. F. Smith's Reports. By courtesy of the Reporter.]

ESSER v. LINDERMAN et al.

1. Esser employed brokers to buy stock and "carry it." The brokers wrote him for futher security, or they would not carry his stock. The stock remained with them unsold till it was worthless. In a suit by the brokers for the money advanced by them; his defence being that they should have sold the stock, he could not testify that he believed from the letter that they would not sell without further orders from him.

2. What the letter meant was a question of law for the court.

3. If the brokers had sold the stock without giving further notice and it had risen, they would have been responsible.

4. Having proved that they had purchased the stock, it was not necessary for the brokers to produce the certificate at the trial.

5. When one purchases a chattel for another, he may sue for the money without a tender of the thing: the delivery of the thing cannot be demanded until the money is paid or tendered.

February 16th and 17th, 1872. Before AGNEW, SHARSWOOD and WILLIAMS, JJ. THOMPSON, C. J., at Nisi Prius.

Error to the District Court of Philadelphia: No. 142½, to July Term, 1871.

GARSEED et al. v. TURNER.

1. Garseed contracted to lease Turner a dye shop, furnish him with work, &c., Turner to put in fixtures, which he did, and was ready to perform the work. In a suit by Turner for breach of contract, no points being presented, the court charged, "if the contract was broken by the defendants, the plaintiff is entitled to be put in the same position, pecuniarily, as he would have been if the contract had been kept, regard being had to the fact that the plaintiff soon afterwards obtained other employment:" *Held*, not to be error.

2. Where there is no prayer for instructions, the court cannot be convicted for error except for positive misdirection.

3. The proper measure of damages was the value of the bargain.

4. A general objection to the admission of evidence will not avail unless it appear that the evidence was irrelevant or inadmissible for any purpose.

6. The *competency* of a witness cannot be questioned under a general objection to evidence.

February 12th, 1872. Before AGNEW, SHARSWOOD and WILLIAMS, JJ. THOMPSON, C. J. at Nisi Prius.

Error to the District Court of Philadelphia: Of July Term, 1871, No. 14.

NEW HAMPSHIRE.

[Head notes of cases in the Supreme Court of New Hampshire, to appear in Vol. 52, N. H. Reports. Received from John M. Shirley, Esq., State Reporter.]

CONTRACT.

The construction of a written contract is for the court; therefore when the instrument contains no words requiring interpretation, it is error to leave it to the jury to say what the parties intended as to the scope and effect of their contract at the time of its execution.

The defendant subscribed for shares in the M. Railroad—a corporation then existing in this State—upon a book which contained the condition that the subscribers should not become liable for the payment of their subcriptions until 2,000 shares of said stock should be taken in cash or its equivalent. Afterwards the M. Railroad was chartered in Massachusetts, with power to unite with the M. Railroad in this State; and the town of W., in Massachusetts, was empowered to subscribe for a certain amount of stock in the Massachusetts corporation, which they did, Afterwards a union was formed between the two corporations, thus forming one line from P., in New Hampshire, to W., in Massachusetts; and they have since been operated as one. Without counting in the subscriptions of the town of W., 2,000 shares of stock in the M. Railroad were not taken.

Held, that, inasmuch as the Massachusetts corporation was not in existence at the time of the subscription, there was no latent ambiguity in the contract as to what was meant by the M. Railroad, and parol evidence was therefore not admissible to show that the parties understood and intended by it the united enterprise of a railroad from P. to W.: hence, that the condition upon which the subscription was made had not been performed, and the defendant was not liable to pay for the shares. Monadnock R. R. v. Felt.

EVIDENCE.

On the question whether a pile of lumber was likely to frighten horses, evidence is admissible to show that horses passing it were or were not frightened by it. Darling v. Westmoreland.

IOWA.

PROMISSORY NOTE.

It is only the *bona fide* holder for valuable consideration of a negotiable note, transferred before maturity, that is protected against equities growing out of the note existing between the maker and the payee. The defendant has a right to show all the circumstances attending the transfer of the note, and the subsequent course of dealing respecting it. The Merchants' National Bank v. Amy T. McNutt, Burten, Hill & Co., and Geo. W. Hill. Supreme Court of Iowa, March, 1873.

LEGAL GAZETTE.

Friday, October 31, 1873.

JOHN H. CAMPBELL,

EDITOR.

Court of Common Pleas of Philadelphia County.

IN EQUITY.

WOOD et al. v. MAITLAND et al.

1. While shares in a stock company are personal property, they are not, strictly speaking, chattels.
2. There can be no such thing as an *actual* delivery of the shares. The legal title in them can only be evidenced, and a transfer made in writing.
3. The sale of shares with a receipt of the purchase money and delivery of the certificate, with a power of attorney to transfer, passes the full equitable title and entitles the owner to demand the full title.
4. When one offers for sale the stock of another, the purchaser is bound to see that the former has authority to make the sale.
5. A trustee has no such general power. His office is to hold and safely keep the trust funds in accordance with the terms of the will or other instrument creating the trust.
6. Where there was nothing in a will limiting the general power of sale incident to the office of executor, the executors have a right to sell shares of stock.
7. An executor pledged stock belonging to an estate for his own debt. This was illegal and the parties holding it took no title, and an injunction will lie to prevent a transfer being made of the same on the books of the company by which the stock was issued.

Opinion by PAXSON, J. Delivered October 28th, 1873.

This was a motion to continue a special injunction. The facts of the case, briefly stated, are as follows: Charles S. Wood died on the 27th of May, 1873, leaving a last will and testament, of which R. Francis Wood, George R. Wood, John N. Packard and Charles S. Wurtz were the executors named therein. Letters testamentary were issued to all of the said executors. At the time of his death the said testator was the owner of 20,385 shares of the capital stock of the Cambria Iron Company, the par of which is $12.50. Said stock is said to be worth considerably more than par, and to have paid 12 per cent. dividends for several years. George R. Wood, one of said executors, a defendant in this suit, for the purpose of securing a liability of his own to defendants, Macdowell & Wilkins, who are partners as stock brokers in this city; and of aiding the latter in securing liabilities of their own to E. V. Maitland and William W. Audenried and others, delivered to the said Macdowell & Wilkins divers certificates of the Cambria Iron Company, for stock of said company held by or in the name of the said testator, together with as many powers of attorney signed by him, the said Geo. R. Wood, as "acting executor" of Chas. S. Wood, authorizing the transfer of the same by a person not named in the powers. One of these certificates, to wit, one for 1,905 shares, with the power of attorney to transfer the same, was given by Macdowell & Wilkins to Maitland, Audenreid & Co., on the 1st day of October, 1873, to secure a loan of $9,000, made on that day by the last-named firm to said Macdowell & Wilkins. The said shares have never been transferred on the books of the Cambria Iron Company. It is to prevent said, transfer, and to restrain the said defendants, who are the holders of said certificate and power of attorney, from transferring or parting with the same that this bill has been filed.

The method of acquiring title to shares in incorported joint stock companies is a subject of very grave importance. This species of property has multiplied to such an extent that a very large proportion of the capital of the country is invested in "shares." The daily transactions therein in our large commercial and moneyed centres are of great magnitude. Certificates and powers of attorney, representing immense sums of money, invested in such securities, pass from hand to hand with almost the rapidity and ease of commercial paper, or money itself. It will thus be seen that the manner in which this species of property may be transferred is a matter of no inconsiderable interest.

The character of this kind of investment has been too well settled by legislative enactment and judicial construction to need discussion. While shares in a stock company are personal property, they are not strictly speaking chattels. It has been considered that they bear a greater resemblance to choses in action; or, in other words, that are merely evidence of property. Angell & Ames on Corporations, chapter xvi. section 2. They are, it has been said, mere demands of the dividends as they become due, and differ from movable property, which is capable of possession and manual apprehension. Denton v. Livingston, 9 Johns. R. 96; Wildman v. Wildman, 9 Ves. R. 177. There can be no such thing as an actual delivery of the shares. It is a general rule of law, that when a thing is intangible and incapable of actual delivery, there may be a symbolical delivery. The legal title of shares in a stock company can only be evidenced, and a transfer made in writing. A certificate of stock may, however, be transferred by a blank endorsement, which may be filled up by the holder, by writing an assignment and power of attorney over the signature endorsed. Kortright v. The Buffalo Com. Bank, 20 Wend. (N. Y.) R. 91. Angell & Ames, above cited. It follows that a power of attorney, signed in blank, is sufficient to enable the holder to make the transfer. The delivery of such a power is an implied authority to fill up the blanks. The Building Association v. Sendmeyer, 14 Wr. 67. A person being the owner of stock may sell, give away, or pledge them as he may any other article of personal property. The sale thereof with receipt of the purchase money and delivery of the certificate, with a power of attorney to transfer, passes the full equitable title and entitles the holder to demand the legal title. A person who purchases stock from the owner, or his duly authorized agent, has only to see that the vendor is owner of the same, and is entitled to a transfer by the rules of the company. The rule is different, however, when a person is acting in a fiduciary capacity. The principle may be generally stated that when one offers for sale the stock of another, the purchaser is bound to see that the former has authority to make the sale. A trustee has no such general power. His office is to hold and safely keep the trust funds in accordance with the terms of the will, or other instrument creating the trust. McMurtrie v. the Penna. Co., Legal Intel., vol. 29, p. 108. A trustee *may* be authorized to sell by the terms of his trust or by order of the court; but the purchaser must see to this at his peril. An executor or administrator stands upon a different footing. His office is to administer the assets. This includes a power of sale; but even in the case of an executor, the stock in question may be specifically bequeathed, or there may be a special trust thereof.

In this case I do not find anything in the will of Charles S. Wood, limiting the general power of sale incident to the office of executor. The executors had an undoubted right to make sale of this particular stock. Nor is there anything in the fact that the power of attorney was signed by but one executor. He signs as "acting executor," a term not unfrequently used, yet difficult of a precise legal meaning. It would seem to apply, if at all, to the case where only one executor has taken out letters testamentary. The law is well settled in this State, that executors may sever, may file separate accounts, and that one executor, separately acting, may convey personal property, as if all had joined. Hall v. Boyd, 6 Barr, 270; Irwin's Appeal, 11 Casey, 206; McNair's Appeal, 4 Rawle, 156; Richardson v. Richardson, 9 Barr, 430; Doebly v. Snavely, 5 Watts, 228; Still's Appeal, 10 Barr, 153. It follows that if George R. Wood, executor, sold the stock in question to Macdowell & Wilkins, and received the consideration therefor, it was a valid sale and passed the title.

In order to determine the rights of the present holders of these shares we must examine, first, the transaction between Mr. Wood and Macdowell & Wilkins, and second between the latter and Maitland, Audenried & Co.

Assuming the facts as before stated, and as they appear upon bill and affidavits, it is clear there was no sale by the executor to Macdowell & Wilkins. It was a mere pledge of the stock for an antecedent debt of the executor. In this age of defalcations and misappropriation of trust money extending through national, State, and municipal affairs, as well as those of private corporations and individuals, carrying in their train losses to public and private interests, as well as widespread distrust and alarm to all classes, I cannot designate this transaction as an indiscretion. It was a fraud; a deliberate attempt to use money held upon a sacred trust for the personal ends of the executor That Macdowell & Wilkins, who received their shares from Wood, knew of this misapplication, is apparent from the face of the papers. The latter disclosed the fact that the stock belonged to the estate of Charles S. Wood. The brokers knew that the executor was pledging the stock for his own debt. As between these parties, the transaction was illegal, and Macdowell & Wilkins took no title to the stock.

It remains to consider the case as between Macdowell & Wilkins and Maitland, Audenried & Co. The latter disclaim all knowledge of any defect in their title.

It is an undoubted principle of equity that the owner of property may follow and reclaim it wherever he can find and identify it, until arrested in the pursuit by the countervailing equity of a *bona fide* purchaser for a valuable consideration paid. A purchaser with notice that the sale is a breach of trust, or a fraud upon the rights of the real owner, is *particeps criminis* with the fraudulent vendor, and his purchase cannot protect him against the owner, because such purchase is not *bona fide*. Gerrard v. Pittsburg and Connellsville Railroad Company, 5 Casey, 154. Whatever is sufficient to put a party upon inquiry, is in equity held to be good notice to bind him.—*Ib.* Where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact. 2 Fonbl. Eq. 63, Ch. 3, § 1, note b.

The application of these familiar rules of equity to the facts of this case is not difficult. This stock belongs to the estate of Charles S. Wood. Equity will follow and reclaim it until it is arrested in such attempt by the finding of the stock in the hands of a *bona fide* purchaser without notice. By purchaser is meant one who has in good faith paid the consideration money. Are Maitland, Audenried & Co. such purchasers.

They allege that they took this stock as collateral for a loan made to Macdowell & Wilkins. They do not pretend to have bought it. Having taken but the equitable title, they are affected with notice of all such facts as lie in the line of the legal title. The papers which they hold as evidence of their equitable title, disclose the fact that the stock in question belongs to the said estate of Charles S. Wood. Also the fact that George R. Wood is one of the executors. Further, that the said executor has executed a power of attorney authorizing an attorney, not named, to sell the stock and transfer the same, with a blank for the name of the purchaser. Do these facts furnish conclusive evidence of a sale? On the contrary the non-transfer of the stock to a purchaser and the unfilled blanks are circumstances to put the purchaser upon his guard, and are notice to him that the transaction was *in fieri*. The power that has never been executed. Such power is subject to revocation, and this notwithstanding present words of bargain and sale. It is true it may not be revoked after an actual sale and payment of the purchase money for this is an execution of the power.

Maitland, Audenreid & Co., being merely the holders of an equitable title, were bound to inform themselves what would be necessary to perfect it, and obtain the legal title. Such inquiry, properly prosecuted, would have led to information of the fact that there never has been a sale of this stock, and that the title thereto remains in the estate of Charles S. Wood.

It was urged upon the argument by the learned and able counsel for the defendants that inasmuch as the interest of George R. Wood in his father's estate would exceed the amount of the stock so misapplied, the equities of the case could be reached by allowing the stock to remain in the hands of the brokers, and setting it off against his share of the estate. The argument is ingenious but unsound. The course indicated would

amount to a partial distribution of the estate of Charles S. Wood in advance without sufficient information or proper parties before us. Our decree in such case would not bind absent parties. We can only know what the share of George R. Wood in his father's estate will be when the executors settle their account in the proper office.

The injunction heretofore granted in this case is continued until the further order of the court.

TWENTY-FIRST JUDICIAL DIST.

Court of Common Pleas of Schuylkill County.

IN EQUITY.

EMILY T. ECHERT et al. v. VALENTINE FERST et al.

1. Cutting timber on the land of another, without color of title, is destruction to the freehold, and may be denominated *destructive trespass*.
2. Equity will enjoin against the commission of such acts, when the party is insolvent, and where it is necessary to prevent a multiplicity of suits.

Opinion by WALKER, J. Delivered October 23d, 1873.

This bill in equity sets forth that the complainants are the owners of one hundred and fifteen acres of timber land, with allowance, situate in Pinegrove township, Schuylkill county. That the defendants are the owners of the adjoining land, and are knowingly and wilfully engaged in cutting down and removing the timber trees from the land of the complainants. That said land is only valuable and useful for the timber. That the defendants are persons of insufficient means to answer in damages, for the injury already done and which they are still doing, and that a judgment against them would be entirely fruitless.

Upon the presentation of this bill at chamber, a preliminary injunction issued, and the court fixed the 25th July, 1873, for the hearing, which was continued to suit the defendants until the 23d September, 1873, at which time it was ably argued by counsel. The affidavits read support these facts.

The question now is whether upon these facts, the injunction shall remain.

"The writ of injunction is a high prerogative, to be exercised with great caution, and only for the prevention of irreparable injury, and where no legal adequate remedy exists." New Boston C. & M. Co. v. The Pottsville Water Co., 4 P. F. S. 164; Clark's Appeal 12 P. F. S. 447.

If neither of these exist, a court of chancery will not interfere, but will turn the party over to his action at law for his redress.

"Whether the injury complained of be irreparable or not, is a conclusion of law for the chancellor from the peculiar circumstances." Hilliard on Injunction, 322 § 3. And the facts that show the nature of the irreparable injury must appear in the bill, a mere general averment is not enough. Chesapeake and Ohio Co. v. Young, 3 Md. 480; Adams' Equity, 210 and notes. And what is meant by "*irreparable damage or mischief*, is defined by the Supreme court in Commonwealth v. Pittsburg and Connellsville R. R. Co., 12 Harris, 159. Nor will the relief be withheld because the bill omits to charge the injury as irreparable, if sufficient facts are alleged to satisfy the court that such is the case. Davis v. Reed, 14 Md. 152; High on Injunctions, 464.

On the part of the defendants it is contended.

1. That the damage complained of is not irreparable.

2. That an adequate remedy exists at law.

3. That injunctions to prevent waste only lie at the instance of the remainderman, mortgagee, or one having the ultimate interest in the land.

4. That injunction is not the remedy for a criminal act.

An injury is irreparable where it is not susceptible of any adequate compensation in damages, or where from its continuance a permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented. Hilliard on Injunctions, 25 § 31. The bill sets forth and the affidavits support it, that the land is only valuable for the timber, which the defendants are cutting down and carrying away. The timber is a part of the real estate (9 Wr. 112) and every tree cut diminishes the value of the land. It is so alleged that the defendants are insolvent. If they be insolvent, and are allowed to take the timber away, the conclusion of law necessarily follows that the damage to the plaintiffs is not susceptible of adequate compensation, and the injury irreparable.

2. Is there an adequate legal remedy? An action of trespass can be sustained for every renewed cutting. This would increase litigation and would be insufficient to prevent the wrong complained of. This appears to be the only proper remedy of the complainants.

3. That an injunction to prevent waste is the usual remedy of the remainderman, mortgagee, and one having the ultimate interest in the land (Hilliard on Injunctions, 325, § 3; 2 Blackstone's Com. 281), yet injunctions to prevent *destructive trespass* have of late years obtained, especially where there have been repeated acts and trespasses. Coulson v. White, 3 Atkins, 20; Scheetz's Appeal, 11 Casey 88; Stewart and Foltz's Appeal, 6 P. F. S. 415.

The interference of equity in cases of waste, is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of discretion in the court. Kane v. Vanderburgh, 1 John's Ch. 11; Hill on Inj. 324. That injunctions may issue to restrain trespasses under color of right, seems to be at length settled. Mitchell v. Dors, 6 Vesey, 147; Twort v. Twort, 16 V. 130; Earl of Cowper v. Baker, 17 V. 128; Thomas v. Oakley, 18 V. 186; Courthope v. Mappleeden, 10 V. 291; Hanson v. Gardner, 7 V. 309; North Union Railway v. The Bolton and Preston Railway Co., 3 Railway and Canal Cases, 345.

The destruction of timber on complainant's land, where such timber is necessary for the use and enjoyment of property is enjoined in Maryland. Davis v. Reed, 14 Md. 152; High on Injunctions, § 464. In Connecticut, where the title is unquestionable, relief as against a trespasser without color of right will be granted. Falls et al. v. Tibbett, 31 Conn. 165. Equity will interfere to prevent destruction to inheritance *even though both title and possession are in dispute*. Cornelius v. Post, 1 Stocht, 196; Speer v. Cutter, 5 Barb. 486. Chancery does not treat questions of destructive damage now, exactly as it did forty or fifty years ago. Haig v. Jaggar, 2 Coll. 234. (33 Eng. C. L. Rep.) The change has been marked since the Fleming Case reported in 7 Vesey, 308.

4. There is a difference between an injunction to prevent waste, and one to prevent a trespass. The law is settled that for a criminal act, an injunction will not be granted, Hilliard on Injunction, 2, § 1; Mayor v. Thorne, 7 Page, 264; unless the trespasser be insolvent, or the injury irreparable and destructive to the plaintiff's estate, and such as calls for immediate relief. Morse v. Massini, 10 Min. 590; Hilliard on Injunctions, 319, sec. 1. These objections are therefore not sustained under the authorities cited.

The complainants urge that as these repeated trespasses to their freehold, denominated *destructive* trespass, can only be prevented by injunction, and that the insolvency of the defendants they urge, is a legal ground for the writ. Destructive trespass is defined to be damage amounting to destruction to the inheritance done by a stranger, whose possession or entry is unlawful (Adams' Equity, 209), and it is a more appropriate term in the present case than waste. Trespass upon real estate in Crookford v. Alexander, 15 Vesey, 138, the lord chancellor terms "destruction." In Smith v. Collyer, 8 Ves. 90, Lord Eldon remarked, "it was always surprising to him, that the jurisdiction by injunction was taken so freely in *waste*, and not in trespass, *for there is a writ at common law after action to restrain waste, but a trespass after one action may be repeated.*" It does not seem to me that when irreparable damages must ensue, there is more reason for granting an injunction to prevent destructive trespass, than to prevent waste, for the reason of the common law remedy after action.

In case of insolvency an injunction will be granted. So when it is to prevent waste and avoid multiplicity of suits. Speer v. Cullen, 5 Barb. 487; Hilliard on Injunction, 329, sec. 4. Per Page J. See Chief Justice Wright's opinion in Cowles v. Shaw, 2 Iowa, 496; see, also, Hawley v. Clower, 2 John's Ch. 122; Hart v. Mayor, 2 Page, 264; Winnipiseogee Lake Co. v. Worster, 9 Foster N. H. 449; James v. Dixon, 20 Mo. 79 Shepley v. Ritton, 7 Md. 408; Cobb v. Smith, 16 Wis. 661; 2 Story's Equity Jur. § 925, *et seq.*; Adam's Eq. 425. So an injunction was granted when the defendant was a pauper, although a legal remedy existed. Hodson v. Duer, 2 Jurist, 1014.

Lord Hardwicke held, as early as 1743, that every trespass is not a foundation for an injunction, but repeated trespasses become a nuisance and may be restrained. Coulson v. White, 3 Atk. 20. For such injury is not reparable in an action for damages, besides that it would be required to be followed up by a successive action. "This," Judge Sharswood says, "*is a well recognized distinction.*" Masson's Appeal, 20 P. F. S. 30.

The 13th section of the act of Assembly of 16th June, 1836 (Purdon's Dig. 591), which extends the jurisdiction of equity to "*the prevention or restraint of the commission or continuance of acts contrary to law and prejudicial to the interests of the community, or the rights of individuals,*" applies to *wastes* by cutting down and removing timber. Denny v. Brimson, 5 C. 382. (See act 14th February, 1857, pl. 39, Purdon's Dig. 592, pl. 8, extending equity powers to the State in general.)

When trespasses are constantly recurring and threaten to be continued, they may be redressed by injunction. Stewart & Foltz's Appeal, 6 P. F. S. 413. See also in Smith & Fleek's Appeal, 19 P. F. S. 479, before cited, Judge Williams decided that cutting down timber to the injury of the inheritance, being waste, may be restrained in equity.

Chancellor Kent held that injunctions will be granted to *prevent trespass as well as to stay waste*, where the mischief will be irreparable, and to prevent a multitude of suits. Livingstone v. Livingstone, 6 John's Ch. 497; Watson v. Hunter, 5 John's Ch. 168.

Judge Page, in Speer v. Cutter, 5 Barb. 188, remarks, "that courts of equity originally declined to interfere by restraining waste or trespass where the right was doubtful or the defendant was in possession, claiming by an adverse title (4 John's Ch. 22; and Story's Eq. Jurisprud. § 918), but such courts have gradually enlarged their jurisdiction in such cases, and now they interfere to prevent injury to land where the title is in dispute and the right is doubtful, if the waste or trespass will be attended by irreparable mischief, or if, from the responsibility of the defendant or otherwise, the plaintiff cannot obtain relief at law; and to sustain this position he cites Hart v. Mayor, 3 Page, 214; Winship v. Pitts, 3 Page, 261; 2 John's Ch. 121. "Trespass," says Mr. Justice Baldwin in the case of Bonaparte v. The Camden and Amboy R. R. Co., 1 Baldwin, 205, "*is destruction in the eye of the law when there is no privity of estate; it* (equity) *prevents its repetition or continuance, protects the right—arrests the injury and prevents the wrong:* this is a more beneficial and complete remedy than the law can give, and, therefore, the proper one for a court of equity to administer." 9 Wheat. 842; 1 Ves. 189; 2 John's Ch. 413; 4 Pet. 215.

The decisions of different States on this question are not in all respects uniform (see Stevens v. Beekman, 1 John's Ch. 318, and others), but from the current of authorities, English and American, we may safely conclude that equity will not lend its aid to restrain a criminal or penal offence.

But where the trespass is destructive to the real estate amounting to irreparable injury; when there is no adequate legal remedy; when the title in the plaintiff to the land is complete and the wrong doer is insolvent; when it is to prevent waste to the inheritance, and when a multiplicity of suits must be the result of legal proceedings; in all such cases equity will enjoin to prevent the injury complained of. It is evident, from the facts, that this case falls within the adjudged cases, and that the plaintiffs are entitled to equitable relief. Even if the offence of cutting timber had not been passed upon, and the

remedy by injunction clearly and repeatedly decided by our own courts, and the courts of the several States, I should still be inclined to grant the relief prayed for; for no vested right of the defendant is determined in this application, and no injury can result from their ceasing to cut timber for the present, until the title is established, for, as has been said by a distinguished writer upon equity jurisprudence (Willard Eq. Juris. 408), "*the extent to which the jurisdiction may be carried is not marked out by any adjudged case and from the nature of things it must forever remain undefined.*" Hilliard on Inj. 12, § 13. Under the English practice, with which we are gradually assimilating, the powerful aid of equity may be invoked to redress the variety of recurring acts and never ending grievances of mankind, where the object is the prevention of irreparable damages, and where no legal remedy exists. If it were not so, it would be no more efficient than law, which, by reason of its universality, has long since been found deficient and unequal to the full and complete administration of justice.

And now, to wit: October 20th, 1873, it is, therefore, ordered and decreed, that the special injunction issued in this case, prohibiting the defendans from cutting timber on the land of complainants, remain until further ordered.

George R. Kaercher and *R. L. Ashhurst, Esqs.*, for plaintiff.

Messrs. *Hughes & Farquhar* for defendant.

NORTHERN DISTRICT.

U. S. Dist. Court of Georgia.

In re JOHN W. A. SMITH, a Bankrupt.

1. That the bankrupt act of March 2d, 1867, the amendatory acts and the declaratory act of 1873, make but one system of law, and are therefore to be taken together, and interpreted and construed as one law, and are constitutional.
2. That Congress never claimed the power, under this or any other provision of the Constitution, to annul State exemption laws, or to mould them to a uniformity and equality throughout the United States.
3. That the words "uniform laws," as used in the clause of the Constitution under consideration, have no reference to or in anywise affect the exemption laws of the several States, no matter how variant they may be.
4. That though the States vary in the extent of their exemptions, yet what remains the bankrupt law distributes equally among the creditors.
5. That there is nothing in the Federal Constitution which precludes Congress from passing laws impairing the obligation of contracts; the inhibition contained in the first clause of the tenth section of the first article of that instrument is confined to the States respectively.
6. That the exemptions claimed by this bankrupt, supplant the liens of State judgments and decrees. *Ed. Legal News.*

Certified question from register.

Opinion of the court by ERSKINE, J. Delivered October 3d, 1873.

The assignee, in consideration of the fact that there are judgments of force against the bankrupt—who filed his petition in bankruptcy in this court on the 24th May, 1873—which had been rendered in the State courts prior to July 21st, 1868, refused to set apart other property than that allowed by the exemption laws of force in 1864. The bankrupt claims the exemption allowed by the constitution and laws of Georgia as existing in the year 1871. The register, after argument before him, held that the bankrupt was entitled to the benefit of the exemption laws of this State as they stood in 1871, and made the following order:

"Let the assignee set apart as exempted property: First, the necessary household and kitchen furniture, and such other articles and necessaries of the bankrupt as he shall designate and set apart, having reference in the amount to the family, condition and circumstances of the bankrupt, but altogether not to exceed in value the sum of five hundred dollars.

2d. The necessary wearing apparel of the bankrupt and that of his wife and children without valuation.

3d. The uniform, arms and equipments of a soldier in the militia, if he be such, or if he is in the service of the United States.

4th. Such other property as now is exempt from attachment, or seizure, or levy on execution by the laws of the United States.

5th. Real estate to the value of two thousand dollars in specie, and personal property to the value of one thousand dollars in specie."

The objections of the assignee were confined to this, the fifth item of the register's order. Here, as previously, before Mr. Register Murray, the validity of certain portions of the 14th section of the bankrupt act of March 2d, 1867, and the amendatory act of June 8th, 1872, and that of March 3d, 1873, were questioned. But counsel for the assignee pressed his argument with more directness against the constitutionality of the act of March 3d, 1873, and which is entitled "An act to declare the true intent and meaning of the act approved June 8th, 1872, amendatory of the general bankrupt law." The 14th section of the original act exempts, in addition to certain property of various kinds excepted from the provisions of this section, "such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court, by the laws of the State in which the bankrupt has his domicile at the time of the com encement of proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year eighteen hundred and sixty-four." The amendment of June 8th, 1872, struck out the words "eighteen hundred and sixty-four," and inserted in lieu thereof "eighteen hundred and seventy-one."

To this followed the amendatory or declaratory act of March 3d, 1873 (just referred to), which declares "that the exemptions allowed the bankrupt by said amendatory act" (of June 8th, 1872), "should, and it is hereby enacted that they shall be the amount allowed by the constitution and laws of each State, respectively, as existing in the year eighteen hundred and seventy-one; and that such exemption be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court, any decision of such court rendered since the adoption and passage of such constitution and laws to the contrary, notwithstanding."

The bankrupt act of March 2d, 1867, the amendatory acts, and the declaratory act of 1873, make but one system of law; they are, therefore, to be taken together and interpreted and construed as one entire law or statute. One of the objections taken by counsel for the assignee to the constitutionality of this law, was that it does not, in certain of its provisions, possess the element of uniformity as required by the fourth clause of the eighth section of the first article of the National Constitution—the clause which confers on Congress the power "to establish uniform laws on the subject of bankruptcies throughout the United States"—and the main reason presented was that it gave a bankrupt, in one State, property, as exempted from the pursuit of his creditors, to a larger or lesser amount or value than it bestowed upon a bankrupt in another State; and he illustrated his theory by examples: if the bankrupt, he argued, is domiciled in Georgia, he will (at least if the head of a family) be entitled to an exemption to the value of $2,000 in specie in realty, and $1,000 in specie in personalty; if the bankrupt is a resident of Mississippi, he would be entitled to property, as exempted to the value of four thousand dollars; if of California to a still larger exemption, and if of Maine to an exemption far less in value than that allowed in any of the States named. This diversity, as was urged, showed clearly the want of uniformity in the statute, and, consequently its repugnancy to the Constitution of the United States.

The argument is plausible and apparently sound; but when the mind rises from effects to causes, the fallacy of the reasoning is revealed; for Congress has never claimed the power, under this or any other provision of the Constitution, to annul State exemption laws, or to mould them to a uniformity and equality throughout the United States. From this brief statement, it will, I apprehend, be seen that the words "uniform laws," as used in this clause of the Constitution, have no reference to, or in anywise, affect the exemption laws of the several States, no matter how variant they may be. And this view is not without authority to support it: In re Beckerford, 1 Dillon, 45—argued before Mr. Justice Miller, of the Supreme Court of the United States, and Krekel, J., in the Federal Circuit Court for the Western District of Missouri, this question came up for decision, and Justice Krekel, in delivering the opinion of the court, said: "It is insisted that the 14th section, already cited, having adopted the exemption laws of the State in which the bankrupt is domiciled, and these exemptions having no regard to uniformity, violate the constitutional provision authorizing *uniform* laws throughout the United States to be passed. If Congress saw cause to pass bankrupt laws under the grant of power referred to, the injunction is that they shall be uniform throughout the United States. So far as the distribution of the bankrupt's assets—the point under consideration—is concerned, the law is uniform. * * * * Though the States vary in the extent of their exemptions, yet what remains the bankrupt law distributes equaly among the creditors." A like view of this question was taken by Rives, J., In re Wylie, 5 A. L. T. 330, and In re Kean and White, Pamph. 2. So likewise, by Dick, J., In re Jordan, 8 N. B. R. 180. See also Bump, 6th edition, 135. If the reason which I have advanced is too narrow to show that the bankrupt act of 1867, and the amendments cited, are in harmony with the clause of the Constitution requiring laws on the subject of bankruptcies to be uniform throughout the United States, then I am content to rest satisfied upon the broader reason of the authorities quoted or referred to.

A bankrupt system or law must be regarded as comprehensive, and not partial in its operation; so, too, it should be accompanied with enlightened principles of equity, that honesty may be encouraged and protected, and fraud suppressed. True, it is a general tenet of ethics, that the author of any damage ought in conscience to repair it. But if this rule be extended to the case of a debtor who makes default of payment at the time appointed, by means whereof the creditor sustains some extraordinary detriment, a strict application of the maxim would (in many cases) be unjust; for it must be also recollected that men should not be held accountable for unforeseen contingencies—contingencies proceeding from a concurrence of conflicting circumstances over which the debtor could have had no control.

No one can peruse the declatory act of March 3d, 1873—and which, it may be said, re-enacts the amendatory act of June 8th, 1872—without perceiving the prominence of its retrospective features, also its power to impair the obligation of contracts, and to displace liens created by judgments and decrees rendered in State courts. But if there be no constitutional infirmity in this enactment, it must be taken as absolute and uncontrollable. And there is nothing in the Federal Constitution which precludes Congress from passing laws impairing the obligation of contracts; the inhibition contained in the first clause of the tenth section of the first article of that instrument is confined to the States respectively. White v. Hart, 13 Wall. 646; Guan v. Barry, Id. 610. In modern days laws of bankruptcy are considered as laws calculated for the benefit of trade, in its largest sense, and are founded on principles of humanity as well as justice; and being for the good of trade, the thought suggests itself, that if a national bankrupt law did not possess the element of retrospectiveness, and the power to impair, or, if necessary, to discharge the obligation of antecedent contracts, it would but half perform its functions. And, indeed, it does not strike my mind that it would be a purely speculative postulate to say, that if the Constitution had not expressly granted to Congress the power to establish laws on the subject of bankruptcies; still the right of the Legislature to enact laws of this nature—laws so intimately connected with the regulation of commerce at home and abroad, and with manufacturing and agricultural interests—would, it seems to me, be within its legitimate powers, as an attribute of sovereignty in the nation—as essentially so as the paramount right of eminent domain, or the authority to pass embargo laws, or laws for the erection of forts,

light houses or public buildings. But notwithstanding the expression of any theoretical ideas, the court has been guided to its conclusion solely by those reasons which were fairly deducible from the language of the Constitution itself. Confining the decision to the issues made, the validity of the general bankrupt law of 1867, the amendatory act of 1872, and also (so far at least as the present matter in controversy is involved) the declaratory act of 1873, is assumed, and cannot, I think, be treated as debatable.

And that I may not fall into the mischievous habit of not indicating the sources of my information, I will name, and, when necessary, quote from the cases and authorities mainly consulted, to sustain the views exhibited.

The 5th section of the act of Congress of March 3d, 1797 (1 Stat. 512), gave a preference to the United States in cases of insolvency, and the Supreme Court, in United States v. Fisher, 2 Cranch, 358, decided the act to be constitutional; and also that it was not confined to persons accountable for public money, but extended to debtors of the government generally.

In Evans v. Eaton, Peters' C. C. R. 323, Mr. Justice Washington said: "There is nothing in the Constitution of the United States which forbids Congress to pass laws violating the obligation of contracts, although such a power is denied to the States individually." Similar language was held by Mr. Justice McLean, in Bloomer v. Statley, 5 McLean, 158; and see Satterlee v. Matthewson, 2 Peters, 330. Chief Justice Chase, in pronouncing the decision of the court in Hepburn v. Griswold, 8 Wall. 603, remarked that "Congress has express power to enact bankrupt laws, and we do not see that a law made in the execution of any other express power, which, incidentally only, impairs the obligation of a contract, can be held to be unconstitutional for that reason."

Mr. Justice Miller, in his dissenting opinion in the same case (concurred in by Justices Swayne and Davis), said that "while the Constitution forbids the States to pass such laws" [laws impairing the obligation of contracts], "it does not forbid Congress. On the contrary, Congress is expressly authorized to establish a uniform system of bankruptcy, the essence of which is to discharge debtors from the obligation of their contracts."

Mr. Justice Field, in his dissenting opinion in the Legal Tender Cases, 12 Wall. 457, said: "The only express authority for any legislation affecting the obligation of contracts is found in the power to establish a uniform system of bankruptcy, the direct object of which is to release insolvent debtors from their contracts upon the surrender of their property."

And Mr. Justice Strong, in giving the judgment of the court in the Legal Tender Cases, *supra*, said: "Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless or partially fruitless. Directly it may, confessedly, by passing a bankrupt act, embracing past as well as future transactions. This is obliterating contracts entirely. * * * * And it is no sufficient answer to this to say it is true only when the powers exerted were expressly granted. There is no around for any such distinction"

Dick, J., In re Jordan; and Rivers, J., In re Kean and White, have held the act of 1873, amendatory of the general bankrupt law, constitutional. And the court is indebted also to Register Murray for his written opinion upholding the validity of the act.

The act of 1873, as previously observed, declares that it was the true intent and meaning of the act of 1872, that the exemptions "as existing in the year eighteen hundred and seventy-one," shall be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court," &c. This court, in a series of cases which arose prior to the declaratory act of 1873, ruled that under the general bankrupt act of 1867, and also under the act of 1872, State exemptions were paramount debts pre-existing the passage of these acts; and none of these rulings were ever seriously questioned here. But whether, before the passage of the declaratory act of 1873, a court would have been warranted in so interpreting and construing the acts of 1867 or 1872, as to adjudge exemptions valid against liens by judgment or decree of State courts, it is now too late to discuss. Congress has, however, by the act of 1873, declared the true intent and meaning of the act of the preceding year; and so far as the case now before me is concerned, the bankrupt having filed his petition in bankruptcy nearly two months subsequent to the passage of the act of 1873—the court decides that the exemptions claimed by this bankrupt supplants the liens of State judgments and decrees. See Cooley on Constitutional Limitations, 2d edition, 90–94, and the cases cited by that learned and accomplished jurist, and also, In re Kean and White, *supra*.

The assignee is instructed to carry into effect the order made by Register Murray. Affirmed.

Messrs. *Boynton & Dismuke*, for the bankrupt.

Messrs. *Peeple & Howell*, for the assignee.

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REAL ESTATE SALE, NOVEMBER 4th.

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Master, No. 2443—Genteel Three-story Brick Dwelling.

Tenth and Tasker, N. E. Corner - Business Stand—Three-story Brick Tavern and Dwelling.

Seventeenth, (South,) No. 1317 Business Stand - Three-story Brick Store and Dwelling. Sale Absolute.

36 Mortgages, $900 each. Executors' Sale—Estate of Joseph J. Canavan, dec'd.

Green, No. 1726—Modern Four-story Brick Residence—2 fronts. Has the modern conveniences. Immediate possession.

Irredeemable Ground Rent, $63.37½ a year, payable in silver. Executors' Sale—Estate of Tacy R. Paneast, dec'd.

Well-secured Ground Rent, $102 a year. Same Estate.

Christian, No. 17—Three-story Brick Dwelling. Executors' Sale—Estate of Catharine Jackson, dec'd.

REAL ESTATE SALE, NOVEMBER 11th.

Will include—

Buttonwood, No. 521—Modern Three-story Brick Residence. Executors' Sale—Estate of Mayer Arnold, dec'd.

Somerset and Kayser, N. W. Corner—3 Lots. Same Estate

Third, (North,) No. 111—Five-story Brick Store, and a Three-story Brick Building in the rear. Same Estate.

Howard, No. 2103 - Modern Double Three-story Brick Residence.

East Cumberland, No. 939—Three-story Brick Dwelling.

Second, (North,) No. 503—Valuable Business Stand—Four-story Brick Store.

Race, No. 1030—Three-story Brick Residence. Sale by Order of Heirs.

Penngrove, 24th Ward—Lot. Same Estate.

Walnut, No. 2016—Very Elegant Four-story Brown Stone Residence. Every convenience.

Eighth, (South,) Nos. 1445 and 1447—Three-story Brick Store and Dwelling. Administrator's Sale.

REAL ESTATE SALE, NOVEMBER 18th.

Will include—

Fortieth and Lancaster avenue, N. E. Corner—Lot. Orphans' Court Sale—Estate of John E. Wood, dec'd.

Church, Bridesburg—Two-story Frame Dwelling. Orphans' Court Sale - Estate of Robert Goldsmith, dec'd.

REAL ESTATE SALE, NOVEMBER 25th.

Will include—

Lancaster avenue and Mica, N. W. Corner—Lot. Orphans' Court Sale.—Estate of John P. Sloan, dec'd.

Lancaster avenue, N. W. of Mica—Lot. Same Estate.

Lancaster and Westminster avenues—Lot. Same Estate.

Forty-fifth, south of Westminster avenue—3 Lots. Same Estate.

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REAL ESTATE SALE AT THE EXCHANGE, NOVEMBER 5th.

On Wednesday, at 12 o'clock noon.

Orphans' Court Absolute Sale.—No. 1740 north Fourth street. Neat Three-story Brick Dwelling, and Large Three-story Brick Manufacturing Building, Cadwalader street above Columbia avenue. Lot 34 x 74 feet, Estate of George Kessler, dec'd.

Orphans' Court Absolute Sale.—No. 1735 north Fourth street. Three-story Brick Dwelling and Brick Shop on Hale street. Lot 15 x 103 feet. Same Estate.

Orphans' Court Absolute Sale.—Sixteenth and Cabot streets. Three-story brick Lager Beer Saloon and Dwelling, at S. W. corner. Lot 18 x 70 feet, 20th Ward. Estate of Francis Kleleon, dec'd.

Orphans Court Absolute Sale.—Paschall street. Two-and-a-half-story Stone House near Lancaster avenue, 24th Ward. Lot 28 x 94 feet. Estate of Paul Phy, dec'd.

Orphans' Court Absolute Sale.—Tacony. Frame House and one acre of ground, 23d Ward. Estate of Sarah Duffield, dec'd.

Peremptory Sale.—Melon street, Large Brick Building, suitable for a manufactory or stable, west of Twelfth street. Lot 50 x 80 feet. Subject to $265 ground rent. Immediate possession.

Orphans' Court Absolute Sale.—No. 325 South street. One-sixth interest in Brick Store and Dwelling. Lot 16½ x 87 feet. Estate of James Cornish, dec'd.

Orphans' Court Absolute Sale.—Ground rent, $42 per annum. One-sixth interest in silver ground rent, well secured. Same Estate.

Assignees' Peremptory Sale in Bankruptcy.—Valuable Factory and Large Lot. Nos. 1076 and 1078 Beach street, west of Shackamaxon street, 18th Ward. Estate of John Derbyshire, bankrupt.

Assignees' Peremptory Sale in Bankruptcy.—Large and Valuable Three-story Brick Residence, with side yard, No. 1080 Beach street. Same Estate.

Executors' Sale.—No. 802 Buttonwood street. Genteel Two-and-a-half-story Brick Dwelling, west of Eighth street. Lot 17½ x 90 feet. Three fourths may remain. Estate of William Drum, dec'd.

Executors' Sale.—Buttonwood street, Nos. 808, 810, 812, 814 and 816. Five Two-and-a-half-story Brick Dwellings, each Lot 18 x 60 feet. Will be sold separately. Same Estate.

Executors' Sale.—No. 818 Buttonwood street. Two-and-a-half-story Brick Store and Dwelling, corner of Garden street. Lot 26 x 60 feet. Same Estate. Over three-fourths may remain on each of the above.

No. 1236 Ellsworth street.—Genteel Three-story Brick Dwelling with back Buildings, and every convenience. Lot 19 x 72 feet. Immediate possession.

316 Gaskill street.—Desirable Two-and-a-half story Brick Dwelling, 5th Ward. Lot 17½ x 64 feet. $2,000 may remain.

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Receiver's Peremptory Sale.—Lease, Stock and Fixtures of a Grain House. On Tuesday Morning, October 28th, at 10 o'clock, will be sold at public sale on the premises, Nos. 1814 and 1816 Market street. The lease, good will and fixtures of a grain and forwarding house, including platform scales, portable grain mill, bins, bags, measures, tools, a quantity of grain, office furniture, desks, stoves, an Evans and Watson fire proof, chairs, &c. Sale Peremptory. Terms Cash.

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the conferring of the powers of a Bank of Deposit, Discount and Issue upon the Philadelphia Banking Company, incorporated in accordance with the Act of Assembly approved March 11th, 1870, and an increase of capital to five million dollars. jul 4-6m

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation, in accordance with the laws of the Commonwealth, of THE SECURITY BANK, to be located in Philadelphia, with a capital of fifty thousand dollars, with the right to increase the same to five hundred thousand dollars jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE STATE OF PENNSYLVANIA BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to ten million dollars. jul 4-6m

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REFERENCES.—By kind permission we refer to the following:—Franklin S. Lane, Louisville, drew $13,000. Miss Hattie Banker, Charleston, $9,000. Mrs. Louisa T. Blake, St. Paul, Piano, $700. Samuel V. Raymond, Boston, $5,500. Eugene P. Brackett, Pittsburgh, Watch, $300. Miss Annie Osgood, New Orleans, $5,000. Emory L. Pratt, Columbus, Ohio, $7,000.

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Supreme Court of Pennsylv'a.

PENNSYLVANIA R. R. COMPANY v. CHRISTIAN ACKERMAN.

In the court below, the judge left it to the jury to determine whether, under the circumstances, a prudent man would not have got out of his wagon and approached a railroad track, which he was about crossing, to see if there was any danger, and that if he would have done so, it was the duty of the plaintiff's servant to do so, and if the latter's neglect in this particular contributed to the injury complained of, the plaintiff could not recover: *Held*, not to be error.

Railroad crossings at grade. Practical suggestions.

Error was assigned in the answer of the court below to plaintiff in error's third point, viz.: "If the jury believe that the driver, by reason of the cars standing on the siding, and in the position described by the witnesses, could not see the approach of the train to the crossing, and that the position of the cars rendered passing over the main track more dangerous than if they had not been there, then he was in law bound to use more care and caution; and if by getting out of his wagon and going on the crossing, he could have discovered the approach of the train, and thereby avoided the collision, and he did not do so, then the plaintiff cannot recover."

Answer of the court:

The first branch of this proposition is affirmed; as to the latter part of it, we submit to the jury to say whether under the circumstances a man of ordinary prudence and caution would not have got out of his wagon and approached the track at the head of the horses, until he was in a position where he could look along the track far enough to see that he was in no danger from an approaching train. If, under the circumstances, an ordinarily prudent and cautious man would, under the circumstances, have done so, it was the duty of the plaintiff's driver to do so, and if his neglect to do so contributed to the injury complained of, the plaintiff cannot recover.

As we have said, it is the duty of a party approaching a railroad crossing to pause, look and listen, in order to satisfy himself that there is no danger from an approaching train.

The point at which he should pause and look and listen will depend on circumstances. If the view is unobstructed, he may exercise these precautions without being very close to the track. If the view from his approach is obstructed, he should place himself in a position where he could satisfy himself that there was no danger.

This is doing nothing more than an ordinarily prudent and cautious man would do. By this rule it must be determined whether the driver did his duty or not.

Opinion of the Court by SHARSWOOD, J. Delivered October 20th, 1873.

There is no subject which, in my judgment more loudly calls for legislative regulation, than that of railroad crossings at grade. We are far behind Great Britain and the countries on the continent of Europe, in the precautions required to prevent those fearful accidents to passenger trains from collisions which have produced the loss of so many valuable lives, accompanied with the horrible suffering from mangled limbs and bodies. The judicial decisions of the courts, and of this court in particular, have gone as far as they could in requiring the utmost care on the part of the servants of the railroad companies to give notice of the approach of trains, and the like care and caution to travellers in attempting to cross. More particularly is this true either in approaching or passing through populous towns or cities.

If the evidence given by the plaintiff below was to be believed, the railroad company in the case before us was guilty of very gross negligence. It was a dark, foggy morning—snow on the track which deadened the usual rumbling sound of a moving train. They were going, even according to their own account, at a much greater speed than was allowed by the ordinance of the city of Alleghany, through whose streets they were passing. They sounded no whistle, and if they were ringing a bell, it could only have been at intervals, not continuously. Too many entirely indifferent witnesses testified that they did not hear a bell, to lead the mind to any other conclusion. This particular crossing was at the time so obstructed by cars on a siding, that the view of the track could not be had until the traveller was directly upon it. One witness testified that a person could not see up the track without getting out on the middle of it. This resulted, as he said, from a tannery which stood out in the way, and from the manner in which cars stood on the siding, one car standing out partly on the street.

On the other hand, the driver of the wagon, the horses of which were killed, according to his testimony, did all he could in the way of precaution, without incurring imminent danger of his own life. He stopped within ten steps of the crossing and listened, but heard nothing. If he had got out and lead his horses on the track, the result would have probably been the loss of his own life as well as that of the horses. It is not to such a case that the opinion and decision in Pennsylvania Railroad Company v. Beale, 21 Pittsburg Legal Journal, 11, applied. We adhere to that decision, that the fact that the track cannot be seen from the road is no reason why the traveller should not stop and listen, approach the track at a slow walk, and if he has reason to fear from his horses taking fright, get out of his wagon and lead them by the head until he comes to a point where he can be sure that it is safe to cross. It is negligence in a railroad company to have such a crossing so obstructed as this one appears to have been, but this does not dispense with the necessity of extreme precaution in the traveller, if he was acquainted with the nature of the locality. The same strict rule cannot be held to apply to a stranger to the country. Indeed one of the regulations which ought to be made by legislative authority should be that the usual notice on country roads, "Look out for the locomotive." should be at a point where the approaching train on the track can be seen in either direction; and as to streets in a city, there should be a flagman at every crossing. The point which was put by the defendants below, to the learned judge, was too broad under the evidence of the case, and he would have been guilty of error if he had affirmed it without qualification. He left it to the jury to say whether the servant of the plaintiff had done all that a prudent and cautious man could do. If the view from his approach is obstructed, he should place himself in a position where he could satisfy himself that there was no danger. Whether he could have done this was a question of fact for the jury, and was properly left to them. Judgment affirmed.—*P. L. J., Oct. 29th.*

BOROUGH OF OIL CITY v. McABOY, for use.

An action against a borough or other municipal corporation can only be maintained in a court having jurisdiction over the territorial limits comprised in such corporation.

Certiorari to the District Court of Alleghany county.

Opinion of the Court by AGNEW, J. Delivered October 20th, 1873.

Counties and townships are the legally recognized municipal divisions of the State. The second section of the act of 15th April, 1834, relating to counties and townships and county and township officers, provides that every city shall be deemed and taken to form part of the county in which it is or may be situate. Much more, then, is a borough to be deemed a part of the county. Indeed, formerly, boroughs were treated as parts of the respective townships to which they belonged, though since the passage of the act of 3d April, 1851, every borough incorporated from within a township is now to be considered a distinct district. These municipal divisions are in their nature local, being within a fixed territory; and the people residing there, no matter how fluctuating in regard to individuals, being the true corporation. Hence it has been held, that actions *against* counties are not transitory but local, and must be brought in the courts of the proper county. Lehigh County v. Kleckner, 5 W. & S. 181. The reasons are founded in the convenience and policy of the State, and the limited remedy for the payment of debts. The same rule, therefore, applies with equal force to cities and boroughs.

It is thought the case before us differs, inasmuch as the writing upon which judgment was confessed against the borough of Oil City contains a warrant of attorney, empowering "any attorney of any court of record of this commonwealth to confess judgment for the sum due at maturity, with costs of suit, release of errors," &c. But this is a question of jurisdiction in the court, and not an irregularity or error in the confession; and we think the judgment can be confessed only in the courts of the proper county, no other having power to enforce payments. The commissioners to revise the civil code, reporting upon the act of 15th April, 1834, 2 Park & Johnson's Dig. 724, remark that the only remedy to obtain payment of the debt of a county or township, was the tedious and expensive course of an application to the Supreme Court for a mandamus. They therefore reported the remedy by writ of command and attachment, contained in the 6th and 7th sections of the act of 1834. In Wilson v. The Commissioners of Huntingdon County, 7 W. & S. 197, Justice Kennedy said, there can be no seizure, extension or sale of the property of the county, and payment can only be enforced after judgment by issuing a writ commanding the commissioners to pay, &c., *and not otherwise.* The 72d section of the act of 16th June, 1836, relating to executions, expressly excepts out of the provision for executions against corporations, counties, townships and other public municipal bodies. Hence it was held in Lehigh County v. Kleckner, *supra*, that the courts of one county could not issue process to compel payment against the commissioners of another county. Had there been no such expression of this court, the reasons for confining the remedy by writ of command and attachment to the courts of the proper county in which the municipality is situate are so strong we could not do otherwise than hold the law to be so. It would be a gross hardship to subject the people of a pre-

scribed territory, who can act only through certain officers, to the multiplied jurisdiction of as many courts as there are counties in the State, to suit the mere convenience of a single person who may be creditor. Different bonds in the hands of different persons might in this instance subject the borough of Oil City to as many different jurisdictions at the same time all over the State. Of necessity the records and papers of a municipality should be kept within its own territory for the use of the people who are governed within it. So the public officers of the municipality should be permitted to remain at home in the performance of duties local in their nature, and not dragged away from their offices and duties to run over the State at the call of individual creditors. In view of these reasons and of the provisions in the 6th and 7th sections of the act of 1834, and 72d section of the act of 1836, we are of opinion that the District Court of Alleghany county has no jurisdiction to compel payment of debts by a municipality existing in Venango county. The reference to the bond suits against counties and cities in the Federal courts furnishes no argument in favor of the jurisdiction of the District Court of Alleghany county in this case. In all such actions the counties sued in the Federal courts, were within their territorial jurisdiction; while the right to entertain jurisdiction was founded on the non-residence of the plaintiff within the State, under the Constitution and laws of the United States. The reference to these bond suits is useful, however, in reminding us of the infinite inconveniences those suits caused to the officers of distant counties. We are, therefore, of opinion that the warrant of attorney did not legally authorize a confession of judgment against the borough of Oil City in the District Court of this county. Consent cannot confer jurisdiction against the laws of the State. The writ of certiorari in this case having been amended under leave granted, and converted into a writ of error, the judgment in this case is reversed, and all proceedings under it are set aside.

The same judgment is rendered in the following cases, viz., Nos 171, 172, 173, 174 of October and November Term, 1873, between the same parties. —*P. L. J., Oct. 29th.*

District Court of Philada.

CONAWINGO PETROLEUM CO. v. CUNNINGHAM.

Under a contract to deliver oil "from this date to December 31st," a tender was made on December 31st. *Held*, too late.

CASE STATED.

It is agreed that the following case be stated for the opinion of the court, with the right to either party to sue out a writ of error to the judgment.

On September 9th, 1870, a contract in writing was made, as follows:

[Copy of contract sued on.]

[Int. Rev. Stamp. 10 cents.]

OIL CITY, Sept. 9, 1870.

Sold on account of the Conawingo Petroleum Refining Company to Wilson A. Cunningham, one thousand (1,000) barrels good green merchantable crude petroleum, forty (40) gallons to the barrel, gravity forty to forty-six (40 to 46) degrees, at a temperature of 60° Fahrenheit, to be delivered, buyer's option, at any time from this date, *to December 31st*, 1870, in bulk cars at Venango City. Payment to be made cash on delivery, at the rate of thirteen and one-half (13½) cents per gallon, in lots as gauged and delivered.

S. BOWERS,
Broker.

Brokerage ⅛ by seller.

Accepted, W. A. Cunningham, Sept. 10th, 1870.

On October 24th, 1870, another contract in writing was made, as follows:

[Int. Rev. Stamp. 10 cents.]

OIL CITY, Oct. 24, 1870.

Sold on account of the Conawingo Petroleum Refining Company to Wilson A. Cunningham, one thousand (1,000) barrels good green merchantable crude petroleum, forty (40) gallons to the barrel, gravity forty to forty-six (40 to 46) degrees, at a temperature of 60° Fahrenheit, to be delivered, buyer's option, at any time from date hereof, *to December 31st, inclusive*, 1870, in bulk cars, at Venango City. Payment to be made cash on delivery, at the rate of eleven (11) cents per gallon, in lots as gauged and delivered. Buyer to give the seller ten (10) day's notice before delivery.

S. BOWERS,
Broker.

Brokerage ⅛ by seller.

Accepted, W. A. Cunningham, Oct. 24th, 1870.

It is agreed that the place of delivery on each of the above contracts was a well known siding of the Alleghany Valley Railroad, between certain termini, at Venango City.

On the 30th day of December, 1870, the defendant was at the place of delivery ready and willing to accept the oil on the contract of September 9th, 1870. The plaintiff made no tender, and on that day had no oil at the place of delivery.

On the morning of the *31st of December*, the defendant, having contracts of his own to fill, purchased of other parties the amount of oil named in the first contract of September 9th, 1870, in order to carry out his own contracts.

On the *31st day of December*, 1870, about 4 o'clock P. M., the plaintiff, at place of delivery, tendered the specific amount of oil on the contract of September 9th, 1870. The defendant declined to accept it, as being too late, but offered to take the same on the contract of October 24th, 1870, which the plaintiff refused to deliver the oil upon.

Oil on December 31st, 1870, was worth, at Venango City, ten cents a gallon.

If the court is of opinion that the defendant was bound to accept the oil tendered on December 31st, as a performance of the contract of September 9th, 1870, then judgment to be entered for the plaintiff in the sum of $1,400. But if the court are of the opinion that tender of December 31st, 1870, was not such as defendant was bound to accept as a performance on the contract of September 9th, 1870, then judgment for defendant.

July 12th, 1873. *Per Curiam.* Judgment for defendant on case stated.

Thomas R. Elcock, Esq., for plaintiff.

David W. Sellers, Esq., for defendant

Court of Appeals, Kentucky.

UNITED SOCIETY OF SHAKERS v. UNDERWOOD et al., and DAVENPORT v. SAME.

1 The plaintiffs made a special deposit of bonds in the bank, and alleged that they were wrongfully taken from plaintiffs' package of special deposit by the officers of the bank, and by them converted to the use and emolument of said bank, by sale without authority of plaintiffs, and of such wrongful conversion and appropriation, defendants, who were directors, had or could have had by the most ordinary diligence and investigation ample notice: *Held*, On demurrer that the defendants were liable.

2. That it is the duty of bank directors to use ordinary diligence to acquaint themselves with the business of the corporation, and whatever information might be acquired by ordinary attention to their duties they must, in controversies with persons doing business with the bank, be presumed to have; that public policy demands they shall not be heard to say that by reason of their gross negligence and wilful inattention they were not appraised of that which the ledgers, books, accounts, correspondence and statements of the bank showed to be true; that in actions like this it is not necessary to bring home to the directors actual knowledge of the fact that the special deposits held by the bank were being sold and converted to its use by the officers having them in custody.

3. That special deposits are mere naked bailments, and that the bank nor its directory undertake to exercise any greater care in their preservation than the depositor has the reasonable right to suppose is exercised in keeping the bank's property of like description; that as the directory is the corporate government of the bank, and in the legal sense is the corporation itself, the negligence or inattention of its members can and ought to be imputed to the bank.—*Ed. Legal News.*

The opinion of the court was delivered by LINDSAY, J.

The court being sufficiently advised delivered the following opinion herein, to wit:

The first named appeal is prosecuted from the judgment of the Franklin Circuit Court, and the latter from that of the Warren Court of Common Pleas; but as the questions involved are almost identical, they will, for convenience, be considered and determined together.

To each of the petitions a general demurrer was sustained, and the parties failing to plead further, judgments were rendered dismissing them absolutely, and we are now called upon to determine whether said petitions set out facts constituting causes of action.

From them it appears that in the year 1865 the Bank of Bowling Green went into operation under a charter approved June 2d, 1865, and that during the time it continued in business the defendants were members of its board of directors; and further, that before the institution of these actions said bank, upon the petition of the defendants, or some of them, had been declared a bankrupt by proper legal proceeding, and was insolvent.

The Society of Shakers allege that on the 22d of February, 1869, its agent, U. E. Johns, deposited with the bank a special deposit of $72,450 in bonds, fully described in a memorandum incorporated into the petition, and that the bank had failed upon demand to return $55,660.40 of said bonds. Also that it had failed to account for $9,702.63 collected on interest coupons attached thereto.

Davenport alleges that on the 3d of March, 1866, he placed in the bank on special deposit, nine Warren county bonds of $1,000 each, which by reason of the premium for which they would sell in the market, were of the value of $11,500, and that the bank had failed upon demand to return all or any of such bonds. The Society of Shakers charge the conversion of their bonds in the following language:

"Plaintiffs state that all the aforementioned bonds, aggregating in value the sum of $55,660.40, were wrongfully taken from plaintiffs' package of special deposit by the officers of the Bank of Bowling Green, and by them converted to the use and emolument of said bank by sale as aforesaid, without right or authority from these plaintiffs or any of them, and of such wrongful conversion and appropriation, defendants, and each of them had, or could have had, by the most ordinary diligence and investigation, ample notice."

Davenport alleges that his bonds had been "wrongfully appropriated by said Bank of Bowling Green and converted to the use and emolument of said bank, forwarded to its regular correspondents and by them sold, and the proceeds of sale credited to the Bank of Bowling Green and paid on checks or drafts of said bank, of all of which defendants, and each of them, had notice, as well from the ledgers, books and accounts of said bank as from its correspondents, reconcilements and statements."

And further: "That said bonds were wrongfully appropriated as aforesaid to the use and benefit of said bank, and without authority from this plaintiff, and that of such wrongful conversion and appropriation defendants, and each of them, had or could have had, by the most ordinary diligence, ample notice."

It is also substantially charged in each petition that the defendants, acting as directors, "did, on various occasions, declare dividends when the condition of the bank did not justify the same, and so appropriated to themselves, they being the largest stockholders, large sums of money actually realized from the conversion of the plaintiffs' property as aforesaid." Upon the facts as thus stated, this court must determine whether or not appellees, or any of them, are personally bound to make good the losses resulting to appellants from the unauthorized and wrongful conversion by the bank of their special deposits. In the adjudication of these causes, it is not necessary that we shall critically inquire into the duties and obligations resting upon the bank directors to look after and protect the interest of special depositors, from whom the corporation represented by the directory receives no compensation. It is sufficient to say that special deposits are mere naked bailments, and that the bank, nor its directory, undertake to exercise any greater care in their preservation than the depositor has the reasonable right to suppose is exercised in keeping the bank's property of like description. It cannot be doubted, however, that if the deposit is lost by reason of the gross negligence, or the wilful inattention of the directors, the bank is responsible therefor, upon the well-established doctrine that a mere depositary is liable for gross negligence. And as the directory is the corporate government of the bank, and in the legal sense is the corporation itself, the negligence or inatten-

tion of its members can, and ought to be imputed to the bank. But the liability of the bank in these actions is not made to turn alone upon the want of fidelity and care upon the part of the directory.

It is distinctly and clearly charged that the deposits were sold by the officers of the bank, and the proceeds of such sales converted to its use and emolument, and that this was done with the knowledge of the directors.

This charge implies a conversion by the bailee of the bailor's goods, for which by the common law rules of pleading the bailors might maintain trover.

The question presenting itself in these actions is, whether the directors, who had knowledge of these alleged wrongful sales, are personally liable for the value of the deposits so converted? It is insisted by the appellees that these actions cannot be maintained because of the want of privity between the depositors and the bank directors. They concede that if they have been guilty of gross mismanagement of the affairs of the bank, and that its insolvency and bankruptcy are the consequence of such mismanagement, they may be held to account to the corporation whose officers and agents they were, but urge that inasmuch as their undertaking was to the bank, they can only be proceeded against by it, the party with whom they contracted, and that these appellants must look to the corporation and not to them.

This assumption is plausible, but it cannot be supported.

Bank directors are not mere agents like cashiers, tellers, and clerks. They are, in a certain sense, trustees for the stockholders; and as to mere dealing with the bank they not only represent it, but for all legal consideration are in fact the bank itself. (Morse on Banking, page 76.)

Their contract is not alone with the bank. They invite the public to deal with the corporation, and when any one accepts their invitation he has the right to expect reasonable diligence and good faith at their hands; and if they fail in either they violate a duty they owe not only to the stockholders but to the creditors and patrons of the corporation. (Hodges v. New England Sacred Company, 1 Rhode Island, 312.)

An honest administration of the affairs of the bank, and slight diligence at least in preventing special deposits from being wrongfully converted to its use, were legal duties which the directors were under obligation to the special depositors to perform; and as these obligations grew out of their implied contract that they would perform such duties, there is a legal privity between the parties This doctrine was recognized by this court in the case of the Lexington and Ohio Road Company v. Bridges, 7 B. Monroe, 556, in which case it was held that the directors of that corporation, by accepting their positions, assumed the discharge of certain duties not only to the company, but to persons dealing with it, and that if they misappropriated the funds entrusted to their control, and a creditor was damaged by the act, he had a right of action against them for the injury resulting from their illegal conduct. Whenever there exists a legal duty to perform or omit to do an act, the law will imply a promise by the person upon whom the duty rests that he will discharge it, and between him and all persons having the legal right to demand its performance a privity of contract exists. (Chitty on Contracts, page 1; Parsons on Contracts.)

These actions, however, are not based upon the contract of bailment to the bank, nor upon the implied contract of the appellants that they would not by gross negligence or tacit acquiescence permit the deposits to be converted to the bank's use. The appellants had the right to elect whether they would avail themselves of the remedies prescribed by law for the breach of contract, either upon the part of the bank or of these appellees, and they have elected to waive their right of action upon these contracts, and sue for the joint tort of the bank and the appellees, committed by the wrongful and unauthorized conversion of their deposits. Treating the bank as the bailee, and the directors as its mere agents, it is perfectly clear that, if they permitted the subordinate officers to sell the special deposits, and then acting for the bank assented to the money arising therefrom being used for the purpose of the bank, they are parties to the tort.

"To maintain trover, the defendant must have converted the property to his own use, or have done some other act with a *wrongful intent*, expressed or implied." (Hilliard on Torts, section 8, chapter 16, page 284, volume 2.)

"If one person disposes of the goods of another for the benefit of a third person, this is a conversion." (Bacon's Abridgment, title Trover, sub. B.)

"Every unlawful intermeddling with the goods of another is a conversion, it being a disposition *pro tanto* of the goods of another as if they were the goods of the intermeddler." (Ib., also Young v. Moore, 7 J. J. Marshall, 646.)

In the well considered case of Pool v. Atkission et al., 1 Dana, 110, it was held that the agent who disposed of the slaves of another in obedience to the instructions of his employer, acting in good faith and ignorant of the complainant's rights, was nevertheless liable to the true owner; and in the learned dissenting opinion it was not argued that his liability would have been an open question if he had acted in the matter with knowledge of the fact that the slaves were the property of the party suing and not of his employer.

These appellants allege that their bonds were sold by the officers of the bank and the proceeds paid out in the satisfaction of claims against it, and in the payment of dividends to its stockholders, and that of all this appellees had notice.

Having such notice, it was their duty (and they had full power in the premises) either to prevent the sale of the deposits or to hold the proceeds for the benefit of their owners. Their failure to discharge this duty must be regarded as wilful, and the conclusion cannot be escaped that by permitting the sales to be made, and the proceeds to be paid out as alleged, they made themselves parties to the unauthorized acts constituting the conversion.

This conclusion is strengthened by the averment that they declared dividends when the condition of the bank did not justify it, and thus distributed to themselves portions of the moneys arising from the conversion of appellants' deposits. If such be the case, and they acted with notice of the wrongful sales, they not only participated in, but derived profit from the tortious conduct of the subordinate officers of the bank.

It is objected that the allegation of notice is so far qualified as to destroy the sufficiency of the averment. It is alleged that the appellees, "and each of them, had, *or could have had, by the most ordinary diligence and investigation, ample notice.*"

It is certainly the duty of bank directors to use ordinary diligence to acquaint themselves with the business of the corporation, and whatever information might be acquired by ordinary attention to their duties, they must in controversies with persons doing business with the bank to be presumed to have. Public policy demands that they shall not be heard to say that by reason of their gross negligence and wilful inattention, they were not apprised of that which the ledgers, books, accounts, correspondence, reconcilements and statements of the bank showed to be true. It is not necessary in actions like these to bring home to the directors actual knowledge of the fact that the special deposits held by the bank were being sold and converted to its use by the officers having them in custody. It must suffice to show that the evidences of the practice were such that it must have been brought to their knowledge unless they were grossly or wilfully careless in the performance of their duties.

It is further insisted in the case of the United Shakers, that it is manifest that all the defendants are not liable, and that by reason of the misjoinder of parties defendant, and that the general demurrer was properly sustained.

An examination of section 120 of the Civil Code of Practice will show that the improper joinder of parties defendant is not a ground for general demurrer, and under the 144th section of the New York Code, which is similar to section 120 of our own, the courts of that State have so held. The People v. Mayor of New York, 28 Barbour, 240. The objection may be made available either by a rule requiring the appellant to elect which of the defendants it will proceed against, or by proper instructions by the court, when the cause goes to the jury.

The case of Hawkins v. Phythian, 8 B. Monroe, 515, does not authorize the deduction that, because there is a different and higher degree of diligence required of the president than of the other directors of the bank, they can not be jointly sued in these actions. In the case cited the declaration did not show that the injury complained of resulted from the joint act of the defendants, as is alleged in these cases.

The judgments sustaining the general demurrers and dismissing the two petitions must be reversed.

The special demurrers filed in the Davenport case were not formally passed upon by the Court of Common Pleas because of its action upon the general demurrer, still they are now before this court, and it seems that the best interests of the parties litigant demand that they shall be noticed, in order that the mandate of this court may set out as nearly as possible the principles upon which further proceedings are to be had.

Special demurrer No. 1 should be overruled, as it is not necessary that the officer who sold the bonds shall be named. It is sufficient that they were converted to the use of the bank, and that these appellees participated in the wrongful act.

No. 2 should be overruled, as the petition does sufficiently allege the conversion complained of.

No. 3 should also be overruled, as the petition does not blend a cause of action growing out of a tort, with a cause of action founded on a contract.

No. 4, which goes to the amended petition, should be sustained.

None of the matters of fact set up in that pleading can be regarded as the proximate cause or causes of the injury complained of. It is the conversion of appellant's bonds that gives to him a right of action, and neither the failure of appellees to discharge the duties owing by them to the stockholders and general creditors of the bank, nor the fraudulent representation made by them as to the amount of stock that had been subscribed for or paid in, can in any way affect this right.

No. 5 should also be sustained. It is unnecessary and improper to plead conclusions of law.

No. 6 should be overruled, so far as it is objected that that petition does not sufficiently allege that the appellees had the actual custody of the bonds, as such possession is not necessary to make them liable for the conversion; but it should be sustained as to all those portions of the petition charging acts of omission upon the part of appellees, whereby they violated the duty owing by them to the stockholders and general creditors of the bank.

It is possible that some of the circumstances thus alleged may be admissible as evidence to show that appellees had knowledge of and assented to the conversion of appellant's bonds, but mere circumstances, from which controlling and essential facts may be deduced, ought not to be embodied in the pleadings.

The relevancy of each circumstance should be passed upon by the court, where the parties offer to prove it, and it should be left to the jury to determine as to the weight to which it is entitled when proved, uninfluenced by the previous determination by the court, that the circumstances stated, if proved, do or do not authorize the conclusions drawn by the pleader.

For reasons already given, special demurrers Nos. 7, 8 and 9 should be overruled.

The two causes are remanded with instructions to overrule the general demurrers, and for further proceedings in each case conformable to the principles of this opinion.

LEGAL GAZETTE.

Friday, November 7, 1873.

JOHN H. CAMPBELL,
EDITOR.

THE NEW CONSTITUTION OF PENNSYLVANIA,

As finally adopted by the Convention, November 3d, 1873, and to be submitted to a popular vote upon the 16th of December, next.

[We are emphatically in favor of its adoption.—EDITOR.]

PREAMBLE.

We, the people of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this constitution.

ARTICLE I.

DECLARATION OF RIGHTS.

That the general, great and essential principles of liberty and free government may be recognized and unalterably established, we declare that—

SECTION 1. All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

SECT. 2. All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.

SECT. 3. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

SECT. 4. No person who acknowledges the being of a God and a future state of rewards and punishment shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth.

SECT. 5. Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

SECT. 6. Trial by jury shall be as heretofore, and the right thereof remain inviolate.

SECT. 7. The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court as in other cases.

SECT. 8. The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures, and no warrant to search any place or to seize any person or thing, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation, subscribed to by the affiant.

SECT. 9. In all criminal prosecutions, the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.

SECT. 10. No person shall, for any indictable offence, be proceeded against criminally, by information, except in cases arising in the land or naval forces or in the militia, when in actual service, in time of war or public danger, or by leave of the court, for oppression or misdemeanor in office. No person shall, for the same offence, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

SECT. 11. All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

SECT. 12. No power of suspending laws shall be exercised unless by the Legislature or by its authority.

SECT. 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.

SECT. 14. All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.

SECT. 15. No commission of oyer and terminer or jail delivery shall be issued.

SECT. 16. The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law.

SECT. 17. No *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed.

SECT. 18. No person shall be attainted of treason or felony by the Legislature.

SECT. 19. No attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the commonwealth; the estate of such persons as shall destroy their own lives shall descend or vest as in cases of natural death, and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof.

SECT. 20. The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.

SECT. 21. The right of the citizen to bear arms in defence of themselves and the State shall not be questioned.

SECT. 22. No standing army shall, in time of peace, be kept up without the consent of the Legislature, and the military shall in all cases, and at all times, be in strict subordination to the civil power.

SECT. 23. No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

SECT. 24. The Legislature shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment to which shall be for a longer term than during good behavior.

SECT. 25. Emigration from the State shall not be prohibited.

SECT. 26. To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate.

ARTICLE II.

THE LEGISLATURE.

SECTION 1. The legislative power of this commonwealth shall be vested in a General Assembly which shall consist of a Senate and a House of Representatives.

SECT. 2. Members of the General Assembly shall be chosen at the general election every second year. Their term of service shall begin on the first day of December next after their election. Whenever a vacancy shall occur in either House, the presiding officer thereof shall issue a writ of election to fill such vacancy for the remainder of the term.

SECT. 3. Senators shall be elected for the term of four years and Representatives for the term of two years.

SECT. 4. The General Assembly shall meet at twelve o'clock noon, on the first Tuesday of January every second year, and at other times when convened by the governor, but shall hold no adjourned annual session after the year eighteen hundred and seventy-eight. In case of a vacancy in the office of United States Senator from this commonwealth, in a recess between sessions, the governor shall convene the two Houses, by proclamation on notice not exceeding sixty days, to fill the same.

SECT. 5. Senators shall be at least twenty-five years of age, and Representatives twenty-one years of age. They shall have been citizens and inhabitants of the State four years, and inhabitants of their respective districts one year next before their election (unless absent on the public business of the United States or of this State) and shall reside in their respective districts during their terms of service.

SECT. 6. No Senator or Representative shall, during the time for which he shall have been elected, be appointed to any civil office under this commonwealth, and no member of Congress or other person holding any office (except of attorney at law or in the militia) under the United States or this commonwealth, shall be a member of either House during his continuance in office.

SECT. 7. No person hereafter convicted of embezzlement of public moneys, bribery, perjury or other infamous crime, shall be eligible to the General Assembly, or capable of holding any office of trust or profit in this commonwealth.

SECT. 8. The members of the General Assembly shall receive such salary and mileage for regular and special sessions as shall be fixed by law, and no other compensation whatever, whether for service upon committee, or otherwise. No member of either House shall, during the term for which he may have been elected, receive any increase of salary, or mileage, under any law passed during such term.

SECT. 9. The Senate shall, at the beginning and close of each regular session, and at such other times as may be necessary, elect one of its members president *pro tempore*, who shall perform the duties of lieutenant governor in any case of absence or disability of that officer, and whenever the said office of lieutenant governor shall be vacant. The House of Representatives shall elect one of its members as speaker. Each House shall choose its other officers, and shall judge of the election and qualifications of its members.

SECT. 10. A majority of each House shall constitute a quorum, but a smaller number may adjourn from day to day, and compel the attendance of absent members.

SECT. 11. Each House shall have power to determine the rules of its proceedings and punish its members or other persons for contempt or disorderly behavior in its presence, to enforce obedience to its process, to protect its members against violence, or offers of bribes or private solicitation, and with the concurrence of two-thirds, to expel a member, but not a second time for the same cause, and shall have all other powers necessary for the Legislature of a free State. A member expelled for corruption shall not thereafter be eligible to either House, and punishment for contempt or disorderly behavior shall not bar an indictment for the same offence.

SECT. 12. Each House shall keep a journal of its proceedings and from time to time publish the same, except such parts as require secrecy, and the yeas and nays of members on any question shall, at the desire of any two of them, be entered on the journal.

SECT. 13. The sessions of each House and of committees of the whole shall be open unless when the business is such as ought to be kept secret.

SECT. 14. Neither House shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECT. 15. The members of the General Assembly shall in all cases, except treason, felony, violation of their oath of office, and breach or surety of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

SECT. 16. The State shall be divided into fifty senatorial districts of compact and contiguous territory, as nearly equal in population as may be, and each district shall be entitled to elect one Senator. Each county containing one or more ratios of population shall be entitled to one Senator for each ratio, and to an additional Senator for a surplus of population exceeding three-fifths of a ratio; but no county shall form a separate district unless it shall contain four-fifths of a ratio, except where the adjoining counties are each entitled to one or more Senators, when such county may be assigned a Senator on less than four-fifths, and exceeding one-half of a ratio, and no county shall be divided unless entitled to two or more Senators. No city or county shall be entitled to separate representation exceeding one-sixth of the whole number of Senators. No ward, borough or township shall be divided in the formation of a district. The senatorial ratio shall be ascertained by dividing the whole population of the State by the number fifty.

SECT. 17. The members of the House of Representatives shall be apportioned among the several counties, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by two hundred. Every county containing less than five ratios shall have one representative for every full ratio, and an additional representative when the surplus exceeds half a ratio; but each county shall have at least one representative. Every county containing five ratios or more shall have one representative for every full ratio. Every city containing a population equal to a ratio shall elect separately its proportion of the representatives alloted to the county in which it is located. Every city entitled to more than four representatives, and every county having over one hundred thousand inhabitants shall be divided into districts of compact and contiguous territory, each district to elect its proportion of representatives according to its population, but no district shall elect more than four representatives.

SECT. 18. The General Assembly at its first session after the adoption of this constitution, and immediately after each United States decennial census shall apportion the State into senatorial and representative districts agreeably to the provisions of the two next preceding sections.

ARTICLE III.

LEGISLATION.

SECTION 1. No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either House, as to change its original purpose.

SECT. 2. No bill shall be considered, unless referred to a committee, returned therefrom, and printed for the use of the members.

SECT. 3. No bill, except general appropriation bills, shall be passed, containing more than one subject, which shall be clearly expressed in its title.

SECT. 4. Every bill shall be read at length on three different days in each House; all amendments made thereto shall be printed for the use of the members before the final vote is taken on the bill, and no bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the persons voting for and against the same be entered on the journal, and a majority of the members elected to each House be recorded thereon as voting in its favor.

SECT. 5. No amendment to bills by one House, shall be concurred in by the other except by the vote of a majority of the members elected thereto, taken by yeas and nays, and the names of those voting for and against recorded upon the journal thereof; and reports of committees of conference shall be adopted in either House only by the vote of a majority of the members elected thereto, taken by yeas and nays, and the names of those voting recorded upon the journals.

SECT. 6. No law shall be revived, amended or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length.

SECT. 7. The General Assembly shall not pass any local or special law authorizing the creation, extension or impairing of liens; regulating the affairs of counties, cities, townships, wards, boroughs or school districts; changing the names of persons or places; changing the venue in civil or criminal cases; authorizing the laying out, opening, altering or maintaining roads, highways, streets or alleys; relating to ferries or bridges or incorporating ferry or bridge companies, except for the erection of bridges crossing streams which form boundaries between this and any other State; vacating roads, town plats, streets or alleys, relating to cemeteries, grave-yards or public grounds not of the State; authorizing the adoption or legitimation of children; locating or changing county seats, erecting new counties or changing county lines; incorporating cities, towns or villages, or changing their charters; for the opening and conducting of elections, or fixing or changing the place of voting; granting divorces; erecting new townships or boroughs, changing township lines, borough limits or school districts; creating offices, or prescribing the powers and duties of officers in counties, cities, boroughs, townships, election or school districts; changing the law of descent or succession; regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts, aldermen, justices of the peace, sheriffs, commissioners, arbitrators, auditors, masters in chancery or other tribunals, or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate; regulating the fees or extending the powers and duties of aldermen, justices of the peace, magistrates or constables; regulating the management of public schools, the building or repairing of school houses and the raising of money for such purposes; fixing the rate of interest; affecting the estates of minors or persons under disability, except after due notice to all parties in interest, to be recited in the special enactment; remitting fines, penalties and forfeitures, or refunding moneys legally paid into the treasury; exempting property from taxation; regulating labor, trade, mining or manufacturing; creating corporations, or amending, renewing or extending the charters thereof; granting to any corporation, association or individual any special or exclusive privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track; nor shall the General Assembly indirectly enact such special or local law by the partial repeal of a general law, but laws repealing local or special acts may be passed; nor shall any law be passed granting powers or privileges in any case where the granting of such powers and privileges shall have been provided for by general law, nor where the courts have jurisdiction to grant the same or give the relief asked for.

SECT. 8. No local or special bill shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or the thing to be effected may be situated, which notice shall be at least thirty days prior to the introduction into the General Assembly of such bill, and in the manner to be provided by law; the evidence of such notice having been published, shall be exhibited in the General Assembly before such act shall be passed.

SECT. 9. The presiding officer of each House shall, in the presence of the House over which he presides, sign all bills and joint resolutions passed by the General Assembly, after their titles have been publicly read immediately before signing, and the fact of the signing shall be entered on the journal.

SECT. 10. The General Assembly shall prescribe by law the number, duties and compensation of the officers and employees of each House, and no payment shall be made from the State treasury or be in any way authorized to any person, except to an acting officer or employee elected or appointed in pursuance of law.

SECT. 11. No bill shall be passed giving any extra compensation to any public officer, servant, employee, agent or contractor, after services shall have been rendered or contract made, nor providing for the payment of any claim against the commonwealth, without previous authority of law.

SECT. 12. All stationery, printing, paper and fuel used in the legislative and other departments of government shall be furnished, and the printing, binding and distributing of the laws, journals, department reports, and all other printing and binding, and the repairing and furnishing the halls and rooms used for the meetings of the General Assembly and its committees, shall be performed under contract, to be given to the lowest responsible bidder below such maximum price, and under such regulations as shall be prescribed by law; no member or officer of any department of the government shall be in any way interested in such contracts, and all such contracts shall be subject to the approval of the governor, auditor general and State treasurer.

SECT. 13. No law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment.

SECT. 14. All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose amendments as in other bills.

SECT. 15. No money shall be paid out of the treasury, except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof.

SECT. 16. The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the commonwealth, interest on the public debt and for public schools; all other appropriations shall be made by separate bill each embracing but one subject.

SECT. 17. No appropriation shall be made to any charitable or educational institution not under the absolute control of the commonwealth, other than normal schools established by law for the professional training of teachers for the public schools of the State, except by a vote of two-thirds of all the members elected to each House.

SECT. 18. No appropriations (except for pensions or gratuities for military services) shall be made for charitable, educational or benevolent purposes, to any person or community, nor to any denominational or sectarian institution, corporation or association.

SECT. 19. The General Assembly may make appropriations of money to institutions wherein the widows of soldiers are supported or assisted, or the orphans of soldiers are maintained and educated; but such appropriation shall be applied exclusively to the support of such widows and orphans.

SECT. 20. The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever.

SECT. 21. No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted; no act shall prescribe any limitation of time within which suits may be brought against corporations for injuries to persons or property, or for other causes different from those fixed by general laws regulating actions against natural persons, and such acts now existing are avoided.

SECT. 22. No act of the General Assem-

bly shall authorize the investment of trust funds by executors, administrators, guardians or other trustees, in the bonds or stock of any private corporation, and such acts now existing are avoided, saving investments heretofore made.

SECT. 23. The power to change the venue in civil and criminal cases shall be vested in the court, to be exercised in such manner as shall be provided by law.

SECT. 24. No obligation or liability of any railroad or other corporation, held or owned by the commonwealth, shall ever be exchanged, transferred, remitted postponed or in any way diminished by the General Assembly, nor shall such liability or obligation be released, except by payment thereof into the State treasury.

SECT. 25. When the General Assembly shall be convened in special session, there shall be no legislation upon subjects other than those designed in the proclamation of the governor calling such session.

SECT. 26. Every order, resolution or vote, to which the concurrence of both Houses may be necessary (except on the question of adjournment), shall be presented to the governor, and, before it shall take effect, be approved by him, or being disapproved, shall be re-passed by two-thirds of both Houses according to the rules and limitations prescribed in case of a bill.

SECT. 27. No State office shall be continued or created for the inspection or measuring of any merchandize, manufacture or commodity, but any county or municipality may appoint such officers when authorized by law.

SECT. 28. No law changing the location of the capital of the State shall be valid until the same shall have been submitted to the qualified electors of the commonwealth at a general election and ratified and approved by them.

SECT. 29. A member of the General Assembly who shall solicit, demand or receive, or consent to receive, directly or indirectly, for himself or for another, from any company, corporation or person, any money, office, appointment, employment, testimonial, reward, thing of value or enjoyment, or of personal advantage or promise thereof, for his vote or official influence, or for withholding the same, or with an understanding, expressed or implied, that his vote or official action shall be in any way influenced thereby, or who shall solicit or demand any such money or other advantage, matter or thing aforesaid for another, as the consideration of his vote or official influence, or for withholding the same, or shall give or withhold his vote or influence in consideration of the payment or promise of such money, advantage, matter or thing to another, shall be held guilty of bribery within the meaning of this constitution, and shall incur the disabilities provided thereby for said offence, and such additional punishment as is or shall be provided by law.

SECT. 30. Any person who shall directly or indirectly, offer, give, or promise any money or thing of value, testimonial, privilege or personal advantage, to any executive or judicial officer or member of the General Assembly, to influence him in the performance of any of his public or official duties, shall be guilty of bribery, and be punished in such manner as shall be provided by law.

SECT. 31. The offence of corrupt solicitation of members of the General Assembly, or of public officers of the State, or of any municipal division thereof, and any occupation or practice of solicitation of such members or officers, to influence their official action, shall be defined by law and shall be punished by fine and imprisonment.

SECT 32. Any person may be compelled to testify in any lawful investigation or judicial proceeding, against any person who may be charged with having committed the offence of bribery or corrupt solicitation, or practices of solicitation, and shall not be permitted to withhold his testimony upon the ground that it may criminate himself or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceeding, except for perjury in giving such testimony, and any person convicted of either of the offences aforesaid, shall, as part of the punishment therefor, be disqualified from holding any office or position of honor, trust, or profit in this commonwealth.

SECT. 33. A member who has a personal or private interest in any measure or bill proposed or pending before the General Assembly, shall disclose the fact to the House of which he is a member, and shall not vote thereon.

ARTICLE IV.

THE EXECUTIVE.

SECTION 1. The executive department of this commonwealth shall consist of a governor, lieutenant governor, secretary of the commonwealth, attorney general, auditor general, State treasurer, secretary of internal affairs and a superintendent of public instruction.

SECT. 2. The supreme executive power shall be vested in the governor, who shall take care that the laws be faithfully executed; he shall be chosen on the day of the general election by the qualified electors of the commonwealth, at the places where they shall vote for representatives. The returns of every election for governor shall be sealed up and transmitted to the seat of government, directed to the president of the Senate, who shall open and publish them in the presence of the members of both Houses of the General Assembly. The person having the highest number of votes shall be governor, but if two or more be equal and highest in votes, one of them shall be chosen governor by the joint vote of the members of both Houses. Contested elections shall be determined by a committee, to be selected from both Houses of the General Assembly, and formed and regulated in such manner as shall be directed by law.

SECT. 3. The governor shall hold his office during four years from the third Tuesday of January next ensuing his election, and shall not be eligible to the office for the next succeeding term.

SECT. 4. A lieutenant governor shall be chosen at the same time, in the same manner, for the same term, and subject to the same provisions as the governor; he shall be president of the Senate, but shall have no vote unless they be equally divided.

SECT. 5. No person shall be eligible to the office of governor or lieutenant governor, except a citizen of the United States, who shall have attained the age of thirty years, and have been seven years next preceding his election an inhabitant of the State, unless he shall have been absent on the public business of the United States or of this State.

SECT. 6. No member of Congress or person holding any office under the United States or this State, shall exercise the office of governor or lieutenant governor.

SECT. 7 The governor shall be commander in chief of the army and navy of the commonwealth, and of the militia, except when they shall be called into the actual service of the United States.

SECT. 8. He shall nominate, and by and with the advice and consent of two-thirds of all the members of the Senate, appoint a secretary of the commonwealth and an attorney general, during pleasure, a superintendent of public instruction for four years, and such other officers of the commonwealth as he is or may be authorized by the constitution or by law to appoint; he shall have power to fill all vacancies that may happen in offices to which he may appoint during the recess of the Senate, by granting commissions which shall expire at the end of their next session; he shall have power to fill any vacancy that may happen during the recess of the Senate, in the office of auditor general, State treasurer, secretary of internal affairs, or superintendent of public instruction, in a judicial office, or in any other elective office which he is or may be authorized to fill; if the vacancy shall happen during the session of the Senate, the governor shall nominate to the Senate, before their final adjournment, a proper person to fill said vacancy; but in any such case of vacancy, in an elective office, a person shall be chosen to said office at the next general election, unless the vacancy shall happen within three calender months immediately preceding such election, in which case the election for said office shall be held at the second succeeding general election; in acting on executive nominations, the Senate shall sit with open doors, and in confirming or rejecting the nominations of the governor, the vote shall be taken by yeas and nays, and shall be entered on the journal.

SECT. 9. He shall have power to remit fines and forfeitures, to grant reprieves, commutations of sentence and pardons, except in cases of impeachment; but no pardon shall be granted, nor sentence commuted, except upon the recommendation in writing of the lieutenant governor, secretary of the commonwealth, attorney general and secretary of internal affairs, or any three of them, after full hearing, upon due public notice and in open session, and such recommendation, with the reasons therefor at length, shall be recorded and filed in the office of the secretary of the commonwealth.

SECT. 10. He may require information in writing from the officers of the executive department, upon any subject relating to the duties of their respective offices.

SECT. 11. He shall, from time to time, give to the General Assembly information of the state of the commonwealth, and recommend to their consideration such measures as he may judge expedient.

SECT. 12. He may, on extraordinary occasions, convene the General Assembly, and in case of disagreement between the two Houses, with respect to the time of adjournment, adjourn them to such time as he shall think proper, not exceeding four months. He shall have power to convene the Senate in extraordinary session by proclamation for the transaction of executive business.

SECT. 13. In case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor, the powers, duties and emoluments of the office, for the remainder of the term, or until the disability be removed, shall devolve upon the lieutenant governor.

SECT. 14. In case of a vacancy in the office of lieutenant governor, or when the lieutenant governor shall be impeached by the House of Representatives, or shall be unable to exercise the duties of his office, the powers, duties and emoluments thereof for the remainder of the term, or until the disability be removed, shall devolve upon the president, *pro tempore*, of the Senate; and the president *pro tempore* of the Senate, shall in like manner become governor if a vacancy or disability shall occur in the office of governor, his seat as Senator shall become vacant whenever he shall become governor, and shall be filled by election as any other vacancy in the Senate.

SECT. 15. Every bill which shall have passed both Houses, shall be presented to the governor; if he approve he shall sign it, but if he shall not approve he shall return it with his objections to the House in which it shall have originated, which House shall enter the objections at large upon their journal, and proceed to re-consider it. If, after such re-consideration, two-thirds of all the members elected to that House shall agree to pass the bill, it shall be sent with the objections to the other House by which likewise it shall be re-considered, and if approved by two-thirds of all the members elected to that House, it shall be a law; but in such cases the votes of both Houses shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered on the journals of each House, respectively. If any bill shall not be returned by the governor within ten days after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the General Assembly, by their adjournment, prevent its return, in which case it shall be a law unless he shall file the same, with his objections, in the office of the secretary of the commonwealth, and give notice thereof by public proclamation within thirty days after such adjournment.

SECT. 16. The governor shall have power to disapprove of any item or items of any bill making appropriations of money, embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items of appropriation disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of other bills over the executive veto.

SECT. 17. The chief justice of the Supreme Court shall preside upon the trial of any contested election of governor or lieutenant governor, and shall decide questions regarding the admissibility of

evidence, and shall, upon request of the committee, pronounce his opinion upon other questions of law involved in the trial. The governor and lieutenant governor shall exercise the duties of their respective offices until their successors shall be duly qualified.

SECT. 18. The secretary of the commonwealth shall keep a record of all official acts and proceedings of the governor, and when required, lay the same, with all papers, minutes and vouchers thereto, before either branch of the General Assembly, and perform such other duties as may be enjoined upon him by law.

SECT. 19. The secretary of internal affairs shall exercise all the powers and perform all the duties of the surveyor general, subject to such changes as shall be made by law. His department shall embrace a bureau of industrial statistics, and such duties relating to corporations, to the charitable institutions, the agricultural, manufacturing, mining, mineral, timber and other material or business interests of the State as may be by law assigned thereto. He shall annually, and at such other times as may be required by law, make report to the General Assembly.

SECT. 20. The superintendent of public instruction shall exercise all the powers and perform all the duties of the superintendent of common schools, subject to such changes as shall be made by law.

SECT. 21. The term of the secretary of internal affairs shall be four years; of the auditor general, three years; and of the State treasurer, two years. These officers shall be chosen by the qualified electors of the State, at general elections. No person elected to the office of auditor general or State treasurer shall be capable of holding the same office for two consecutive terms.

SECT. 22. The present great seal of Pennsylvania, shall be the seal of the State.

SECT. 23. All commissions shall be in the name and by authority of the commonwealth of Pennsylvania, and be sealed with the State seal and signed by the governor.

ARTICLE V.

THE JUDICIARY.

SECTION 1. The judicial power of this commonwealth shall be vested in a Supreme Court, in Courts of Common Pleas, Courts of Oyer and Terminer and General Jail Delivery, Courts of Quarter Sessions of the Peace, Orphans' Courts, Magistrates' Courts, and in such other courts as the General Assembly may from time to time establish.

SECT. 2. The Supreme Court shall consist of seven judges, who shall be elected by the qualified electors of the State at large. They shall hold their offices for the term of twenty-one years, if they so long behave themselves well, but shall not be again eligible. The judge whose commission shall first expire, shall be chief justice, and thereafter each judge whose commission shall first expire, shall in turn be chief justice.

SECT. 3. The jurisdiction of the Supreme Court shall extend over the State, and the judges thereof shall, by virtue of their offices, be justices of oyer and terminer and general jail delivery in the several counties; they shall have original jurisdiction in cases of injunction, where a corporation is a party defendant, of *habeas corpus*, of *mandamus* to courts of inferior jurisdiction, and in case of *quo warranto* as to all officers of the commonwealth whose jurisdiction extends over the State, but shall not exercise any other original jurisdiction; they shall have appellate jurisdiction by appeal, *certiorari* or writ of error in all cases, as is now or may hereafter be provided by law.

SECT. 4. Until otherwise directed by law, the Courts of Common Pleas shall continue as at present established, except as herein changed; not more than four counties shall, at any time, be included in one judicial district organized for said courts.

SECT. 5. Whenever a county shall contain forty thousand inhabitants, it shall constitute a separate judicial district, and shall elect one judge learned in the law; and the General Assembly shall provide for additional judges, as the business of the said districts may require; counties containing a population less than is sufficient to constitute separate districts, shall be formed into convenient single districts, or, if necessary, may be attached to contiguous districts as the General Assembly may provide. The office of associate judge, not learned in the law, is abolished in counties forming separate districts; but the several associate judges in office when this constitution shall be adopted shall serve for their unexpired term.

SECT. 6. In the counties of Philadelphia and Alleghany, all the jurisdiction and powers now vested in the District Courts and Courts of Common Please, subject to such changes as may be made by this constitution or by law, shall be in Philadelphia vested in four, and in Alleghany in two distinct and separate courts of equal and co-ordinate jurisdiction, composed of three judges each; the said courts in Philadelphia shall be designated respectively as the Court of Common Pleas number one, number two, number three and number four, and in Alleghany as the Court of Common Pleas number one and number two, but the number of said courts may be by law increased, from time to time, and shall be in like manner designated by successive numbers; the number of judges in any of said courts, or in any county where the establishment of an additional court may be authorized by law, may be increased from time to time; and whenever such increase shall amount in the whole to three, such three judges shall compose a distinct and separate court as aforesaid, which shall be numbered as aforesaid. In Philadelphia all suits shall be instituted in the said Courts of Common Pleas, without designating the number of said court, and the several courts shall distribute and apportion the business among them in such manner as shall be provided by rules of court, and each court to which any suit shall be thus assigned, shall have exclusive jurisdiction thereof, subject to change of venue, as shall be provided by law. In Alleghany each court shall have exclusive jurisdiction of all proceedings at law and in equity commenced therein, subject to change of venue as may be provided by law.

SECT. 7. For Philadelphia there shall be one prothonotary's office, and one prothonotary for all said courts, to be appointed by the judges of said courts, and to hold office for three years, subject to removal by a majority of the said judges; the said prothonotary shall appoint such assistants as may be necessary and authorized by said courts; and he and his assistants shall receive fixed salaries, to be determined by law and paid by said county; all fees collected in said office, except such as may be by law due to the commonwealth, shall be paid by the prothonotary into the county treasury. Each court shall have its separate dockets, except the judgment docket, which shall contain the judgments and liens of all the said courts, as is or may be directed by law.

SECT. 8. The said courts in the counties of Philadelphia and Alleghany, respectively, shall, from time to time, in turn, detail one or more of their judges to hold the Courts of Oyer and Terminer and the Courts of Quarter Sessions of the Peace of said counties in such manner as may be directed by law.

SECT. 9. Judges of the Courts of Common Pleas learned in the law, shall be judges of the Courts of Oyer and Terminer, Quarter Sessions of the Peace and General Jail Delivery, and of the Orphans' Court, and within their respective districts shall be justices of the peace as to criminal matters.

SECT. 10. The judges of the Courts of Common Pleas, within their respective counties shall have power to issue writs of *certiorari* to the justices of the peace and other inferior courts not of record, and to cause their proceedings to be brought before them, and right and justice to be done.

SECT. 11. Except as otherwise provided in this constitution, justices of the peace or aldermen shall be elected in the several wards, districts, boroughs and townships at the time of the election of constables, by the qualified electors thereof, in such manner as shall be directed by law, and shall be commissioned by the governor for a term of five years. No township, ward, district or borough shall elect more than two justices of the peace or aldermen without the consent of a majority of the qualified electors within such township, ward or borough; no person shall be elected to such office unless he shall have resided within the township, borough, ward or district for one year next preceding his election. In cities containing over fifty thousand inhabitants, not more than one alderman shall be elected in each ward or district.

SECT. 12. In Philadelphia, there shall be established for each thirty thousand inhabitants, one court not of record, of police and civil causes, with jurisdiction, not exceeding one hundred dollars; such courts shall be held by magistrates whose term of office shall be five years, and they shall be elected on general ticket by the qualified voters at large; and in the election of the said magistrates, no voter shall vote for more than two-thirds of the number of persons to be elected when more than one are to be chosen; they shall be compensated only by fixed salaries, to be paid by said county; and shall exercise such jurisdiction, civil and criminal, except as herein provided, as is now exercised by aldermen, subject to such changes, not involving an increase of civil jurisdiction or conferring political duties, as may be made by law. The office of alderman is abolished.

SECT. 13. All fees, fines and penalties in said courts shall be paid into the county treasury.

SECT. 14. In all cases of summary conviction in this commonwealth, or of judgment in suit for a penalty before a magistrate, or court not of record, either party may appeal to such court of record as may be prescribed by law, upon allowance of the appellate court or judge thereof, upon cause shown.

SECT. 15. All judges required to be learned in the law, except the judges of the Supreme Court, shall be elected by the qualified electors of the respective districts over which they are to preside, and shall hold their offices for the period of ten years, if they shall so long behave themselves well; but for any reasonable cause, which shall not be sufficient ground for impeachment, the governor may remove any of them on the address of two-thirds of each House of the General Assembly.

SECT. 16. Whenever two judges of the Supreme Court are to be chosen for the same term of service, each voter shall vote for one only, and when three are to be chosen, he shall vote for no more than two; and candidates highest in vote shall be declared elected.

SECT. 17. Should any two or more judges of the Supreme Court, or any two or more judges of the Court of Common Pleas, for the same district, be elected at the same time, they shall, as soon after the election as convenient, cast lots for priority of commission, and certify the result to the governor, who shall issue their commissions in accordance therewith.

SECT. 18. The judges of the Supreme Court and the judges of the several Courts of Common Pleas, and all other judges required to be learned in the law, shall, at stated times, receive for their services an adequate compensation, which shall be fixed by law, and paid by the State. They shall receive no other compensation fees or perquisites of office for their services from any source, nor hold any other office of profit under this commonwealth, the United States or any other State.

SECT. 19. The judges of the Supreme Court, during their continuance in office, shall reside within this commonwealth; and the other judges, during their continuance in office, shall reside within the district for which they shall be respectively elected.

SECT. 20. The several Courts of Common Pleas, besides the powers herein conferred, shall have and exercise within their respective districts, subject to such changes as may be made by law, such chancery powers as are now vested by law in the several Courts of Common Pleas of this commonwealth, or as may hereafter be conferred upon them by law.

SECT. 21. No duties shall be imposed by law upon the Supreme Court or any of the judges thereof, except such as are judicial, nor shall any of the judges thereof exercise any power of appointment, except as herein provided. The court of *nisi prius* is hereby abolished, and no court of original jurisdiction to be presided over by any one or more of the judges of the Supreme Court shall be established.

SECT. 22. In every county wherein the population shall exceed one hundred and fifty thousand, the General Assembly shall, and in any other county may, establish a separate Orphans' Court to consist of one or more judges who shall be learned in the law, which court shall exercise all the jurisdiction and powers now vested in or which may hereafter be conferred upon the Orphans' Courts, and thereupon the jurisdiction of the judges of the Court of Common Pleas within such county, in Orphans' Court proceedings, shall cease and determine; in any county in which a separate Orphans' Court shall be established, the register of wills shall be clerk of such court and subject to its direction in all matters pertaining to his office; he may appoint assistant clerks, but only with the consent and approval of said court. All accounts filed with him as register or as clerk of the said separate Orphans' Court shall be audited by the court without expense to parties, except where all parties in interest in a pending proceeding shall nominate an auditor whom the court may, in its discretion, appoint. In every county Orphans' Courts shall possess all the powers and jurisdictions of a Registers' Court, and separate Registers' Courts are hereby abolished.

SECT. 23. The style of all process shall be "The Commonwealth of Pennsylvania;" all prosecutions shall be carried on in the name and by the authority of the commonwealth of Pennsylvania, and conclude against the peace and dignity of the same.

SECT. 24. In all cases of felonious homicide, and in such other criminal cases as may be provided for by law, the accused, after conviction and sentence, may remove the indictment, record and all proceedings to the Supreme Court for review.

SECT. 25. Any vacancy happening by death, resignation or otherwise, in any court of record, shall be filled by appointment by the governor, to continue till the first Monday of January next succeeding the first general election, which shall occur three or more months after the happening of such vacancy.

SECT. 26. All laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction and powers of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process and judgments of such courts shall be uniform; and the General Assembly is hereby prohibited from creating other courts to exercise the powers vested by this constitution in the judges of the Courts of Common Pleas and Orphans' Courts.

SECT. 27. The parties, by agreement filed, may, in any civil case, dispense with the trial by jury, and submit the decision of such case to the court having jurisdiction thereof, and such court shall hear and determine the same; and the judgment thereon shall be subject to writ of error as in other cases.

ARTICLE VI.

IMPEACHMENT AND REMOVAL FROM OFFICE.

SECTION 1. The House of Representatives shall have the sole power of impeachment.

SECT. 2. All impeachments shall be tried by the Senate; when sitting for that purpose, the Senators shall be upon oath or affirmation; no person shall be convicted without the concurrence of two-thirds of the members present.

SECT. 3. The governor and all other civil officers under the commonwealth shall be liable to impeachment for any misdemeanor in office, but judgment in such cases shall not extend further than to removal from office and disqualification to hold any office of trust or profit under this commonwealth; the party, whether convicted or acquitted, shall, nevertheless, be liable to indictment, trial, judgment and punishment according to law.

SECT. 4. All officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime.

Appointed officers other than judges of the courts of record, and the superintendent of public instruction, may be removed at the pleasure of the power by which they shall have been appointed. All officers elected by the people, except governor, lieutenant governor, members of the General Assembly and judges of the courts of record, learned in the law, shall be removed by the governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate.

ARTICLE VII.

OATHS OF OFFICE.

SECTION 1. Senators and Representatives and all judicial, State and county officers shall, before entering on the duties of their respective offices, take and subscribe the following oath or affirmation:

I do solemnly swear that I will support, obey and defend the Coustitution of the United States, and the constitution of this commonwealth, and that I will discharge the duties of my office with fidelity; that I have not paid or contributed, or promised to pay or contribute, either directly or indirectly, any money or other valuable thing, to procure my nomination or election, except for necessary and proper expenses expressly authorized by law; that I have not knowingly violated any election law of this commonwealth, or procured it to be done by others in my behalf; that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law.

The foregoing oath shall be administered by some person authorized to administer oaths, and in the case of State officers and judges of the Supreme Court, shall be filed in the office of the secretary of the commonwealth, and in the case of other judicial and county officers, in the office of the prothonotary of the county in which the same is taken; any person refusing to take said oath or affirmation shall forfeit his office; and any person who shall be convicted of having sworn or affirmed falsely, or of having violated said oath or affirmation, shall be guilty of perjury, and be forever disqualified from holding any office of trust or profit within this commonwealth.

The oath to the members of the Senate and House of Representatives shall be administered by one of the judges of the Supreme Court or of a Court of Common Pleas, learned in the law, in the hall of the House to which the members shall be elected.

ARTICLE VIII.

SUFFRAGE AND ELECTIONS.

SECTION 1. Every male citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections:

First. He shall have been a citizen of the United States at least one month.

Second. He shall have resided in the State one year [or if, having previously been a qualified elector or native born citizen of the State, he shall have removed therefrom and returned, then six months], immediately preceding the election.

Third. He shall have resided in the election district where he shall offer to vote at least two months immediately preceding the election.

Fourth. If twenty-two years of age or upwards, he shall have paid within two years a state or county tax, which shall have been assessed at least two months and paid at least one month before the election.

SECT. 2. The general election shall be held annually on the Tuesday next following the first Monday of November, but the General Assembly may by law fix a different day, two-thirds of all the members of each House consenting thereto.

SECT. 3. All elections for city, ward, borough and township officers for regular terms of service shall be held on the third Tuesday of February.

SECT. 4. All elections by the citizens shall be by ballot. Every ballot voted shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters, opposite the name of the elector who presents the ballot. Any elector may write his name upon his ticket, or cause the same to be written thereon and attested by a citizen of the district. The election officers shall be sworn or affirmed not to disclose how any elector shall have voted, unless required to do so as a witness in a judicial proceeding.

SECT. 5. Electors shall in all cases, except treason, felony and breach or surety of the peace, be privileged from arrest during their attendance on elections and in going to and returning therefrom.

SECT. 6. Whenever any of the qualified electors of this commonwealth shall be in actual military service, under a requisition from the President of the United States or by the authorities of this commonweath, such electors may exercise the right of suffrage in all elections by the citizens, under such regulations as are or shall be prescribed by law, as fully as if they were present at their usual places of election.

SECT. 7. All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State, but no elector shall be deprived of the privilege of voting by reason of his name not being registered.

SECT. 8. Any person who shall give, or promise or offer to give to an elector, any money, reward or other valuable consideration for his vote at an election, or for withholding the same, or who shall give or promise to give such consideration to any other person or party for such elector's vote or for the withholding thereof, and any elector who shall receive or agree to receive, for himself or for another, any money, reward or other valuable consideration for his vote at an election, or for withholding the same, shall thereby forfeit the right to vote at such election, and any elector whose right to vote shall be challenged for such cause before the election officers, shall be required to swear or affirm that the matter of the challenge is untrue, before his vote shall be received.

SECT. 9. Any person who shall, while a candidate for office, be guilty of bribery, fraud, or wilful violation of any election law, shall be forever disqualified from holding an office of trust or profit in this commonwealth; and any person convicted of wilful violation of the election laws, shall, in addition to any penalties provided by law, be deprived of the right of suffrage absolutely for a term of four years.

SECT. 10. In trials of contested elections and in proceedings for the investigation of elections, no person shall be permitted to withhold his testimony upon the ground that it may criminate himself or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceeding, except for perjury in giving such testimony.

SECT. 11. Townships and wards of cities, or boroughs shall form or be divided into election districts, of compact and contiguous territory, in such manner as the Court of Quarter Sessions of the city or county in which the same are located may direct. But districts in cities of over one hundred thousand inhabitants shall be divided by the Courts of Quarter Sessions, having jurisdiction therein, whenever, at the next preceding election, more than two hundred and fifty votes shall have been polled therein; and other election districts, whenever the court of the proper county shall be of opinion that the convenience of the electors and the public interests will be promoted thereby.

SECT. 12. All elections by persons in a representative capacity shall be *viva voce*.

SECT. 13. For the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence while employed in the service, either civil or military, of this State or of the United States, nor while engaged in the navigation of the waters of the State or of the United States, or on the high seas, nor while a student of any institution of learning, nor while kept in any poor house or other asylum at public expense, nor while confined in public prison.

SECT. 14. District election boards shall consist of a judge and two inspectors, who shall be chosen annually by the citizens. Each elector shall have the right to vote for the judge and one inspector, and each inspector shall appoint one clerk. The first election board for any new district shall be selected, and vacancies in election boards filled as shall be provided by law. Election officers shall be privileged from arrest upon days of election, and while engaged in making up and transmitting returns, except upon warrant of a court of record or judge thereof, for an election fraud, for felony,

or for wanton breach of the peace. In cities they may claim exemption from jury duty during their terms of service.

SECT. 15. No person shall be qualified to serve as an election officer who shall hold, or shall within two months have held any office, appointment or employment in or under the goverment of the United States or of this State, or of any city, or county, or of any municipal board, commission or trust in any city, save only justices of the peace and aldermen, notaries public and persons in the militia service of the State; nor shall any election officer be eligible to any civil office to be filled at an election at which he shall serve, save only to such subordinate municipal or local offices below the grade of city or county offices, as shall be designated by general law.

SECT. 16. The Courts of Common Pleas of the several counties of the commonwealth shall have power, within their respective jurisdictions, to appoint overseers of election, to supervise the proceedings of election officers and to make report to the court as may be required, such appointments to be made for any district in a city or county, upon petition of five citizens, lawful voters of such election district, setting forth that such appointment is a reasonable precaution to secure the purity and fairness of elections; overseers shall be two in number for an election district, shall be residents therein, and shall be persons qualified to serve upon election boards, and in each case members of different political parties; whenever the members of an election board shall differ in opinion, the overseers, if they shall be agreed thereon, shall decide the question of difference; in appointing overseers of election, all the law judges of the proper court able to act at the time shall concur in the appointments made.

SECT. 17. The trial and determination of contested elections of electors of President and Vice President, members of the General Assembly, and of all public officers, whether State, judicial, municipal or local, shall be by the courts of law, or by one or more of the law judges thereof; the General Assembly shall, by general law, designate the courts and judges by whom the several classes of election contests shall be tried, and regulate the manner of trial and all matters incident thereto; but no such law assigning jurisdiction, or regulating its exercise, shall apply to any contest arising out of an election held before its passage.

ARTICLE IX.

TAXATION AND FINANCE.

SECTION 1. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the General Assembly may, by general laws, exempt from taxation, public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity.

SECT. 2. All laws exempting property from taxation, other than the property above enumerated, shall be void.

SECT. 3. The power to tax corporations and corporate power shall not be surrendered or suspended by any contract or grant to which the State shall be a party.

SECT. 4. No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or to pay existing debt; and the debt created to supply deficiencies in revenue shall never exceed in the aggregate at any one time one million of dollars.

SECT. 5. All laws authorizing the borrowing of money by and on behalf of the State, shall specify the purpose for which the money is to be used, and the money so borrowed shall be used for the purpose specified and no other.

SECT. 6. The credit of the commonwealth shall not be pledged or loaned to any individual, company, corporation or association, nor shall the commonwealth become a joint owner or stockholder in any company, association or corporation.

SECT. 7. The General Assembly shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or to loan its credit to any corporation, association, institution or individual.

SECT. 8. The debt of any county, city, borough, township, school district or other municipality or incorporated district, except as herein provided, shall never exceed seven per centum upon the assessed value of the taxable property therein, nor shall any such municipality or district incur any new debt, or increase its indebtedness to an amount exceeding two per centum upon such assessed valuation of property without the assent of the electors thereof, at a public election, in such manner as shall be provided by law. But any city, the debt of which now exceeds seven per centum of such assessed valuation, may be authorized by law to increase the same three per centum, in the aggregated [in the aggregate at any one time], upon such valuation.

SECT. 9. The commonwealth shall not assume the debt, or any part thereof, of any city, county, borough or township, unless such debt shall have been contracted to enable the State to repel invasion, suppress domestic insurrection, defend itself in time of war, or to assist the State in the discharge of any portion of its present indebtedness.

SECT. 10. Any county, township, school district or other municipality incurring any indebtedness shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof within thirty years.

SECT. 11. To provide for the payment of the present State debt and any additional debt contracted as aforesaid, the General Assembly shall continue and maintain the sinking fund sufficient to pay the accuring interest on such debt, and annually to reduce the principal thereof by a sum not less than two hundred and fifty thousand dollars; the said sinking fund shall consist of the proceeds of the sales of the public works or any part thereof, and of the income or proceeds of the sale of any stocks owned by the commonwealth, together with other funds and resources that may be designated by law, and shall be increased from time to time by assigning to it any part of the taxes or other revenues of the State not required for the ordinary and current expenses of government; and, unless in case of war, invasion or insurrection, no part of the said sinking fund shall be used or applied otherwise than in the extinguishment of the public debt.

SECT. 12. The moneys of the State, over and above the necessary reserve, shall be used in the payment of the debt of the State, either directly or through the sinking fund, and the moneys of the sinking fund shall never be invested in or loaned upon the security of anything, except the bonds of the United States or of this State.

SECT. 13. The moneys held as necessary reserve shall be limited by law to the amount required for current expenses, and shall be secured and kept as may be provided by law. Monthly statements shall be published showing the amount of such moneys, where the same are deposited, and how secured.

SECT. 14. The making of profit out of the public moneys or using the same for any purpose not authorized by law by any officer of the State, or member or officer of the General Assembly, shall be a misdemeanor and shall be punished as may be provided by law, but part of such punishment shall be disqualification to hold office for a period of not less than five years.

ARTICLE X.

EDUCATION.

SECTION 1. The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this commonwealth, above the age of six years, may be educated, and shall appropriate at least one million dollars each year for that purpose.

SECT. 2. No money raised for the support of the public schools of the commonwealth shall be appropriated to or used for the support of any sectarian school.

SECT. 3. Women twenty-one years of age and upwards, shall be eligible to any office of control or management under the school laws of this State.

ARTICLE XI.

MILITIA.

SECTION 1. The freemen of this commonwealth shall be armed, organized and disciplined for its defence when and in such manner as may be directed by law. The General Assembly shall provide for maintaining the militia by appropriation from the treasury of the commonwealth, and may exempt from military service persons having conscientious scruples against bearing arms.

ARTICLE XII.

PUBLIC OFFICERS.

SECTION 1. All officers whose selection is not provided for in this constitution, shall be elected or appointed as may be directed by law.

SECT. 2. No member of Congress from this State, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this State to which a salary, fees or perquisites shall be attached. The General Assembly may by law declare what offices are incompatible.

SECT. 3. Any person who shall fight a duel or send a challenge for that purpose, or be aider or abettor in fighting a duel, shall be deprived of the right of holding any office of honor or profit in this State, and may be otherwise punished as shall be prescribed by law.

ARTICLE XIII.

NEW COUNTIES.

SECTION 1. No new county shall be established which shall reduce any county to less than four hundred square miles, or to less than twenty thousand inhabitants; nor shall any county be formed of less area, or containing a less population, nor shall any line thereof pass within ten miles of the county seat of any county proposed to be divided.

ARTICLE XIV.

COUNTY OFFICERS.

SECTION 1. County officers shall consist of sheriffs, coroners, prothonotaries, registers of wills, recorders of deeds, commissioners, treasurers, surveyors, auditors or controllers, clerks of the courts, district attorneys, and such others as may from time to time be established by law; and no sheriff or treasurer shall be eligible for the term next succeeding the one for which he may be elected.

SECT. 2. County officers shall be elected at the general elections, and shall hold their offices for the term of three years, beginning on the first Monday of January next after their election, and until their successors shall be duly qualified; all vacancies not otherwise provided for, shall be filled in such manner as may be provided by law.

SECT. 3. No person shall be appointed to any office within any county who shall not have been a citizen and an inhabitant therein one year next before his appointment, if the county shall have been so long erected but if it shall not have been so long erected, then within the limits of the county or counties out of which it shall have been taken.

SECT. 4. Prothonotaries, clerks of the courts, recorders of deeds, registers of wills, county surveyors and sheriffs, shall keep their offices in the county town of the county in which they respectively shall be officers.

SECT. 5. The compensation of county officers shall be regulated by law, and all county officers who are or may be salaried, shall pay all fees which they may be authorized to receive, into the treasury of the county or State, as may be directed by law. In counties containing over one hundred and fifty thousand inhabitants, all county officers shall be paid by salary, and the salary of any such officer and his clerks, heretofore paid by fees, shall not exceed the aggregate amount of fees earned during his term and collected by or for him.

SECT. 6. The General Assembly shall provide by law for the strict accountability of all county, township and borough officers, as well for the fees which may be collected by them, as for all public or municipal moneys which may be paid to them.

SECT. 7. Three county commissioners and three county auditors shall be elected

in each county where such officers are chosen, in the year one thousand eight hundred and seventy-five, and every third year thereafter; and in the election of said officers each qualified elector shall vote for no more than two persons, and the three persons having the highest number of votes shall be elected; any casual vacancy in the office of county commissioner or county auditor shall be filled by the Court of Common Pleas of the county in which such vacancy shall occur, by the appointment of an elector of the proper county who shall have voted for the commissioner or auditor whose place is to be filled.

ARTICLE XV.

Cities and City Charters.

Section 1. Cities may be chartered whenever a majority of the electors of any town or borough, having a population of at least ten thousand, shall vote at any general election in favor of the same.

Sect. 2. No debt shall be contracted or liability incurred by any municipal commission, except in pursuance of an appropriation previously made therefor by the municipal government.

Sect. 3. Every city shall create a sinking fund, which shall be inviolably pledged for the payment of its funded debt.

ARTICLE XVI.

Private Corporations.

Section 1. All existing charters, or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place and business been commenced in good faith at the time of the adoption of this constitution, shall thereafter have no validity.

Sect. 2. The General Assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend the same, or pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter, subject to the provisions of this constitution.

Sect. 3. The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals; and the exercise of the police power of the State shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the State.

Sect. 4. In all elections for directors or managers of a corporation, each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer.

Sect. 5. No foreign corporation shall do any business in this State without having one or more known places of business and an authorized agent or agents in the same, upon whom process may be served.

Sect. 6. No corporation shall engage in any business other than that expressly authorized in its charter, nor shall it take or hold any real estate, except such as may be necessary and proper for its legitimate business. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against a corporation made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury.

Sect. 7. No corporation shall issue stocks or bonds except for money, labor done or money or property actually received; and all fictitious increase of stock or indebtedness shall be void; the stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting to be held after sixty days' notice given in pursuance of law.

Sect. 8. Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction.

Sect. 9. Every banking law shall provide for the registry and countersigning, by an officer of the State, of all notes or bills designed for circulation, and that ample security to the full amount thereof shall be deposited with the auditor general for the redemption of such notes or bills

Sect. 10. The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this commonwealth, in such manner, however, that no injustice shall be done to the corporators. No law hereafter enacted shall create, renew or extend the charter of more than one corporation.

Sect. 11. No corporate body to possess banking and discounting privileges shall be created or organized in pursuance of any law, without three months' previous public notice at the place of the intended location, of the intention to apply for such privileges, in such manner as shall be prescribed by law, nor shall a charter for such privilege be granted for a longer period than twenty years.

Sect. 12. Any association or corporation organized for the purpose, or any individual shall have the right to construct and maintain lines of telegraph within this State, and to connect the same with other lines, and the General Assembly shall, by general law of uniform operation, provide reasonable regulations to give full effect to this section. No telegraph company shall consolidate with, or hold a controlling interest in the stock or bonds of any other telegraph company owning a competing line, or acquire by purchase or otherwise any other competing line of telegraph.

Sect. 13. The term "corporations," as used in this article, shall be construed to include all joint stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships.

ARTICLE XVII.

Of Railroads and Canals.

Section 1. All railroads and canals shall be public highways, and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any points within this State and to connect at the State line with railroads of other States. Every railroad company shall have the right with its road to intersect, connect with or cross any other railroad, and shall receive and transport each the other's passengers, tonnage and cars, loaded or empty, without delay or discrimination.

Sect. 2. Every railroad and canal corporation, organized in this State, shall maintain an office therein, where transfers of its stock shall be made, and where its books shall be kept for inspection by any stockholder or creditor of such corporation, in which shall be recorded the amount of capital stock subscribed or paid in, and by whom, the names of the owners of its stock and the amounts owned by them, respectively, the transfers of said stock, and the names and places of residence of its officers.

Sect. 3. All individuals, associations and corporations shall have equal right to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made in charges for or in facilities for transportation of freight or passengers within the State or coming from or going to any other State. Persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class in the same direction to any more distant station: but excursion and commutation tickets may be issued at special rates.

Sect. 4. No railroad, canal or other corporation, nor the lessees, purchasers or managers of any railroad or canal corporation, shall consolidate the stock, property or franchises of such corporation with, or lease, purchase, or in any way control any other railroad or canal corporation, owning or having under its control a parallel or competing line, nor shall any officer of such railroad or canal corporation act as an officer of any other railroad or canal corporation owning or having the control of a parallel or competing line, and the question whether railroads or canals are parallel or competing line shall, when demanded by the party complainant, be decided by a jury as in other civil issues.

Sect. 5. No incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over its works, nor shall such company, directly or indirectly, engage in any other business than that of common carriers, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the products of its mines and manufactories on its railroad or canal not exceeding fifty miles in length.

Sect. 6. No president, director, officer, agent or employee of any railroad or canal company shall be interested, directly or indirectly, in the furnishing of material or supplies to such company or in the business of transportation as a common carrier of freight or passengers over the works owned, leased, controlled or worked by such company.

Sect. 7. No discrimination in charges or facilities for transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback or otherwise, and no railroad or canal company, nor any lessee, manager or employee thereof, shall make any preferences in furnishing cars or motive power.

Sect. 8. No railroad, railway or other transportation company shall grant free passes or passes at a discount, to any person except officers or employees of the company.

Sect. 9. No street passenger railway shall be constructed within the limits of any city, borough or township, without the consent of its local authorities.

Sect. 10. No railroad, canal or other transportation company, in existence at the time of the adoption of this article, shall have the benefit of any future legislation by general or special laws, except on condition of complete acceptance of all the provisions of this article.

Sect. 11. The existing powers and duties of the auditor general in regard to railroads, canals and other transportation companies, except as to their accounts, are hereby transferred to the secretary of internal affairs, who shall have a general supervision over them, subject to such regulations and alterations as shall be provided by law; and in addition to the annual reports now required to be made, said secretary may require special reports at any time upon any subject relating to the business of said companies from any officer or officers thereof.

Sect. 12. The General Assembly shall enforce by appropriate legislation the provisions of this article.

ARTICLE XVIII.

Future Amendments.

Section 1. Any amendment or amendments to this constitution may be proposed in the Senate or House of Representatives, and if the same shall be agreed to by a majority of the members elected to each House such amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and the Secretary of the Commonwealth shall cause the same to be published three months before the next general election, in at least two newspapers in every county in which such newspapers shall be published; and if, in the General Assembly next afterwards chosen, such proposed amendment or amendments shall be agreed to by a majority of the members elected to each House, the Secretary of the Commonwealth shall cause the same again to be published in the manner aforesaid, and such proposed amendment or amendments shall be submitted to the qualified electors of the State in such manner, and at such time, at least three months after being so agreed to by the two Houses, as the General Assembly shall prescribe; and if such

amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall become a part of the constitution; but no amendment or amendments shall be submitted oftener than once in five years. When two or more amendments shall be submitted they shall be voted upon separately.

SCHEDULE.

That no inconvenience may arise from the changes in the constitution of the commonwealth, and in order to carry the same into complete operation, it is hereby declared that:

SECTION 1. This constitution shall take effect on the first day of January, in the year 1874, for all purposes not otherwise provided for therein.

SECT. 2. All laws in force in this commonwealth at the time of the adoption of this constitution not inconsistent therewith, and all rights, actions, prosecutions, and contracts, shall continue as if the constitution had not been adopted.

SECT. 3. At the general elections in the years one thousand eight hundred and seventy-four and one thousand eight hundred and seventy-five, senators shall be elected in all districts where there shall be vacancies. Those elected in the year one thousand eight hundred and seventy-four shall serve for two years, and those elected in the year one thousand eight hundred and seventy-five shall serve for one year. Senators now elected, and those whose terms are unexpired, shall represent the districts in which they reside until the end of the term for which they were elected.

SECT. 4. At the general election in the year one thousand eight hundred and seventy-six, senators shall be elected from the even numbered districts to serve for two years, and from odd numbered districts to serve for four years.

SECT. 5. The first election of governor under this constitution shall be at the general election in the year one thousand eight hundred and seventy-five, when a governor shall be elected for three years; and the term of the governor elected in the year one thousand eight hundred and seventy-eight and those thereafter elected shall be for four years, according to the provisions of this constitution.

SECT. 6. At the general election in the year 1874, a lieutenant governor shall be elected according to the provisions of this constitution.

SECT. 7. The secretary of internal affairs shall be elected at the first general election after the adoption of this constitution; and when the said officer is duly elected and qualified, the office of surveyor general shall be abolished, and the surveyor general in office at the time of the adoption of this constitution shall continue in office until the expiration of the term for which he was elected.

SECT. 8. When the superintendent of public instruction shall be duly qualified, the office of superindent of common schools shall cease.

SECT. 9. Nothing contained in this constitution shall be construed to render any person now holding any State office for a first official term ineligible for re-election at the end of such term.

SECT. 10. The judges of the Supreme Court in office when this constitution shall take effect, shall continue until their commissions severally expire. Two judges in addition to the number now composing the said court shall be elected at the first general election after the adoption of this constitution.

SECT. 11. All courts of record, and all existing courts which are not specified in this constitution, shall continue in existence until the first day of December, in the year 1875, without abridgment of their present jurisdiction, but no longer. The Court of First Criminal Jurisdiction, for the counties of Schuylkill, Lebanon, and Dauphin, is hereby abolished; and all causes and proceedings pending therein in the county of Schuylkill shall be tried and disposed of in the Courts of Oyer and Terminer and Quarter Sessions of the peace of said county.

SECT. 12. The Registers' Courts now in existence shall be abolished on the first day of January next succeeding the adoption of this constitution.

SECT. 13. The General Assembly shall, at the next session after the adoption of this constitution, designate the several judicial districts as required by this constitution. The judges in commission when such designation shall be made, shall continue during their unexpired terms judges of the new districts in which they reside. But when their shall be two judges residing in the same district, the president judge shall elect to which district he shall be assigned; and the additional law judge shall be assigned to the other district.

SECT. 14. The General Assembly shall, at the next succeeding session after each decennial census, and not oftener, designate the several judicial districts as required by this constitution.

SECT. 15. Judges learned in the law of any court of record holding commissions in force at the adoption of this constitution shall hold their respective offices until the expiration of the terms for which they were commissioned and until their successors shall be duly qualified. The governor shall commission the president judge of the Court of First Criminal Jurisdiction for the counties of Schuylkill, Lebanon, and Dauphin, as a judge of the Court of Common Pleas of Schuylkill county, for the unexpired term of his office.

SECT. 16. After the expiration of the term of any president judge of any Court of Common Pleas in commission at the adoption of this constitution, the judge of such court learned in the law and oldest in commission shall be the president judge thereof, and when two or more judges are elected at the same time in any judicial district, they shall decide by lot which shall be president judge; but when the president judge of a court shall be re-elected he shall continue the president judge of that court. Associate judges, not learned in the law, elected after the adoption of this constitution, shall be commissioned to hold their office for the term of five years from the first day of January after their election.

SECT. 17. The General Assembly, at the first session after the adoption of this constitution, shall fix and determine the compensation of the judges of the Supreme Court and of the judges of the several judicial districts of the commonwealth, and the provisions of the fifteenth section of the article on "legislation" shall not be deemed inconsistent herewith. Nothing contained in this constitution shall be held to reduce the compensation now paid to any law judge of this commonwealth now in commission.

SECT. 18. The Courts of Common Pleas in the counties of Philadelphia and Alleghany shall be composed of the present judges of the District Court and Court of Common Pleas of said counties until their offices shall severally end, and of such other judges as may from time to time be selected.

For the purpose of first organization in Philadelphia the judges of the court No. 1, shall be Judges Allison, Peirce, and Paxson; of the court No. 2, Judges Hare, Mitchell, and one other judge to be elected; of the court No. 3, Judges Ludlow, Finletter, and Lynd, and of the court No. 4. Judges Thayer, Briggs, and one other judge to be elected.

The judge first named shall be the president judge of said courts respectively, and thereafter the president judge shall be the judge oldest in commission; but any president judge re-elected in the same court or district shall continue to be president judge thereof.

The additional judges for courts Nos. 2 and 4 shall be voted for and elected at the first general election after the adoption of this constitution in the same manner as the two additional judges of the Supreme Court, and they shall decide by lot to which court they shall belong. Their term of office shall commence on the first Monday of January in the year 1875.

SECT. 19. In the county of Alleghany, for the purpose of first organization under this constitution, the judges of the Court of Common Pleas, at the time of the adoption of this constitution, shall be the judges of the court No. 1, and the judges of the District Court at the same date shall be the judges of the Common Pleas No. 2.

The president judges of the Common Pleas and District Courts shall be president judges of courts Nos. 1 and 2, respectively, until their offices shall end, and thereafter the judge oldest in commission shall be president judge; but any president judge re-elected in the same court or district shall continue to be president judge thereof.

SECT. 20. The organization of the Courts of Common Pleas, under this constitution, for the counties of Philadelphia and Alleghany, shall take effect on the first Monday of January, 1875, and existing courts in said counties shall continue with their present powers and jurisdiction until that date; but no new suits shall be instituted in the courts of Nisi Prius after the adoption of this constitution.

SECT. 21. The causes and proceedings pending in the court of Nisi Prius, Common Pleas, and District Court in Philadelphia, shall be tried and disposed of in the Court of Common Pleas. The records and dockets of said courts shall be transferred to the Prothonotary's office of said county.

SECT. 22. The causes and proceedings pending in the Court of Common Pleas in the county of Alleghany shall be tried and disposed of in the court number *one*; and the causes and proceedings pending in the District Court shall be tried and disposed of in the court number *two*.

SECT. 23. The prothonotary of the Court of Common Pleas of Philadelphia shall be first appointed by the judges of said court on the first Monday of December, 1875, and the present prothonotary of the District Court in said county shall be the prothonotary of the Court of Common Pleas until said date, when his commission shall expire, and the present clerk of the Court of Oyer and Terminer and Quarter Sessions of the peace in Philadelphia, shall be the clerk of such court until the expiration of his present commission, on the first Monday of December, in the year 1875.

SECT. 24. In cities containing over fifty thousands inhabitants (except Philadelphia), all aldermen in office at the time of the adoption of this constitution shall continue in office until the expiration of their commissions and at the election for city and ward officers in the year 1875, one alderman shall be elected in each ward, as provided in this constitution.

SECT. 25. In Philadelphia, magistrates in lieu of aldermen, to be elected under this constitution, shall be chosen as required in this constitution, at the election in said city for city and ward officers in the year 1875; their term of office shall commence on the first Monday of April succeeding their election.

The term of office of aldermen in said city, holding or entitled to commissions at the time of the adoption of this constitution, shall not be affected thereby

SECT. 26. All persons in office in this commonwealth at the time of the adoption of this constitution, and at the first election under it, shall hold their respective offices until the term for which they have been elected or appointed shall expire, and until their successors shall be duly qualified, unless otherwise provided in this constitution.

SECT. 27. The seventh article of this constitution, prescribing an oath of office, shall take effect on and after the first day of January, 1875.

SECT. 28. The terms of office of county commissioners and county auditors, chosen prior to the year 1875, which shall not have expired before the first Monday of January, in the year 1876, shall expire on that day.

SECT 29. All State, county, city, ward, borough, and township officers, in office at the time of the adoption of this constitution, whose compensation is not provided for by salaries alone, shall continue to receive the compensation allowed them by law until the expiration of their respective terms of office.

SECT. 30. All State and judicial officers heretofore elected, sworn, affirmed, or in office when this constitution shall take effect, shall severally, within one month after such adoption, take and subscribe an oath (or affirmation) to support this constitution.

SECT. 31. The General Assembly, at its first session, or as soon as may be after the adoption of this constitution, shall pass such laws as may be necessary to carry the same into full force and effect.

SECT. 32. The ordinance passed by this convention, entitled "An ordinance for submitting the amended constitution of Pennsylvania to a vote of the electors thereof," shall be held to be valid for all the purpose thereof.

SECT. 33. The words "county commissioners," wherever used in this constitution, and in any ordinance accompanying the same, shall be held to include the commissioners for the city of Philadelphia.

Adopted at Philadelphia on the third day of November, in the year of our Lord one thousand eight hundred and seventy-three.

M. THOMAS & SONS, AUCTIONEERS.

Nos. 139 and 141, late 67 and 69 S. Fourth St.

REAL ESTATE SALE, NOVEMBER 11th.

Will include—

Buttonwood, No. 521—Modern Three-story Brick Residence. Executors' Sale—Estate of Mayer Arnold, dec'd.

Somerset and Kayser, N. W. Corner—3 Lots. Same Estate.

Third, (North,) No. 111—Five-story Brick Store, and a Three-story Brick Building in the rear. Same Estate.

Howard, No. 2103—Modern Double Three-story Brick Residence.

East Cumberland, No. 939—Three-story Brick Dwelling.

Second, (North,) No. 503—Valuable Business Stand—Four-story Brick Store.

Race, No. 1030—Three-story Brick Residence. Sale by Order of Heirs.

Penngrove, 24th Ward—Lot. Same Estate.

Walnut, No. 2016—Very Elegant Four-story Brown Stone Residence. Every convenience.

Eighth, (South,) Nos. 1445 and 1447—Three-story Brick Store and Dwelling and Three-story Brick Dwelling. Administrator's Sale. Estate of Edwin Milner, dec'd.

Rocky hill, above Frankford, 23d Ward—Genteel Three-story Frame Dwelling.

Girard avenue Market, between Fifth and Randolph streets—Stalls Nos. 56 and 58. Executors' Peremptory Sale—Estate of Matthew Trudel, dec'd.

Almond, N. E. of Anthracite—Two-story Brick Dwelling.

Emerald, N. W. of Albert—Two-story Brick Dwelling.

Montgomery avenue, No. 811—Three-story Brick Store and Dwelling.

Seventeenth and Jefferson—6 Desirable Lots.

Maplewood avenue, Southwest of Green street, Germantown—Handsome Pointed-stone Residence. Lot 42 feet front.

Seventeenth above Oxford—Building Lot.

Frankford road, No. 2323—Store and Dwelling.

REAL ESTATE SALE, NOVEMBER 18th.

Will include—

Fortieth and Lancaster avenue, N. E. Corner—Lot. Orphans' Court Sale—Estate of John E. Wood, dec'd.

Church, Bridesburg—Two-story Frame Dwelling. Orphans' Court Sale—Estate of Robert Goldsmith, dec'd.

Spruce, No. 2032—Very Elegant Four-story Pictou Stone Residence—2 fronts. Has all the modern improvements and conveniences. Trustees' Peremptory Sale.

Thirty-second, North of Arch—2 Modern Four-story Brick Residences.

Perth, No. 1449, south of Jefferson, and between Franklin and Eighth street—Three-story Brick Dwelling.

Haverford road, No. 4931, junction of Fiftieth street and Silverton avenue—Genteel Two-story Brick Store and Dwelling.

Silverton avenue, No. 4916—Genteel Two-story Brick Store and Dwelling, with Stable and Coach House.

Fifty-second and Lombard, S. E. Corner—6 Cottage Lots.

Twentieth, (North,) No. 1744—Handsome Modern Three-story Dwelling.

A. K. SAURMAN,
COLLECTOR AND REAL ESTATE AGENT.
463 North Ninth Street, Philadelphia.
may 19-1y*

J. FLETCHER BUDD,
ATTORNEY AND COUNSELLOR AT LAW,
Jan 31-6mo* No. 615 Walnut St., Phila.

CHAS. M. SWAIN,
ATTORNEY AT LAW,
247 S. Sixth Street, Philadelphia.
oct 18-1y* Office first floor back.

J. L. HOWELL,
ATTORNEY AT LAW,
103 PLUM ST., CAMDEN, N. J.
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oct 7-1y

CHARLES P. CLARKE,
ATTORNEY AT LAW,
UNITED STATES COMMISSIONER.
Commissioner for New Jersey,
feb10-1y 424 Library St., Phila.

SILAS W. PETTIT,
ATTORNEY AT LAW.
No. 518 WALNUT STREET,
Jul 9-tf PHILADELPHIA.

JAMES A. FREEMAN & CO. AUCTIONEERS.

No. 422 WALNUT STREET.

REAL ESTATE SALE AT THE EXCHANGE, NOVEMBER 19th.

On Wednesday, at 12 o'clock noon.

Orphans' Court Sale.—Girard avenue. Valuable Lot at N. W. corner of Twenty-seventh street, 175 x 85½ feet to Saulnier street, 3 fronts, and is within three squares of the Park. Estate of Robert W. Solly, dec'd.

Orphans' Court Sale.—Twenty-seventh street. An Eligible Lot of Ground, above Girard avenue, having fronts on 4 streets, 239 x 104 feet, with Three-story Brick House thereon erected. Same Estate.

Orphans' Court Sale.—Twenty-eighth street. Valuable Lot of Ground, above Girard avenue, 129 x 100 feet to McFall street. All street improvements made on Twenty-eighth street front. Same Estate.

Orphans' Court Sale.—Oxford and Twenty-seventh streets. 4 Building Lots at the S. W. corner, 70 x 84½ feet. Estate of Jacob Kiefer, dec'd.

Orphans' Court Sale.—Oxford street. Building Lot, west of Twenty-seventh street, 29th Ward, 17 x 79 feet. Same Estate.

Orphans' Court Sale.—Bailey street. Building Lot, west of Twenty-sixth street, south of Oxford street, 29th Ward, 18 x 87½ feet. Same Estate.

☞ On all of the above lots there is a large deposit of gravel.

Orphans' Court Absolute Sale.—Salmon street. Building Lot, near Bockius street, 25th Ward, 20 x 117½ feet. Estate of Alex. J. Fromberger, dec'd.

Sale by Order of Heirs.—Brown and Front streets. Business Location, Four-story Brick Tavern and Dwelling, at S. E. corner. Lot 83 x 18 feet. Estate of Mary E. Pleasants, dec'd.

Sale by Order of Heirs.—$72 per annum. Irredeemable Silver Ground Rent, well-secured and promptly paid. Same Estate.

Sale by Order of Heirs.—$51 per annum. Irredeemable Silver Ground Rent, well-secured and promptly paid. Same Estate.

Sale by Order of Heirs.—$45 per annum. Irredeemable Silver Ground Rent, well-secured and promptly paid. Same Estate.

Sale by Order of Heirs.—$120 per annum. Silver Ground Rent, well-secured and promptly paid. Same Estate.

Peremptory Sale.—Thirty-seventh street. Three-story Brick Dwelling, above Walnut street, 27th Ward. Lot 16½ x 77 feet. $2,000 may remain.

Trustees' Sale.—North Twelfth street. 3 Building Lots, above Susquehanna avenue, 18 x 75 feet, 28th Ward. Will be sold separately. Estate of Wm. Ross, dec'd.

Assignees' Absolute Sale.—No. 1525 N. Eighth street. Handsome Modern Three-story Brick Dwelling with back buildings, below Oxford street. Lot 24 x 100 feet to Perth street. $108 ground rent. Assigned estate of Francis D. Leidy.

Assignees' Absolute Sale.—No. 2020 N. Fifth street. Neat Three-story Brick Dwelling with Three-story Brick House in rear on Manakin street. Lot 17 x 100 feet. Same Estate

Assignees' Absolute Sale.—No. 2048 N. Fifth street. Genteel Three-story Brick Dwelling, with back building, above Norris street. Lot 16 x 100 feet to Manakin street. Same Estate.

Assignees' Absolute Sale.—No. 2050 N. Fifth street. Three-story Brick Dwelling with 2 Three-story Brick Houses in rear. Lot 16 x 100 feet to Manakin street. Same Estate.

No. 1239 Fairmount avenue. Genteel Three-story Brick Dwelling, with back buildings and conveniences. Lot 17 x 79 feet. $51 ground rent, silver.

EDWARD C. DIEHL,
ATTORNEY AT LAW,
COMMISSIONER TO TAKE DEPOSITIONS AFFIDAVITS, &C.
No. 530 WALNUT ST., 2D STORY, PHILA.
Special attention given to taking Depositions, Affidavits, &c. sep 16-tf

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LAW OFFICES OF READ & PETTIT.
No. 518 Walnut Street, Second floor, Philadelphia.
JOHN R. READ. SILAS W. PETTIT.
sep 5-3mos

JAS. F. MILLIKEN,
ATTORNEY AT LAW,
Hollidaysburg, Pa.
Prompt attention given to the collection of claims in Blair, Bedford, Cambria, Huntingdon, Centre and Clearfield counties. *Refers to* MORGAN, BUSH & Co., Genl. C. H. T. COLLIS, JOHN CAMPBELL, Esq. nov 24-1y

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THE FORENSIC SPEECHES OF DAVID PAUL BROWN,

EDITED BY HIS SON,

ROBERT EDEN BROWN,

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For sale by all the prominent booksellers, and at 607 Sansom Street, by

KING & BAIRD,
PUBLISHERS.

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE AMERICAN EXCHANGE BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to three million dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled the INDEPENDENCE HALL BANK, to be located in Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE DRY GOODS BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE ARTISANS' BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE MARKET BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE DELAWARE RIVER BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to one million dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE GROCERS' BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to five million dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the conferring of the powers of a Bank of Deposit, Discount and Issue upon the Philadelphia Banking Company, incorporated in accordance with the Act of Assembly approved March 11th, 1870, and an increase of capital to five million dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation, in accordance with the laws of the Commonwealth, of THE SECURITY BANK, to be located in Philadelphia, with a capital of fifty thousand dollars, with the right to increase the same to five hundred thousand dollars jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE THIRD STREET BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with a right to increase the same to twenty-five hundred thousand dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE CHESTNUT HILL BANK, to be located at Philadelphia, with a capital of fifty thousand dollars, with the right to increase the same to five hundred thousand dollars. jul 4-6m

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NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE STATE OF PENNSYLVANIA BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to ten million dollars. jul 4-6m

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THE PHILADELPHIA TRUST, SAFE DEPOSIT AND INSURANCE COMPANY,

OFFICE AND BURGLAR-PROOF VAULTS IN

THE PHILADELPHIA BANK BUILDING,

No. 421 CHESTNUT STREET.

CAPITAL, $1,000,000. PAID, $600,000.

FOR SAFE-KEEPING of GOVERNMENT BONDS and OTHER SECURITIES, FAMILY PLATE, JEWELRY, and other Valuables, under special guarantee, at the lowest rates.

The Company offers for rent, at rates varying from $15 to $75 per annum—the renter alone holding the key—SMALL SAFES IN THE BURGLAR-PROOF VAULTS.

This Company recognizes the fullest liability imposed by law, in regard to the safe keeping of its vaults and their contents.

The Company is by law empowered to act as Executor, Administrator, Trustee, Guardian, Assignee, Receiver or Committee; also to be surety in all cases where security is required.

MONEY RECEIVED ON DEPOSIT AND INTEREST ALLOWED.

ALL TRUST INVESTMENTS STATE THE NAMES OF THE PARTIES FOR WHOM THEY ARE HELD, AND ARE KEPT SEPARATE AND APART FROM THE COMPANY'S ASSETS.

DIRECTORS.

Thomas Robins,	Daniel Haddock, Jr.,
Lewis R. Ashhurst,	Edward Y. Townsend,
J. Livingston Erringer,	Hon. Wm. A. Porter,
R. P. McCullagh,	Edward S. Handy,
James L. Claghorn,	Joseph Carson, M. D.,
Benjamin B. Comegys,	Alexander Brown,
Augustus Heaton,	James M. Aertsen,
F. Ratchford Starr,	William C. Houston.

OFFICERS.

PRESIDENT—LEWIS R. ASHHURST.
VICE PRESIDENT—J. LIVINGSTON ERRINGER.
TREASURER—WILLIAM L DUBOIS.
SECRETARY—WILLIAM L. EDWARDS.

$955,000. $955,000.

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A PRIZE FOR EVERY TICKET.

1	Cash Gift			$100,000
6	Cash Gifts,	each		50,000
12	"	"	"	25,000
20	"	"	"	5,000
75	"	"	"	1,000
300	"	"	"	500
200	"	"	"	200
550	"	"	"	100
400	Gold Watches			$75 to 300
275	Sewing Machines			60 to 150
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Cash Gifts, Silver Ware, &c., valued at				$1,500,000

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REFERENCES.—By kind permission we refer to the following:—Franklin S. Lane, Louisville, drew $13,000. Miss Hattie Banker, Charleston, $9,000. Mrs. Louisa T. Blake, St. Paul, Piano, $700. Samuel V. Raymond, Boston, $5,500. Eugene P. Brackett, Pittsburgh, Watch, $300. Miss Annie Osgood, New Orleans, $5,000. Emory L. Pratt, Columbus, Ohio, $7,000.

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EASTERN DISTRICT.

Supreme Court of Pennsylv'a.

In re ESTATE OF C. S. BOKER, dec'd.

Upon the death of C. S. Boker, president of the Girard Bank of Philadelphia, and the filing and reference of an account of his estate by his administrators, various claims were made before the auditor, against the estate, for amounts of money, &c. (nearly a million dollars), which were alleged by claimants to have been received by the decedent in his lifetime, and used and retained by him in his own private business, although the same belonged to the bank. These claims were resisted, and the auditor disallowed them all except five, amounting to about $25,000 with interest, and allowed certain claims for salary of the decedent as president of the bank. After argument upon exceptions filed in the court below, the report of the auditor was substantially confirmed. An appeal was taken to the Supreme Court, which affirmed the decree of the court below, finding a balance due the bank from the estate of $17,799.72.

Appeal of the Girard Bank et al. from the decree of the Orphans' Court of Philadelphia.

Opinion of the court by READ, C. J. Filed November 6th, 1873, at Pittsburg.

Stephen Girard died in December, 1831, devising his residuary real and personal estate to the city of Philadelphia upon certain trusts of a charitable character. His bank, of course, ceased its operations, and so much banking capital was necessarily withdrawn from the public. To supply this deficiency, the Girard Bank, in the City of Philadelphia, was chartered by an act of Assembly, approved 3d April, 1832, with a capital stock not exceeding one million five hundred thousand dollars, to be divided into shares of fifty dollars each, the said bank paying to the commonwealth the sum of seventy-five thousand dollars in three annual instalments of twenty-five thousand dollars each.

The bill to recharter the Bank of the United States was vetoed by the President on the 10th July, 1832, and in November of the same year General Jackson was re-elected President. In October, 1833, the secretary of the treasury, Mr. Taney, removed the deposits from the Bank of the United States and placed them in State institutions selected by him, one of which was the Girard Bank.

The Bank of the United States, in order to force a recharter, and a return of the deposits, reduced its discount line to a very low limit, and accumulated specie in its vaults, so as to have dollar for dollar of its circulation. The effort proving unsuccessful, in the spring of 1835 the discount line was run up to seventy millions of dollars, and on the 3d March, 1836, when it changed into a State institution, its notes in actual circulation were $20,114,227.56, and its deposits, $3,594,048.25, making a total of immediate liabilities $23,708,275.31, whilst its specie was only $5,595,077.25. The Pennsylvania Bank of the United States was chartered by the act of 18th February, 1836, for which they were to pay the commonwealth $4,500,000, and to subscribe $675,000 to various railroad, navigation and turnpike companies, besides a voluntary subscription to similar works of $978,759, amounting altogether to $6,153,759, out of a nominal capital of $35,000,000, including the $7,000,000 of stock owned by the United States.

By an act passed the 19th March, 1836, the charter of the Girard Bank was extended twenty years from the passage of the act, and its capital stock increased so as to consist of one hundred thousand shares of fifty dollars, for which they were to pay to the commonwealth within one year after the passage of the act, $125,000, and within two years after its passage, $125,000, as a *bonus* for the privileges granted by the act.

By the act of Congress of 11th April, 1836, the 1st, 2d and 3d sections of the act, transferring the duties of commissioner of loans, to the Bank of the United States, were repealed, and by the act of 15th June, 1836, the 14th section of the bank charter of 10th April, 1816, enacting that all notes or bills of said bank payable on demand shall be receivable in all payments to the United States, was also repealed.

By an act passed 23d June, 1836, the secretary of the treasury was authorized to act as the agent of the United States in all matters relating to their stock in the bank of the United States, in pursuance of which authority the value of the stock was estimated by a committee of the bank, and also by the agent of the secretary. Both valued it above par, but the bank a shade lower than the agent of the secretary.

On the 3d March, 1837, Congress passed a resolution in these words, "That the secretary of the treasury be directed to accept the terms of settlement proposed by the president and directors of the Bank of the United States, under the Pennsylvania charter in their memorial to Congress presented at the present session, for the payment to the United States of the capital stock owned by them in the late Bank of the United States, and the final adjustment and settlement of the claims connected with or arising out of the same, and to take such obligation for the payment of the several instalments in such proposed terms of settlement mentioned as he may think proper."

The bank settled with the United States for their stock in the preceding Bank of the United States, by giving them their four bonds dated 10th of May, 1837, for the payment of four several sums of $1,986,589.04 each, with six per cent. interest on the same, from the 3d March, 1836. The aggregate of these four sums show that the bank settled with the government for their stock at $946,356.16 above its par value, and on the 11th May, the very next day, the bank failed, with $25,592,698.20 of liabilities, and only $1,490,968.01 of specie in their vaults, and their notes in actual circulation, being $7,193,021.04; notwithstanding over eleven millions of dollars had been borrowed in Europe by loans, and the sale of its bonds, and the evil day had been postponed by a large issue of post notes. All the banks in Philadelphia and the State followed the example and suspended specie payments, with the exception of one bank in Pittsburg.

By an act of Congress, passed 7th July, 1838, in all cases of any corporation whose charter has expired, it is made a high misdemeanor for any director or other person therein described, who shall put in circulation any bill or note of such expired corporation, and on conviction thereof, shall be punished by a fine not exceeding ten thousand dollars, or by imprisonment and confinement not less than one year, nor exceeding five years, or by both such fine and imprisonment.

The second section authorizes the Circuit Courts of the United States to grant injunctions to prevent such issuing.

By an act passed 23d June, 1836, to regulate the deposits of the public money, it was enacted "That no bank shall be selected or continued as a place of deposite of the public money, which shall not redeem its bills and notes on demand in specie," and no bank issuing notes less than five dollars after 4th July, 1836, shall be selected or continued as aforesaid, nor shall notes or bills of any bank issuing notes less than five dollars be received in payment of any debt due to the United States. By the 11th section, whenever the amount of public deposits in any bank shall for a whole quarter of a year exceed one-fourth part of the amount of the capital stock of such bank actually paid in, the bank shall allow and pay to the United States for the use of the excess of the deposits over the one-fourth of its capital, an interest at the rate of two per centum per annum, to be calculated for each quarter upon the average excesses of the quarter. The 13th section enacted that the money in the treasury of the United States on the first day of January, eighteen hundred and thirty-seven, reserving the sum of five millions of dollars, shall be deposited with the several States, which was carried into effect, but the money was never paid back to the government as was intended and provided for by the act itself. On the 16th October, 1837, an act of Congress was passed for adjusting the remaining claims upon the late deposit banks.

The failure of the Bank of the United States on the 11th May, left that institution a debtor to the United States in the sum of $7,946,356.16, with interest at the rate of 6 per cent. from 3d March, 1836. The suspension at the same time of the Girard Bank removed the deposits of the government from that institution, and it ceased from that moment, by the act of the 23d June, 1836, to be a deposit bank. This rendered the increase of its capital to five millions of dollars not only unnecessary, but burdensome, for it had been made with the express intention of holding the government deposits, however large they might be. These deposits were discounted upon, and at the same time gave character and firmness to it, as a banking institution of the second largest capital in the State. The suspension also made it a debtor to the amount of its deposits to the United States, and the larger they were, the more inconvenient it was for the bank to pay them. It is more than doubtful whether a large portion of the $3,500,000 was ever *actually* paid in.

A deep and serious injury was then inflicted upon the bank from which it never recovered during the disastrous financial years which preceded its assignment. It was also the misfortune of all the banks of the city and State, that their policy was regulated by that of an overgrown, insolvent institution.

This suspension was followed by an indiscriminate issue of small notes by individuals and corporations, commonly called shinplasters, and especially by the city of Philadelphia, under the influence of the Bank of the United States. In August, 1838, the Bank of the United States resumed specie payments, having $3[illegible],769,400.61 of liabilities (including $2,254,871.38 still due to the United States), with $7,357,137.72 of specie in their vaults. The specie steadily declined, and on the 1st April, 1839, it was reduced to $3,069,580.21, and on that day the president of the bank resigned. On the 1st July, 1839, the specie was $1,950,186.83, and the liabilities $25,952,357.28, and the bank then declared its last dividend of 4 per cent., amounting to $1,354,997.05, increasing the liabilities on that day to $27,307,354.33. It was a dividend out of capital, and not out of profits.

Its liabilities increasing and its assets decreasing, and its specie being at a low ebb, the bank suspended specie payments on the 9th October, 1839, the day after the general election.

Owing to the city banks using the notes of the bank of the United States instead of paying out their own bills, a debt of over five millions was created, for which they took the post notes of the Bank of

the United States, in order to facilitate the resumption of specie payments. The bank resumed for a few days, and then closed its doors forever, and by various assign ents on 1st May, 7th June, 4th and 6th September, 1841, conveyed their property to several sets of trustees for the benefit of their creditors. We have seen that the Pennsylvania Bank of the United States commenced its career as a State bank under liabilities and embarrassments sufficient to endanger a perfectly solvent institution, with all its assets completely in hand for immediate use. The sales of the debts at the offices of the bank, made at different periods, amounted in 1836 to $14,839,034.71, and some of these were not closed until after the 3d of March, 1836, and the credit given on such sales was generally at one, two, three and four years, with five per cent. interest, and in some instances the interest was as low as four and four and a half per cent., and in one case, four, five, six and seven years were given on $250,000, and in another, twenty years on $1,000.000. Long loans for one, two, three, four or more years were made both at the bank and its offices, amounting, in 1836, to $13,785,254.60, making the amount of long loans outstanding in 1836, $28,624,289.91, which could not be collected in order to meet the immediate liabilities of the bank. This state of things is partly described in the memorial of the stockholders of the bank to the Legislature, in 1841: "The system of permanent loans on any species of security, is at war with the first principles of banking, because it deprives the bank of that command over its means which can only enable it to comply with its duty to the public.

"Unfortunately for your petitioners, the administration of the bank, departing from the great principles of the trust that was confided to it, has squandered a part of their property, and locked up a part of the residue in such securities as to render it unavailable for banking purposes."

The result of the operations of this unfortunate and mismanaged institution is told in a few words in Shollenberger v. Brinton, 2 P. F. Smith, p. 81.

On the 4th May, 1841, an act was passed to provide revenue to meet the demands on the State treasury and for other purposes, which provided for an issue of an irredeemable currency of one, two and five dollar notes, commonly called relief notes, to the amount of three millions one hundred thousand dollars, their real immediate value being that they were receivable for debts due the commonwealth.

The history of the Girard Bank shows a gradual weakening and decline of the institution until, on the 3d February, 1840, a resolution was offered by a director. "That it is inexpedient for the bank at this time to make any new loans," coupled with a proposition to place the property of the bank in the hands of trustees, if necessary, and on the 18th May, 1840, Mr. Boker was elected president.

It seems, therefore, clear, that the Girard Bank was actually insolvent on the 9th October, 1839, the day of the suspension of specie payments, two years and five months from the day they lost the deposits of the general government.

On the 27th January, 1842, the Girard Bank closed its doors, and on the 29th a run was made on the Bank of Pennsylvania for current funds, and the governor, through the attorney general, in order to secure the State deposits for the payment of the February interest of the State debt, obtained from the Supreme Court an injunction against the bank; the proceedings in which case are to be found in the two cases of The Commonwealth v. The Bank of Pennsylvania, 3 Watts & Sergeant, pp. 184, 173.

We therefore find that in the spring of 1842, forty millions of banking capital had entirely disappeared, and $5.078,444.29 of the capital of nine of the city banks were locked up in the hands of the trustees, under the assignment of the 1st May, 1841, for the payment of the post notes held by them.

On the 12th March, 1842, an act was passed "to provide for the resumption of specie payments by the banks of this commonwealth and for other purposes," under the provisions of which act the Girard Bank made a general assignment to Charles S. Boker, Henry Horn and Charles Rugan, on the 19th of the same month. Mr. Boker, who had been president since May, 1840, resigned his office on the 16th March, and was again elected president on the 16th June, 1842, and so continued until his death on the 8th February, 1858.

Under an act "to provide for the domestic creditors of this commonwealth, sale of State stocks, and for other purposes," passed 8th April, 1843, the whole of the $1,500,000 owned by the commonwealth in the Bank of Pennsylvania was sold, and produced only $607,753.75, being $40.51 cents and 69 hundredth of a cent per cent. of its par value, and on the 5th April, 1844, an act was passed reducing its capital to $1.562,500, and the par value of the stock from four hundred dollars to two hundred and fifty dollars per share.

On the 14th April, 1842, the appraisers appointed by the Court of Common Pleas, in their general inventory of the appraised value of the assets of the Girard Bank, estimated their total cash value at $738,771.46, whilst the debts were $690,000, the difference being about $46,000; among their assets was a debt of the Commercial and R. R. Bank of Vicksburg of $430,219.60, valued at ten cents on the dollar.

On the 6th August, 1846, the assignees reassigned the surplus which remained, after discharging the debts of the institution to the bank, which on the 10th of the same month commenced operations with a cash capital of $50,128.69, and with other assets valued at $455,000, which could not be used for banking purposes until they were collected. The capital of the bank was $5,000,000, divided into 100,000 shares of $50 each, of which 65,784 shares were outstanding, represented by its capital of $50,000 in cash and appraised assets; 34,216 shares were owned by the bank, a significant fact, showing that a large portion of its increased capital never had been actually paid in.

On the 30th June, 1847, the active capital of the bank was $249,570.69, and on the 20th June, 1849, it was $341,610.23. The capital was reduced by the act of 2d April, 1849, from five millions of dollars to the sum of twelve hundred and fifty thousand dollars, and the par value of the stock from fifty dollars to twelve dollars and fifty cents per share. On the 13th June, 1849, the Girard Bank succeeded in obtaining the deposits of the commonwealth, whose account began on the 5th July, with a balance of $44,509.19, running up on 3d January, 1850, to $344,516.54; on the 2d October, 1851, it was $567,381.10, and on the 6th January, 1853, the balance was $332,772.61.

On the 27th January, 1853, an alternative mandamus was issued from the Supreme Court, the Bank of Pennsylvania being the relators, against John M. Bickel, State treasurer, to compel him to make all the deposits of the State in that bank, to which writ the State treasurer made a return, which was filed on the 25th March, 1853, and "on the 25th April, 1853, on motion of G. Mallery and St. George T. Campbell, Esquires, for the relators, leave is given to the relators to discontinue the proceeding in this case." I was employed as additional counsel by the attorney general, and prepared the return of the State treasurer, and beside the legal defence that they were not entitled to the deposits, gave a history of the bank, shewing that their financial condition and former and present conduct to the commonwealth would not justify that officer in entrusting the State funds to their care.

In his return the State treasurer says "that on or about the twenty-seventh day of July, eighteen hundred and fifty, I called at the Bank of Pennsylvania in company with Asa Dimock, chief clerk in the treasury office, for the purpose of making arrangements for the payment of the State interest due on the first day of August, and without giving me an opportunity of making any explanation, I was met by the president and cashier of the bank in a spirit of unkindness. The first words they addressed to me, was the inquiry why I had not been there ten days before, that I ought to have been there and had the money all ready, and in the bank before the day I called, and in a commanding tone of voice declared that the interest could not be paid; that it was now too late to make the arrangements for the payment of the interest. I said that I had money to pay the interest, such as it was; and asked what they could do with the notes of country banks commonly called currency? They positively declared they would look at nothing but the specie or its equivalent. I told them that my money was mostly of country banks, and that I had an arrangement with the cashier of said banks, to redeem their notes for me in city funds, but that it would take a little time to do so. They again refused to take anything but the specie, or its equivalent. I then asked them to settle the State account, and inform me what the amount of the State deposit was, in order to compare it with my account, and that I must see to get sufficient par funds to pay the interest.

"I then called on Mr. Boker, president of the Girard Bank, and told him the circumstance and explained the matter fully to him, and stated to him the amount of money I had on hand, and the kind of money I had in my trunk then in his vault. He then called upon the bank himself, and when he returned he informed me that they had refused to take anything but specie or its equivalent. He then kindly offered to take the kind of money I had, and pay the interest. I then went to the Bank of Pennsylvania and they informed me of the amount of funds to the credit of the State. The amount was about $234,706 27; but they informed me that out of that amount there were 93 or $94,000 special funds, consisting of $80.000 relief notes and the balance country notes, and that they could not take that from me for interest purposes unless I would pay them a discount of $1,500 which I refused to do. I postively declined paying one cent." On the first of August they came down to $1,000, which he again declined. "I then told them that I should draw a check for the amount they had on deposit. They then proposed I should draw two checks, one for the par, and the other for the special funds, which I did, and then left and got the balance (some $750,000) of the Girard Bank, and deposited it in the Bank of Pennsylvania, which was sufficient to pay the interest then due. I then went back to the Girard Bank, and commenced counting out to the different cashiers from the country the notes I had on hand, and they redeemed them for me in city funds, which enabled me to repay the Girard Bank." On the 2d August, having enough money, he redeemed the special funds held by the Bank of Pennsylvania.

At this time the whole active capital of the Girard Bank was but $404.733.47. From the 5th July, 1849, to October 5th, 1854, of twenty-two balances to the credit of the commonwealth on the books of the Girard Bank, the average was $247.227.35, and of thirty-five balances from July, 1849, to January 4th, 1858, the average was $183,519.43.

A little more than a month after the defeat of the Bank of Pennsylvania in their attempt to remove the deposits, on the 28th May, 1853, an act was passed extending the charter of the Girard Bank for twenty years from the expiration of their then charter, in 1856, "and said bank shall immediately after its passage, if the *State treasurer* shall so direct, pay into the treasury of the State the sum of $125,000, and for such *bonus* thus paid the said Girard Bank shall be free from any tax or other charge whatever, until the expiration of their extended charter."

It is in evidence that in 1849, Mr. Ball, the State treasurer, applied to the city banks to submit propositions as to the terms on which they would become the depositories of the State funds, and could find no one willing to take them on such terms as he considered reasonable, except the Girard Bank. "The treasurer decided to make his deposits with the Girard Bank, considering the advantages offered superior to those of any other institution. Mr. Boker managed on behalf of the Girard Bank." Still further, he managed to retain them under every change of the official head of the State treasury, a matter of vital importance to th ecredit and profits of the institution. On the 26th June, 1854, by ordinance, the Girard Bank was made one of the depositories of the corporate moneys of the City of Philadelphia, and thus became both a State and city deposit bank.

The active capital of the bank was increased by the gradual collection of its assets, and by the sale of its bank stock.

In 1847, 2,670 shares of stock were sold by the bank at $10 per share, and the remaining shares, 31,546, were sold at $12.50 per share, of which three-fourths were sold, in 1851. In 1853 the bank sold its stock as high as $14.06 net, and in 1853 as high as $14.37½. On the 30th June, 1857, the active capital of the bank was $1,076,023.20, which was composed of $535,882.36 collections of old assets, and $421,025 from the sales of its own stock. By collections from the old assets subsequent to the 30th June, and prior to Mr. Boker's death, the amount of collections of old assets was increased to $893,592.37, making the capital whole, after all deductions, as made in volume 2 of the evidence, p. 474, and leaving a balance of surplus capital of $52,676.74, carried to the credit of profit and loss account.

The bank, in order to utilize the relief notes received by the commonwealth, loaned them at par to manufacturers and others to pay their customers, and to the Reading Railroad to pay their laborers

In January, 1857, a committee was appointed to examine into the condition of the bank, who made a verbal report to the board of directors, which was entirely satisfactory.

The condition of financial affairs was not reassuring in 1856, and I recollect distinctly that in 1857 it was the general feeling of the business community that there was danger of a revulsion, but no one knew how soon or when it would come. It came like a thunder clap, on the 25th of September all the banks of Philadelphia suspended specie payments. The crash is well described in an evening journal:

In 1857 "everything was involved in common ruin. The banks suspended; financial institutions of almost every description toppled over; manufacture was suddenly checked; mercantile establishments tottered; industry was everywhere paralyzed; property found itself without a market, and the intervention of law was necessary to protect society from the operation of the ordinary conditions existing between debtor and creditor. What has now proved only a few days flurry, disastrous enough in its effects, it is true, but still restricted in its limits, was then a wide spread calamity of the sharpest kind, from which recovery was very slow and painful."

On the 17th Feoruary, 1858, the Bank of Pennsylvania made a general assignment for the benefit of its creditors, and finally passed out of existence. The governor called an extra session of the Legislature, who, on the 13th October, 1857, passed an act providing for the resumption of specie payments by the banks, and for the relief of debtors.

The first section enacted "That the provisions of every act of Assembly or of incorporation or re-incorporation heretofore passed declaring or authorizing the forfeiture of the charter of any bank, saving, trust or insurance company, or corporation having banking privileges, or inflicting any penalties, or authorizing any compulsory assignment for or by reason of the non-payment of any of its liabilities, or the issuing or paying out the notes of other banks incorporated under the laws of this commonwealth, though not specie paying, or its loaning or discounting without the requisite amount of specie or *specie funds*, since the 1st day of September, Anno Domini 1857, be and the same are hereby suspended until the second Monday in April, Anno Domini 1858; and all forfeitures and penalties, or liability thereto heretofore incurred, or that may be hereafter incurred, before the said second Monday in April, under such acts of Assembly, or of incorporation, or reincorporation for or by reason of the causes aforesaid, or any of them, are hereby remitted, and so much thereof as prohibits any bank from making loans and discounts, issuing its own notes, or the notes of other banks, incorporated under the laws of this commonwealth, though not specie paying, or declaring dividends during the suspension of specie payments, or from loaning or discounting without the requisite amount of specie or specie funds as aforesaid, be and the same is hereby suspended until the day and year aforesaid, and any such bank during such suspension of specie payments, may declare dividends to an amount not exceeding six per cent. on its capital."

The fifth section provided "That the deposits by the State treasurer, or to the credit of the commonwealth in the several banks and other corporations, and all bank notes which are now or may hereafter be in the treasury, during the period of suspension aforesaid, shall from time to time, on demand of the said treasurer, be paid by the said banks or other corporations respectively in specie, in such amounts as may be required by said treasurer to enable him to pay the interest accruing on the public loans of the commonwealth."

The sixth section provided for a stay of execution on judgments for one year.

In October, 1857, Mr. John R. White, one of the directors, examined at great length before the auditor, said, "The Girard Bank suspended on the same day with the other city banks, and was more nearly in a condition of liquidation (I mean payment of her debts) than any other bank of the city relative to her business." "Some time after the suspension, which occured about the 25th of September, the stockholders' meeting drew near, and Mr. Boker himself, according to my recollection invited examination. He appointed a committee consisting of myself and Mr. Foster and Mr. Neff."

This committee made a thorough examination of the assets and liabilities and the general condition of the bank.

As some of the bank's property stood in Mr. Boker's name, he executed and deposited in the bank a declaration of trust in the handwriting of Mr. Schaffer, the cashier, as follows:

"PHILADELPHIA, October 31, 1857.

I do hereby declare that all the real estate, mortages and stock standing in my name, now in possession of the Girard Bank, are the property of said bank, and are held by me as trustee of the same.

C. S. BOKER."

The report of the committee was made to the board of directors on the 3d November, 1857, approved by them, and laid before the stockholders, who elected a new board, a majority of whom were new men. It was determined to declare no dividend.

In November the board raised a new committee of the whole board of which Mr. Riché was chairman and Mr. White was secretary, which made another thorough examination and made a report on the 17th December, 1857. In this report there was a passage in these words: "3. The president's salary stands at $500 per annum, and is but a nominal compensation for the duties of the office, and the board would respectfully suggest to the president the propriety of explaining his views as to what annual sum would be satisfactory."

On the 6th August, 1846, four days before the bank reopened, it was resolved, "That the salaries of the officers of the bank shall be as follows, viz.: President, $500 per annum." Mr. Boker had never drawn the salary.

Mr. White says, "The old members had never talked of the salary question, but the new ones considered it a point which in some way ought to be settled and closed; one of them expressed considerable anxiety lest Mr. Boker should bring forward some astounding claim of $50,000 or $60,000 for his past services, and he asked me why he might not do so. To which my reply was, I had always found Mr. Boker a reasonable man, and did not suppose he had any such intention."

Mr. White spoke to Mr. Boker before the report was presented, and told him that his nominal salary opened him to obloquy and misrepresentation, and said, "I thought he owed it to himself to fix a fair compensation; that the public would not believe that he served for a nominal sum, without deriving some incidental advantages from the position. He smiled, and remarked he should like those advantages pointed out. I told him that I did not believe there were such derived by him, but that I was not the public. *He smiled again with a fatigued air, for he was quite indisposed at the time, and Mrs. Boker was at death's door.*"

Another director recollects, "that at a meeting of the board, the subject of officers' salaries was brought up, and some one remarked that they had not paid any attention to the president's salary, and Mr. Boker said if they would consult his feelings, they would let the matter rest."

At this time the capital of the bank, for the first time in its history, was made whole, having divided amongst its stockholders $564,873.24, after paying all the expenses and losses of the institution. Mrs. Boker was dying, and expired towards the close of December. Mr. Boker was overworked and indisposed, and saddened by domestic afflictions, and it was no wonder that he treated the question of salary as he did. But no fair-minded man could say that he was not entitled to a fair and liberal compensation from the owners of an institution he had so long benefited. On the 8th February, 1858, Mr. Boker died, about six weeks after the death of his wife. His two sons administered to his estate, and filed an account, which was referred to an auditor, Furman Sheppard, Esq., a gentleman of great legal ability.

It is proper here to say, that on the first of March another examination took place into the condition of the bank, and an appraisement was made by a committee of the whole board, which resulted in making a reduction in value of the assets representing the capital, of $166,711.74, throwing the profit and loss account on the wrong side to the extent of $114,110.95. Mr. White says: "That appraisement was an estimate of the cash value of the property of the bank, excluding everthing that was doubtful, and leaving only such things as might be considered at the prices of the appraisement, a safe basis for a declaration of dividends." Among these assets, the bank's Crescentville property was valued at naught, which, after realizing a fair profit, was sold in 1864 for $45,000, which, if deducted from the above estimated deficiency, would have reduced it to $69,110.95.

Under an act to consolidate the stock of the Girard Bank of the City of Philadelphia, passed 25th January, 1859, the president and directors of said bank changed "the value of the shares of the said bank from the present par value of $12.50 per share to $50 per share, by cancelling the present certificates of stock and issuing new ones upon the ratio of one to four, so that hereafter the par value of said stock shall be $50 per share," pregnant proof that the directors thought the capital then whole.

I am aware that in 1862 the rebellion made the bonds of the Vicksburg Railroad valueless. They were derived from the old assets of the old Girard Bank, the par value being $225,000.

By an act to reduce the capital stock of the Girard Bank in the City of Philadelphia, passed the eighth of April, 1862, the capital stock of the said bank was reduced to $1,000,000, and the par value of the shares changed from $50 per share to $40 per share, and the par value of said shares shall thereafter be $40 per share.

The claims of the bank against Mr. Boker's estate, as presented by their counsel, amounted, according to the estimate of one of the counsel of the administrators, to a million of dollars. They gradually, in the course of the proceedings, assumed a more definite shape, and resulted in twenty separate claims, which were elaborately discussed by the learned auditor in his report to the Orphans' Court. The directors of the bank had but one regular discount day in the week, and all discounts or loans in the intermediate period must be made by a committee or by the cashier or president. No committee was in existence, and it naturally fell upon the president, as had been the practice in the bank under its former administration. It was known to the directors, one or more of whom availed themselves of it. The cashier and clerks knew of it, and it was done openly through the whole course of Mr. Boker's administration of upwards of eleven years, and was spoken of at the board.

It is proper here to state that in the crisis of 1857, the Bank of Pennsylvania first stopped payment, and it was generally supposed that the Girard Bank would follow, a public journal having pointed out both banks as insecure. The banks had established a temporary clearing house system, and required of each other a deposit of security for any balance which might "in the clearing house" be found against them respectively. Mr. Boker in this emergency deposited with the trustees of the clearing house valuable securies, which were his own private property, as

(*Continued on page* 370.)

LEGAL GAZETTE.

Friday, November 14, 1873.

JOHN H. CAMPBELL,
EDITOR.

A STATEMENT AND EXPOSITION OF THE CHANGES CONTAINED IN THE NEW CONSTITUTION OF PENNSYLVANIA.

"The preamble is made to express the gratitude of the people of the commonwealth to Almighty God for the blessings of civil and religious liberty, and is followed by the several articles in their proper order, all the material changes in which are the following:

ARTICLE I.

THE DECLARATION OF RIGHTS.

The corresponding article in the old constitution is but slightly changed, and is made to take its proper place as the first article of the new constitution.

In the seventh section, the provisions securing the freedom of the press, are extended by the insertion of a new clause to the effect that in prosecutions for the publication of papers relating to the official conduct of officers or men in public capacity, or to other matters proper for public investigation or information, there shall be no conviction "when the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury." This provision excludes the legal inference of malice from the mere fact of publication or from the inaccuracy of the matter published, and leaves the question of conviction to depend upon the actual malice or negligence of the author or publisher of an alleged libel. It will simply permit the jury to render a verdict upon the real merits of the case. The provision is confined to criminal prosecutions, and does not modify the existing laws relating to civil remedies in actions of libel and slander.

ARTICLE II.

THE LEGISLATURE.

The principal changes in this article are the following:

Members of the Senate are to be elected for four years instead of three, and of the House for two years instead of one. The regular sessions of the Legislature are to be biennial instead of annual, and no adjourned annual sessions are permitted after the year 1878, but the governor may convene the two Houses upon extraordinary occasions, and the Senate alone, when a meeting of that body shall be necessary for the transaction of executive business. The governor is further required to convene the two Houses upon proclamation to fill any vacancy in the office of United States senator from this State. It is further provided, that whenever the Legislature shall be convened by the governor, the sessions shall be confined to the transaction of business expressly mentioned in the executive proclamation. No senator or representative shall be appointed to any civil office during his term of service, and persons convicted of embezzlement of public moneys, bribery, perjury, or other infamous crime, shall not be eligible to the Legislature or capable of holding any public office. The compensation of members shall be fixed by law, and shall not be increased during any official term. The Senate is empowered to choose a presiding officer, who shall perform the duties of lieutenant governor when necessary. The powers of each House are more definitely expressed, and their sessions more completely guarded against improper influence than by the old constitution. By the sixteenth and seventeenth sections, the numbers of each House are increased, and the apportionment of membership by districts determined and regulated. The Senate is to consist of fifty members, instead of thirty-three, to be chosen from single districts, one-half thereof every second year. The provision in the old constitution forbidding the division of counties is retained, except as to those which shall be entitled to two or more Senators; and the former limitation that no city or county shall elect more than four senators is changed to a provision that no county shall elect more than one-sixth of the whole number in counties divisible into senatorial districts, the districts are to be made equal, and no ward, borough or township is to be divided in their formation. A full senatorial ratio will entitle a county to separate representation, but the Legislature may assign a senator to a county with four-fifths of a ratio, and a special provision is made to meet the case of a county containing more than one-half and less than four-fifths of a ratio, which shall be wholly surrounded by counties entitled of right to separate representation.

For the House of Representatives the population of the State is to be divided by 200, to establish a represenative ratio, and each county is to have at least one representative, and as many additional representatives as it shall have ratios. Counties with less than five ratios will have an additional member for any surplus fraction exceeding one-half a ratio. The separate representation of cities coataining one or more ratios is provided for, and such cities and counties containing more than 100,000 inhabitants are to be divided into representative districts, but no district so formed shall elect more than four representatives. These provisions in regard to the constitution of the Senate and House are wholly new, and are radical changes in the application of the representative principle.

The additional change in this article is, that apportionments are to be made by the Legislature at the session of 1874, and immediately after each decennial census of the United States, and are to be based in each case upon such census, and not as heretofore upon a septennial enumeration of taxables. In brief, the important changes in the legislative article are biennial elections and biennial sessions of the Legislature, an increase of membership in both houses, a mixed system of county and district representation with decennial apportionments, and the presidency of the lieutenant governor in the Senate.

ARTICLE III.

LEGISLATION.

The article upon legislation is mostly new, and is elaborate in its provisions. It contains a large body of limitations upon the Legislature and regulations for its action, the enumeration of all which would be inconvenient in this place; but they are of high importance, and will doubtless produce a decided effect upon the character of future legislation in this commonwealth. Special and local legislation are largely prohibited, and minute and searching provisions are established for the passage and approval of bills. Of the thirty-three sections of this article fully three-fourths contain new matter, and are well calculated to elevate the character and secure the perfection of future laws.

ARTICLE IV.

THE EXECUTIVE.

The conspicuous changes made by the twenty-three sections of the executive article are the following.

1. An increase of the governor's term from three to four years, to correspond with the change made in legislative terms and sessions.

2. The creation of the office of lieutenant governor.

2. The substitution of a secretary of internal affairs and a superintendent of public instruction for the surveyor general and superintendent of common schools.

4. That the governor, lieutenant governor, and auditor general shall not be eligible for a second term.

5. A stringent limitation upon the pardoning power.

6. A requirement that the vote in each House to pass a bill over the governor's veto shall be two-thirds of all the members elected to each House instead of two-thirds of those present.

7. That the governor may veto particular items in appropriation bills and approve others.

Lastly, that the chief justice of the Supreme Court shall preside upon the trial of any contested election of governor or lieutenant governor.

Attention should be particularly directed to two of these changes, to wit: the creation of the office of lieutenant governor and the limitation of the pardoning power. By the first of these a majority decision will always be secured in the Senate by a casting vote when the Senate shall be equally divided, and the prompt organization of the Senate at the commencement of sessions will always be secured. By it, also, the office of governor will be fitly filled in case of a casual vacancy, and a high officer, chosen by popular election, will be provided for the consideration of applications for pardon.

The other provision referred to, requiring the recommendation of the lieutenant governor, secretary of the commonwealth, attorney general, and secretary of internal affairs, or any three of them, given after public notice and full hearing of the case, to authorize the governor to pardon any criminal offence, will introduce a most substantial and much-needed reform in the practice of the government.

Briefly, the changes made by the executive article would seem to be judicious, and altogether fit for popular acceptance.

ARTICLE V.

THE JUDICIARY.

This article does not contain many radical changes. Two judges are added to the bench of the Supreme Court, who will be chosen at the general election in 1874, and they and all judges subsequently elected will hold for twenty-one year terms, and will not be re-electable. Whenever two or three judges are to be elected at the same time to that court they are to be divided between political parties by virtue of the manner of voting provided for in the sixteenth section. The *nisi prius* jurisdiction of the Supreme Court is abolished, and no duties not judicial are to be imposed upon any of the judges of said court.

These several provisions were intended to secure a full representation of the people in the Supreme Court, to strengthen and increase the usefulness of that court, and to separate its judges from the performance of duties not appropriate to their office.

Special provisions for consolidating the District and Common Pleas Courts of Philadelphia and Alleghany, though possessing little interest in other parts of the State, are of much local importance. All judges will be of the same class and possess the same jurisdiction hereafter in both those populous divisions of the State. They will in turn hold the criminal courts in their respective counties, will be enabled to distribute conveniently the judicial business which they are to transact and execute their duties with greater efficiency and success.

Other local provisions limiting the number of aldermen in the cities, abolishing the office of alderman in Philadelphia and substituting magistrates' courts, the appointment of prothonotary by all the Philadelphia judges, and the provision for separate Orphans' Courts in counties containing more than one hundred and fifty thousand inhabitants, are notable changes for the more perfect administration of justice in the localities to which they refer. In all counties Registers' Courts are abolished and their jurisdiction conferred upon the Orphans' Courts.

Uniformity of legislation with reference to courts is enjoined, and voluntary waiver of jury trial by parties authorized.

Lastly, counties containing less than 40,000 inhabitants each, are to be formed into judicial districts, while those containing a greater population shall be made separate districts, in which the office of associate judge shall be abolished, saving the commissions of associate judges now in office. No commission of any law judge is disturbed, and the existing provision that no judicial salary shall be decreased during a judicial term is preserved, with the addition that it shall not be increased during such term.

ARTICLE VI.

IMPEACHMENT AND REMOVAL FROM OFFICE.

This article, after retaining the provisions of the old constitution that all civil officers may be removed upon impeachment, and that all officers shall hold their offices on condition of good behavior during their terms of service, adds the following new provisions:

That all appointed officers, other than judges and the superintendent of public instruction, may be removed at the pleasure of the power by which they shall be appointed, and that officers elected by the people, except governor, lieutenant governor and law judges, shall be removed

for reasonable cause on the address of two-thirds of the Senate, after due notice and full hearing.

ARTICLE VII.

Oath of Office.

In place of the brief general oath to support the constitution and perform official duty with fidelity, prescribed by the old constitution, a searching oath of office is provided to be administered to all senators, representatives and State and county officers. They will be sworn or affirmed to support, obey, and defend the Constitution of the United States, and the constitution of this commonwealth: that no money has been paid by them to secure their nomination, election, or appointment, save necessary expenses to be authorized by law; that they have knowingly violated no election law, and that they will not receive any money or valuable thing for the performance or non-performance of official duty, other than lawful compensation.

Provision is made for preserving the oath, and false swearing is punishable as perjury, with disqualification from holding any office in this commonwealth.

ARTICLE VIII.

Suffrage and Elections.

This article is of high importance. The changes made in it are the following:

First. As to the qualification for voting. The word "white" is dropped from its former position in the constitution, and the right to vote is extended to every male citizen twenty-one years of age who shall possess the following qualifications, to wit.: United States citizenship for one month, residence in the election district for two months instead of ten days, and, as in the old constitution, residence in the State for one year, &c., and payment of a State or county tax, which latter must, however, have been assessed two months, and paid one month before an election.

Second. General elections are fixed on the Tuesday next following the first Monday of November, to correspond with the date of presidential and congressional elections, and municipal elections on the third Tuesday in February.

Third. New securities against fraudulent voting are provided by the fourth section. Ballots are to be numbered by election officers, and permission is given to voters to place their names upon their tickets, so that the vote can be followed upon any judicial investigation, and its integrity vindicated or falsity exposed. Very properly, however, election officers will be sworn or affirmed not to divulge how any elector shall have voted, unless required to do so as witnesses in judicial proceedings.

Fourth. District election boards are to be constituted uniformly throughout the State according to the plan of the general election act of 1839; that is, of a judge, two inspectors, and two clerks, the inspectors to be chosen by the limited vote, and no person holding any public office or employment, or who has held such within two months, shall be qualified to serve as an election officer.

Fifth. Overseers of election may be appointed by the Courts of Common Pleas whenever their appointment shall be a reasonable precaution to secure the purity and fairness of elections, and shall possess certain additional powers to those possessed by such overseers under the present laws of the State.

Sixth. No person shall be permitted to withold his testimony as a witness in any election trial or investigation, upon the ground that it will criminate himself, and several careful provisions are made against the corruption of voters or violation of the election laws by candidates.

Seventh. All laws regulating the holding of elections, and for registration of voters, must be uniform throughout the State, but the right of an unregistered voter is carefully preserved.

Lastly. Trials of all contested elections in this State are to be in courts of justice, or before law judges thereof, under regulations to be established by statute, so that the scandal of unjust and party decisions of such cases shall be prevented hereafter.

A few other changes of less importance, but tending to improvement, will be observed upon a careful reading of this article, and, upon the whole, it may be assumed that justice and purity in elections will be greatly promoted thereby, and offenders against election laws curbed and punished.

ARTICLE IX

Taxation and Finance.

This article retains all the salutary provisions of the old constitution against an increase of the State debt, and for a sinking fund, as well as those which forbid subscriptions by the State or by municipalities to the stock or loans of corporations, or the pledging of public credit to such bodies, and makes more secure against manipulation and misuse the moneys and securities of the sinking fund of the State.

Strong limitations upon the creation of debts by municipalities are added to the provisions above mentioned, as well as others in relation to the application and uses of surplus funds in the treasury of the commonwealth, and the making of private profit therefrom is made a criminal offence. Finally, taxation is to be equal upon all property of the same class, and the property which may be exempted from taxation by statute is accurately limited and defined.

ARTICLE X.

Education.

The article upon education has been expanded in the new constitution, from the former provision for the education of the children of the poor gratis, to one for the education of all the children of the State over six years of age, who may require such provision, and a guarantee is given of a liberal annual appropriation for that object. It is also provided that public school moneys shall not be appropriated to the support of sectarian schools, and that women, who supply a majority of the teachers of the State, and are natural protectors and teachers of the young, may be selected for positions of control and management under the school laws of the State.

ARTICLE XI.

Militia

The article in the old constitution on this subject is substantially retained, the only change being in regard to the exemption from military duty of those who have conscientious scruples against bearing arms. The question of exemption, and the form which it may assume are left to the Legislature of the State.

ARTICLE XII.

Public Officers.

This article retains several provisions found in the old constitution which are appropriate and useful.

ARTICLE XIII.

New Counties.

In this article the provision in the old constitution which requires that any new county shall contain at least four hundred square miles, is retained, and to it are added that such new county shall contain at least twenty thousand inhabitants, that none of its lines shall pass within ten miles of the county seat of any county proposed to be divided, and that no old county shall be reduced below the area or population required for a new one. The requirement of the old constitution that a majority of the voters of the county must agree in order to its division, is dropped, but in the article on legislation it is provided that new counties shall be established and county lines changed only under general and uniform laws.

ARTICLE XIV.

County Officers.

The seven sections of this article are almost entirely new, and they introduce important regulations of county government. Commissioners and auditors of counties are to be elected triennially, commencing with the year eighteen hundred and seventy-five, and are to be divided between political parties upon a principle of proportional representation. In counties of large population they are to be paid by salaries, and all fees of office are to be paid into the treasury of the county or State. The strict accountability of all county, township, and borough officers is to be provided for by law. The various county officers are enumerated, and those who shall keep their offices at the county seat specified, and the terms of all county officers fixed at three years, to begin on the first Monday of January next after their election.

ARTICLE XV.

Cities and City Charters.

Provision is made in this article (which is new) for the incorporation of cities containing ten thousand inhabitants, upon demand of the people thereof. Every city must establish a sinking fund for the payment of its debts, and is protected against the creation of any debt by any municipal commission except upon appropriation first made by the government of the city.

ARTICLE XVI.

Private Corporations.

Most of this article is also new and it constitutes one of the important divisions of the new constitution. Many salutary regulations against abuse in corporate management and securities against monopoly and clique management are contained in it. Corporations are to be confined to the business for which they shall be established, and their charters may be repealed when the public interest shall demand it, upon condition that injustice shall not be done to the corporators. All unused charters existing when the constitution shall take effect shall be void.

ARTICLE XVII.

Railroads and Canals.

This article, which covers a comparatively new field of constitutional action, was one of those most earnestly considered by the convention, and almost the whole of it is new matter, and deeply interesting to all the people, and particularly to the business interests of the State. Any synopsis of its contents would give an imperfect view of its importance, and of the varied points of business, and of corporate action and management with which it deals. The regulations which it imposes upon railroad and canal companies are believed to be more judicious and well advised than those which have been established by constitutional provision and by statute in other States, and were adopted by the convention in a spirit of complete fairness to all interests with which they are concerned. The eighth section, which limits the granting of free passes, will doubtless attract general attention and commend itself to those who have not heretofore enjoyed them. But the feature of principal value contained in this article is the stringent limitations imposed upon the railroad and other transportation companies in regard to discriminations and favoritism in the conduct of their works and business. These limitations, which may from time to time be perfected by statute, will, it is believed, correct many abuses and recommend themselves upon trial to the whole people of the State.

ARTICLE XVIII.

Future Amendments.

This, the last of the articles, is taken nearly entire from the old constitution, and provides a reasonable means for securing occasional changes in the fundamental law, as they shall be found necessary in future years.

AN ORDINANCE FOR SUBMITTING THE AMENDED CONSTITUTION OF PENNSYLVANIA TO A VOTE OF THE QUALIFIED ELECTORS THEREOF.

Be it ordained by the Constitutional Convention of the Commonwealth of Pennsylvania, as follows:

1. That the amended constitution prepared by this convention be submitted to the qualified electors of the commonwealth for their adoption or rejection, at an election to be held on the third Tuesday of December next; except as hereinafter ordered and directed, the said election shall be held and conducted by the regular election officers, in the several election districts throughout the commonwealth, under all the regulations and provisions of existing law relating to general elections; and the sheriffs of the several counties shall give at least twenty days' notice of said election by proclamation.

2. The secretary of the commonwealth shall, at least twenty days before the said election, furnish to the commissioners of each county a sufficient number of properly prepared circulars of instructions. The commissioners of the several counties shall cause to be printed at least three times as many ballots of affirmative votes as there are voters in each county—and

the same number of negative votes; and the said commissioners shall, at least five days before said election, cause to be fairly distributed to the several election districts in their respective counties, the said ballots, tally-lists, returns, circulars of instructions, and such other books and papers as may be necessary. The ballots shall be printed or written in the following form: On the outside the words "New Constitution;" in the inside, for all persons giving affirmative votes, the words "For the New Constitution," and for all persons giving negative votes, the words "Against the New Constitution."

3. If it shall appear that a majority of the votes polled are for the new constitution, then it shall be the constitution of the commonwealth of Pennsylvania on and after the first day of January, in the year of our Lord, one thousand eight hundred and seventy-four; but if it shall appear that a majority of the votes polled were against the new constitution, then it shall be rejected and be null and void.

4. Five commissioners of election, viz.: Edwin H. Fitler, Edward Browning, John P. Verree, Henry S. Hagert, and John O James, are hereby appointed by this convention, who shall have direction of the election upon this amended constitution in the city of Philadelphia. The said commissioners shall be duly sworn or affirmed to perform their duties with impartiality and fidelity. They shall also have power to fill vacancies in their own number. It shall be the duty of said commissioners, or a majority of them, and they shall have authority to make a registration of voters for the several election divisions of said city, and to furnish the lists so made to the election officers of each precinct or division; to distribute the tickets for said city provided for by this ordinance to be used at the election; to appoint a judge and two inspectors for each election division, by whom the election therein shall be held and conducted, and to give all necessary instructions to the election officers regarding their duties in holding the election and in making returns thereof. No person shall serve as an election officer who would be disqualified under section 15, article 8, of the new constitution. The general return of the election in the said city shall be opened, computed, and certified before the said commissioners, and with their approval, which approval shall be endorsed upon the return. They shall make report, directed to the president of this convention, of their official action under this ordinance and concerning the conduct of the said election within the said city.

The judges and inspectors aforesaid shall conduct the election in all respects conformably to the general election laws of this commonwealth, and with like powers and duties to those of ordinary election officers. Each inspector shall appoint one clerk to assist the board in the performance of its duties, and all the election officers shall be duly sworn or affirmed according to law, and shall possess all the qualifications required by law of election officers in this commonwealth. At said election any duly qualified elector who shall be unregistered shall be permitted to vote upon making proof of his right to the election officers, according to the general election laws of this commonwealth. Return inspectors and their clerks, and an hourly count of the votes, shall be dispensed with, but overseers of election may be selected for any precinct by said election commissioners, whose duties and powers shall be the same as those of overseers of election in said city under existing election laws applicable thereto. Returns of the election shall be made in said city, as in the case of an election for governor, but a triplicate general return for said city shall be made out and forwarded to the president of this convention, at Harrisburg, as is hereafter provided in case of county returns.

5. In each of the counties of the commonwealth (except Philadelphia), the returns of the election shall be made as in the case of an election for governor, but the return judges in each county shall make out a triplicate county return and transmit the same, within five days after the election, directed to the president of this convention, at Harrisburg.

Done in convention, this third day of November, in the year of our Lord one thousand eight hundred and seventy-three.

JOHN H. WALKER, President.

D. L. IMBRIE, Chief Clerk."

(*Continued from page* 367.)

security for the Girard Bank, which saved the bank until the next day, when all the banks suspended at the same time. "These securities," as has been well said, "had the effect of supporting the bank's credit, and the deposit of them by Mr. Boker was the strongest evidence of his faith in that institution." Shortly afterwards the "clearing house" arrangement was discontinued, and the certificates were returned by the trustees to the banks which had deposited them. Mr. Boker in the meantime died, and on the application of one of the counsel of the administrators on behalf of his estate for these securities, was informed by one of the trustees that they would be surrendered to the Girard Bank, which was so done. On application to the bank for them by the administrators they were refused, and they remained in the possession of the institution. The administrators received the dividends on the stock, but of $8,100 Camden & Amboy coupon bonds they received nothing, neither the interest on them nor the principal of one of them of $1,700 which fell due in 1864.

The allegation in the claims generally before the auditor was that they were really the private transactions of Mr. Boker, using the funds of the bank for his own private benefit, and that all the profits went into his pocket and never reached the bank.

Through the great skill, industry and sagacity of an expert of the first order, Mr. Burke, these transactions comprised in the claims were traced in the books of the bank, and it was shown clearly that they were regular banking operations conducted for the benefit of the bank, and that all the profits, legal or illegal, went into the coffers of the institution.

The learned auditor, after a most searching and careful examination of the whole subject, in a very able, temperate and exhaustive report, arrived at the same conclusion. "The claims," says the auditor, "against the estate for interest, profits, and other gains, from moneys of the bank, amount to nearly a million of dollars, and yet after minute investigation, the private estate of Mr. Boker, during his presidency, is not shown to have been increased by an amount at all approximating thereto; and on the other hand, the affairs of the bank under his management, the dividends regularly paid, the making whole of its capital, and the percentage of loss sustained, compared with the extent of business done, indicate a financial management profitable to the institution."

"In accordance with the views above expressed, it becomes the duty of the auditor to allow the second, third, fourth, ninth and eighteenth of the claims presented by the bank, and to disallow the remaining claims respectively."

The second, third and fourth claims never were disputed by the administrators, and were included in a tender made to the bank on the 31st May, 1859. The eighteenth claim was not disputed, and the ninth claim was the only one which was disputed by the accountants. The remaining fifteen claims were disallowed.

As to what were termed "the clearing house securities," the auditor said, "there seems to be no reason why these securities should not now be returned to the administrators, and it is accordingly directed to be done," and they were accordingly returned to the administrators by the bank.

Under these findings of the auditor, he was directed by the court to report upon five items specified in the order of the court of the 15th November, 1870. The second item was "that he report the specific amounts allowed on each side as the same stands confirmed by the court, and the amount of interest due on each item."

"*Fourth.* Interest in all cases where it is allowed, to be calculated to the date of filing supplementary report," which was the 29th November, A. D. 1870.

The report so filed was excepted to by the bank and the accountants, and the court so modified it as to charge the bank with only one-half of the expense of phonographing and printing the testimony, $2,100, and the accountant's exception to the ninth claim was sustained to the amount of $4,540.72, and that their exception "to the disallowance of interest on the salary of the decedent be sustained, and that the sum of $4,412.12, being interest on the said salary from the death of the decedent, February 8th, 1858, to 29th November, 1870, be added thereto."

"That the court do order and decree, that the total sums of principal and interest, as thus corrected, due by the estate of the decedent, resulted on the 29th November, 1870, in a balance of $25,430,11 due to the Girard Bank, and the reports with these modifications are confirmed." This decree is dated December 10th, 1870.

From this decree appeals were taken by the Girard Bank and by the accountants, to the Supreme Court, which were heard at great length in February last, the very able and elaborate arguments of counsel occupying twelve days. The claims of the bank, amounting to sixteen in number, which were disputed, with the twenty-six errors assigned by them, took up a very large portion of the time. Four printed volumes of testimony, with the printed speeches of counsel before the auditor, dealing with the details of bank management during a period of more than eleven years, made the task of sifting out the truth a very laborious one. It is true, we had a most able report from a most intelligent auditor, on whose discrimination and sound judgment we could safely rely, backed by the decision of a very learned tribunal whose peculiar duty it is to investigate cases of this character.

After a deliberate consideration of the whole questions, we have arrived at the conclusion, that the decree of the Orphans' Court was right, and should be affirmed, and both appeals be dismissed, each party paying the costs of his own appeal.

The result is, calculating interest on the decree from 29th November, 1870, that to the decree of the Orphans' Court, as stated above.....$25,430 11
is to be added the interest on it to the 20th October, 1873.... 4.412 11

Making a total on that day of.$29 843 22
From this sum are to be deducted the dividends since declared on the Girard Bank stock, with interest to 20th October, 1873, on each dividend..... 12.043 50

Making the amount due to the Girard Bank of.....$17,799 72
by the accountants on the 20th October, 1873.

And now, October 20th, 1873, it is ordered, adjudged and decreed, that the accountants pay to the Girard Bank in the City of Philadelphia, the sum of seventeen thousand seven hundred and ninety-nine dollars and seventy-two cents, and that the appeals of the bank and of the accountants be dismissed, each party paying the costs of his own appeal.

And now, November, 6th, 1873, it is ordered, that the above decree be entered as of the 20th October, 1873, *nunc pro tunc.*

Appeal of the executors of George W. Edwards.

And now, October 20th, 1873, it is ordered, adjudged and decreed, that this appeal be dismissed, at the costs of the appellants.

And now, November, 6th, 1873, it is ordered that the above decree be entered as of 20th October, 1873, *nunc pro tunc.*

Recent Decisions.

UNITED STATES COURTS.

[Head notes of cases to appear in Vol. 2, Bissell's Reports. By courtesy of Josiah H. Bissell, Esq., official reporter]

BANKRUPTCY.

Fifty per cent. clause refers to fair cash value of assets. Is not operative against a bankrupt, if the fair cash value of the assets turned over to the assignees is equal to 50 per cent. of the claims proved, on which he was liable as principal debtor. In re Thompson.

The change made by the amendment of July 27th, 1868, clearly indicates that the discharge is not contingent upon the amount of dividend actually received by creditors. Ib.

The English rule in bankruptcy that where there are both partnership and individual debts, but no partnership assets and no solvent partner, the debts of the

firm and of the members can be proved, and the estate is to be distributed *pari pas u* among the creditors, approved and adopted. In re Knight.

This rule applies even though the total assets consist of property sold by the individual creditors to the bankrupt. Ib.

The Federal courts, in construing the bankrupt law, are not bound by the decisions of a State court on a similar insolvent law. Ib.

A bank having discounted a note made by a firm to one of the partners, and endorsed by him, is entitled to prove the debt against the estate of the firm and of the individual partner. In re Bradley.

The form of the contract or obligation of the maker and endorser should not prejudice the legal rights of a creditor claiming distribution of assets in bankruptcy. Ib.

An involuntary bankrupt may be discharged unless some act specified in the 29th section is proved against him. In re Clark.

His estate having been administered upon, and the object of the law having been fulfilled, if he has acted in good faith there is no reason why he should be compelled to go through the vain ceremony of filing a voluntary petition. Ib.

The 12th section of the bankrupt act does not authorize the granting of a discharge where the bankrupt, dying during the proceedings, has not taken the final oath prescribed by the 29th section. In re Quinike.

Judgment for tort is discharged under the bankrupt law. In re Wiggers.

A bankrupt arrested under a *ca. sa.* issued upon such a judgment will be released by this court, even though the State court had refused so to do. Ib.

Jurisdiction exclusive. The jurisdiction of the District Court is exclusive, and its authority paramount, and it will protect the bankrupt in the manner contemplated by the law. Ib.

As to arrest, there is no distinction between *mesne* and final process. Ib.

A discharge may be granted to a bankrupt on an application made more than a year after the adjudication. In re Canady.

The true construction of the 29th section gives the court a discretionary power, and, in a proper case, on explanation of the delay, a discharge will be granted. Ib.

A revisary petition to the Circuit Court, under the second section of the bankrupt act, must show wherein the error in the order or ruling of the District Court complained of consists, and its nature must be distinctly set forth. The case will not be taken up *de novo*. In re Sutherland.

Municipal Bonds.

Where the statute of a State prescribes the manner in which a special meeting of the board of supervisors of a county shall be called, a special meeting held without observing these requirements is not legal. Goedgen v. Supervisors of Manitowoc Co.

A board thus convened has no authority to initiate a proceeding to subscribe for stock in a railroad company and issue bonds in payment therefor, and proceedings based upon the action of such a meeting will be enjoined. Ib.

Proceedings preparatory to issuing the bonds must as substantially comply with the law, as in levying a tax for the payment of the debt, although in suits brought on such bonds by innocent holders, the court rejects proof of errors in or about the election, or in issuing the bonds. Objections made by taxpayers before the bonds are issued, are in time. Ib.

The fact that the total revenue of a city is used in defraying its current expenses, does not constitute a legal or sufficient excuse for not paying its maturing indebtedness. United States ex rel. v. City of Sterling.

They have no right to spend their income in this way, leaving their bonds and other debts unpaid; but are bound to provide for and pay the latter, and on failure or refusal, this court will, on *mandamus*, compel them to do so. Ib.

A city, which, by its charter, has certain general powers of taxation, and by consent of a majority of its legal voters at a proper election, can levy and collect a further tax, cannot plead that they have not sufficient power to collect an adequate tax to pay their debts. Under such a charter the authorities should, from their ordinary revenue, discharge their legal indebtedness, and provide for their ordinary expenses by a further tax, according to their charter. Ib.

Patents.

A court of equity, while it may be satisfied the patent is valid, does not feel inclined, where those claiming under the patent have been negligent in enforcing their rights, to interfere in all cases, by an absolute peremptory injunction. Goodyear v. Honsinger.

When granted. If the rights under a patent are clear, and the infringement by the defendant free from doubt, and particularly after use of the invention by the patentee for a considerable time without controversy, the modern practice is not to compel the plaintiff in the first instance to proceed at law. Shelly v. Brannan.

Under such circumstances, it is the general practice to apply to the equitable side of the court for relief, which, in a proper case, is given without hesitation. Ib.

PENNSYLVANIA.

[Head notes of cases to appear in 21 P. F. Smith's Reports. By courtesy of the Reporter.]

HAWKINS et al. v. WEIGHTMAN.

1. In covenant against H. and D. on ground rent deed, the sheriff returned "served" as to D., and "*nihil*" as to H.: judgment by default was taken against D. On an alias against H., he returned "served," by posting a copy of the writ on the premises, and advertising, &c., in a daily newspaper, agreeably to the act of Assembly, &c., and "*nihil*" as to the defendant. Judgment was taken for want of appearance after two "*nihils*:" *Held*, A good judgment.

2. Under the act of April 8th, 1840, it is not necessary that the return should state expressly that there was no tenant on the premises.

3. The return by sheriff that he posted a copy of the writ, is an affirmance that there was no tenant on the premises.

4. If there was a tenant in fact on the premises, the sheriff was liable for a false return.

February 26th, 1872. Before Agnew, Sharswood and Williams JJ. Thompson, C. J., at Nisi Prius.

Error to the District Court of Philadelphia: No. 44, to January Term, 1872.

WOOD v. SHERMAN et al.

1. Davis was indebted to Sherman for printing; he refused to do more without a guaranty. Woods agreed to "guaranty to Sherman the contract made by him with Davis to the amount of $10,000." Afterwards, Davis paid money to Sherman, without directing any appropriation. *Held*, that Sherman might apply it to the debt due before the guaranty.

2. To recover against a guarantor, the creditor must prove due diligence against the debtor or his insolvency, so that pursuit would be fruitless. He need not prove both.

3. An execution was issued against the debtor, suit was brought against the gurantor; two days afterwards the execution was returned "*nulla bona*." *Held*, prima facie evidence of due diligence.

4. Reasonable diligence is a question for the jury.

5. *Ex vi termini* a guaranty of a contract is a concurrent act and part of the original agreement.

6. Reigart v. White, 2 P. F. Smith, 438, followed.

February 20th, 1872. Before Agnew, Sharswood and Williams, JJ. Thompson, C. J., at Nisi Prius.

Error to the District Court of Philadelphia: No. 98, to July Term, 1871.

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REAL ESTATE SALE, NOVEMBER 18th.

Will include—

Fortieth and Lancaster avenue, N. E. Corner—Lot. Orphans' Court Sale—Estate of John E. Wood, dec'd.

Church, Bridesburg—Two-story Frame Dwelling. Orphans' Court Sale—Estate of Robert Goldsmith, dec'd.

Spruce, No. 2032—Very Elegant Four-story Pictou Stone Residence—3 fronts. Has all the modern improvements and conveniences. Trustees' Peremptory Sale.

Thirty-second, North of Arch—2 Modern Four-story Brick Residences.

Perth, No. 1449, south of Jefferson, and between Franklin and Eighth street—Three-story Brick Dwelling.

Haverford road, No. 4931, junction of Fiftieth street and Silverton avenue—Genteel Two-story Brick Store and Dwelling.

Silverton avenue, No. 4916—Genteel Two-story Brick Store and Dwelling, with Stable and Coach House.

Fifty-second and Lombard, S. E. Corner—6 Cottage Lots.

Twentieth, (North,) No. 1744—Handsome Modern Three-story Dwelling.

Front, (South,) No. 766.—Three-story Brick Dwelling, with 2 Frame and 3 Three-story Brick Dwellings and Carpenter Shop in the rear, known as "Murray's Court."

Canby, No. 1237-Two-and-a-half-story Brick Dwelling.

Brown, No. 2316—Business Stand—Three-story Brick Store and Dwelling.

Eighteenth, (North,) No. 1629—Desirable Three-story Brick Dwelling. Sale Absolute.

Bouvier, No. 1622—Desirable Three-story Brick Dwelling. Sale Absolute.

Tenth, (South,) No. 703—Modern Four-story Brick Residence. Has the modern conveniences. Immediate possession.

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Moore, West of Second, extending through to McClellan—2 fronts—Brick Hide and Tallow Factory and Frame Stable. Orphans' Court Sale—Estate of James T. Naulty, dec'd.

Franklin, No. 2162—Three-story Brick Dwelling. Same Estate.

Twelfth, (North,) No. 1123—Three-story Brick Dwelling. Same Estate.

Fresh Meat Stalls, Nos. 31 and 33 Washington Market, Bainbridge street, between Third and Fourth. Same Estate.

Pine, No. 4107—Three-story Brown Stone Residence, with Side Yard, 40 feet front. 160 feet deep. Has all the modern convenience. Orphans' Court Sale—Estate of J. Thomas Elliott, dec'd.

Montgomery avenue and Woodstock, S. E. Corner—Modern Three-story Brick Dwelling. Sale Absolute.

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Orphans' Court Sale.—Girard avenue. Valuable Lot at N. W. corner of Twenty-seventh street, 175 x 85½ feet to Saulnier street, 3 fronts, and is within three squares of the Park. Estate of Robert W. Solly, dec'd.

Orphans' Court Sale.-Twenty-seventh street. An Eligible Lot of Ground, above Girard avenue, having fronts on 4 streets, 239 x 104 feet, with Three-story Brick House thereon erected. Same Estate.

Orphans' Court Sale.—Twenty-eighth street. Valuable Lot of Ground, above Girard avenue, 129 x 100 feet to McFall street. All street improvements made on Twenty-eighth street front. Same Estate.

Orphans' Court Sale. Oxford and Twenty-seventh streets. 4 Building Lots at the S. W. corner, 70 x 84½ feet. Estate of Jacob Kiefer, dec'd.

Orphans' Court Sale.—Oxford street. Building Lot, west of Twenty-seventh street, 29th Ward, 17 x 79 feet. Same Estate.

Orphans' Court Sale.—Bailey street. Building Lot, west of Twenty-sixth street, south of Oxford street, 29th Ward, 18 x 87½ feet. Same Estate.

☞ On all of the above lots there is a large deposit of gravel.

Orphans' Court Absolute Sale.—Salmon street. Building Lot, near Bockius street, 24th Ward, 20 x 117½ feet. Estate of Alex. J. Fromberger, dec'd.

Sale by Order of Heirs.—Brown and Front streets. Business Location, Four-story Brick Tavern and Dwelling, at S. E. corner. Lot 83 x 18 feet. Estate of Mary E. Pleasants, dec'd.

Sale by Order of Heirs.—$72 per annum. Irredeemable Silver Ground Rent, well-secured and promptly paid. Same Estate.

Sale by Order of Heirs.—$51 per annum. Irredeemable Silver Ground Rent, well-secured and promptly paid. Same Estate.

Sale by Order of Heirs.—$45 per annum. Irredeemable Silver Ground Rent, well-secured and promptly paid. Same Estate.

Sale by Order of Heirs.—$120 per annum. Silver Ground Rent, well-secured and promptly paid. Same Estate.

Peremptory Sale.—Thirty-seventh street. Three-story Brick Dwelling, above Walnut street, 27th Ward. Lot 16¾ x 77 feet. $2,000 may remain.

Trustees' Sale.—North Twelfth street. 3 Building Lots, above Susquehanna avenue, 18 x 75 feet, 28th Ward. Will be sold separately. Estate of Wm. Ross, dec'd.

Assignees' Absolute Sale.—No. 1525 N. Eighth street. Handsome Modern Three-story Brick Dwelling with back buildings, below Oxford street. Lot 24 x 100 feet to Perth street. $108 ground rent. Assigned estate of Francis D. Leidy.

Assignees' Absolute Sale.—No. 2030 N. Fifth street. Neat Three-story Brick Dwelling with Three-story Brick House in rear on Manakin street. Lot 17 x 100 feet. Same Estate

Assignees' Absolute Sale.—No. 2048 N. Fifth street. Genteel Three-story Brick Dwelling, with back building, above Norris street. Lot 16 x 100 feet to Manakin street. Same Estate.

Assignees' Absolute Sale.—No. 2050 N. Fifth street. Three-story Brick Dwelling with 2 Three-story Brick Houses in rear. Lot 16 x 100 feet to Manakin street. Same Estate.

No. 1239 Fairmount avenue. Genteel Three-story Brick Dwelling, with back buildings and conveniences. Lot 17 x 79 feet. $51 ground rent, silver.

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VOL. V. PHILADELPHIA, FRIDAY, NOVEMBER 21, 1873. No. 47.

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Orphans' Court of Phil'a.

ESTATE OF JAMES RAFFERTY, DECEASED.

A petition to vacate a decree of specific performance of a contract made by decedent in his lifetime, was dismissed by the Orphans' Court on the ground of want of jurisdiction. Weyand v. Weller, 3 Wright, 443, followed.

In the matter of the petition of Charles W. Zimmerman to vacate a decree of specific performance.

Opinion by PEIRCE, J. Delivered November 15th, 1873.

James Rafferty died in 1857, leaving issue three children, Sarah, William and James, and his wife Catharine, whom he appointed executrix. He devised one-third of his real estate to his wife and two-thirds to his sons, William and James, and the survivors of them. He provided for his daughter otherwise. The decedent's two sons died in their minority, the oldest and survivor of them on the 16th of January, 1872. In April, 1872, M. A. Kane, as assignee of Patrick Harvey, presented his petition to the Orphans' Court, setting forth that decedent in his lifetime had made a written agreement with the said Harvey on certain conditions therein set forth, for the sale of the said real estate to the said Harvey, and praying the court to decree a specific performance of the said contract.

An answer was put in by the executrix admitting the facts set forth in the said petition, and submitting to the adjudication and decree of the court, and, therefore, on April 20th, 1872, a decree of specific performance was made as prayed for. On the 18th of September, 1871, the petitioner, Charles W Zimmerman, bought at sheriff's sale the property at the southeast corner of South street and Passyunk road, part of the real estate of which the said decedent died seized, as the property of Catharine McIlvaine, formerly Catharine Rafferty, on a judgment against her, which was conveyed to him by sheriff's deed, dated September 21st, 1871. On May 4th, 1872, Charles W. Zimmerman presented his petition to the court praying that the said decree of specific performance be vacated on the ground of want of notice to him, and some alleged inconsistencies referred to in the said petition.

To this petition answers were put in by the executrix and M. A. Kane, in whose favor the decree of specific performance had been made, and the case submitted on answers and proofs. The case seems to be ruled by the case of Weyand v. Weller, 3 Wright, 443; in which Thompson, J., said: "It seems to have been forgotten that the Orphans' Court is a court of limited jurisdiction. Its jurisdiction is well defined; and while it has unquestionable jurisdiction to decree the execution of contracts to decedents, yet it would be difficult to find its authority to entertain bills by strangers to such decrees to rescind its orders for specific execution."

Furthermore, it is not very apparent how the interests of the petitioner have been affected by this decree for a specific performance. Whatever his rights are, they were acquired before the proceeding for the specific performances were commenced. And if he was a purchaser for a valuable consideration, without notice, upon a valid judgment against the devisee, his rights, whatever they may be, would seem to be independent of the proceedings in the Orphans' Court for the decree of specific performance.

The petition is dismissed with costs.

Supreme Court of California.

REED v. CLARK.

1. **In an action for breach of promise of marriage, it is the duty of the jury to look beyond the contract itself for the measure of damages, and give to the injured party a full compensation for all loss, in not having the contract fulfilled.**
2. **This has always been held to embrace the injury to the feelings, affections and wounded pride as well as the loss of marriage.**
3. **A charge by the judge that the jury have a right to consider in aggravation of damages whether or not the defendant has wantonly come into court and attempted to show the plaintiff guilty of improper conduct of which she was innocent: *Held*, not to be error.**

Appeal from the District Court of the Fifteenth Judicial District, city and county of San Francisco. October Term, 1873.

Opinion by NILES, J., BELCHER, CROCKETT, JJ. and WALLACE, C. J., concurring.

Action for breach of promise of marriage.

The plaintiff having recovered a verdict, the defendant moved for a new trial, which was refused. The defendant appeals from the order of refusal and from the judgment.

1. At the trial, and after the evidence had been introduced tending to show the proposal of marriage by the defendant, and its acceptance by the plaintiff, the court, against the objection of the defendant, admitted evidence that the plaintiff, within a few days after the proposal and acceptance, had announced the fact of the engagement to a number of ladies with whom she was intimate, and whom she invited to attend the wedding. This evidence upon the express ground that, if the plaintiff was entitled to recover at all, the fact sought to be proven would be an element to be considered in the estimate of damages. This ruling is now urged as one of the principal grounds of error.

The action for breach of promise of marriage is peculiar in its nature, and the elements going to constitute the damages differ materially from those existing in the case of a breach of any other contract. It is the duty of the jury to look beyond the contract itself for the measure of damages and give to the injured party a full compensation for all loss in not having the contract fulfilled. This has always been held to embrace the injury to the feelings, affections and wounded pride as well as the loss of marriage. The difficulty arising from the very nature of the case, of fixing any accurate rule by which to estimate the damages arising from these sources, has rendered it necessary to give a great latitude to the introduction of evidence, and to admit the jury to a full knowledge of all the circumstances attending the transaction, not only in its inception, but during the continuance of the relationship between the parties.

It cannot be doubted that knowledge of the fact of a marriage engagement by the intimate friends and relatives of a party to the contract, with whom she has frequent and familiar intercourse, would increase in a considerable degree the annoyance and mental suffering occasioned by a sudden discontinuance of the relationship. A rule which admits evidence of this character would not have the effect, as suggested in the argument, of allowing a designing person, by premeditation and artifice, to enhance the damages she might receive in case of an anticipated breach of the contract, by a general and immodest publication of the engagement; for such behavior would naturally injuriously affect the complainant in the judgment of the jury, and would tend to diminish, rather than to augment, the damages. But the announcement of the engagement to a few intimate friends may be neither improper nor unbecoming, and certainly requires no express authorization. We think the jury should be permitted to consider this, with the other circumstances of the case, in estimating the injury occasioned to the plaintiff by a breach of the contract.

2. But it is urged by the appellant as a ground of errors, that the court in passing upon the admissibility of the evidence we have considered, remarked in the presence and hearing of the jury, in substance, that as the case then stood, a *prima facie* promise had been proven; and it is claimed that this amounted to a decided expression of opinion by the court upon the weight of evidence, which could not fail to influence the decision of the jury upon a matter of fact directly in issue.

It frequently happens that the admissibility of a particular piece of evidence depends upon the establishment of some preliminary fact. In such case the court must determine what facts have been shown to exist, in order to determine what further facts may properly be shown. It is not unusual or improper for the judge in passing upon such a question, to announce, for the guidance and benefit of counsel, the reasons which controlled him in the admission or rejection of proferred evidence. This necessarily involves the expression of an opinion upon the evidence already introduced. But this expression is not addressed to the jury, or intended for their guidance, as is an instruction given at the request of counsel, or by the court upon its own motion. and which it is the duty of the jury to follow strictly and without questioning.

In this case the court, before admitting the testimony offered, was bound to determine whether sufficient evidence of the promise had been given to establish a *prima facie* case. The mere announcement of his ruling would have been equivalent to an expression of his opinion upon this point. While the expression of the learned judge that as *the case then stood a prima facie promise had been proven*, might be the subject of criticism if presented to the jury as a formal instruction. We think it meant no more, as used, than that evidence had been given tending to show the promise, sufficient to lay the foundation for the introduction of the proposed testimony. Moreover, whatever impression may have been made upon the minds of the jury by the language of the court, must have been removed by its subsequent instructions. They were not only told that they should not be influenced "by any apparent expression of opinion as to the facts made by the court," but were fully instructed that the question whether a promise had been made or not was to be determined by them, from the evidence.

3. The fourth ground for a new trial assigned by the defendant was "error in law in not permitting the defendant's counsel to cross-examine the plaintiff when on the stand as a witness in her own behalf as to matters affecting her character and conduct, and as to matters affecting her credibility."

The statement is defective in the respect that it does not sufficiently particularize the ruling to which it is intended to apply. We are referred, however, by the brief of counsel to the ruling of the court upon the defendant's proposal to show in cross-examination of the plaintiff that she had formerly resided in a certain house, and had been accustomed to visit it from time to time, and that it was kept by a notorious procuress. It appears from the transcript that the witness had already testified fully upon this point be-

fore any objection was made by the plaintiff's counsel. No motion to strike out the testimony was made, and it was before the jury for their consideration. While the transcript is very indefinite in this regard, the ruling of the court in refusing to allow a continuance of the examination upon the point seems to have been placed upon the two grounds: that the cross-examination was being protracted to an unreasonable length, and that the alleged bad character of the witness, being a substantial and affirmative defence, could not be inquired into upon cross-examination of the plaintiff's witnesses.

We do not think it necessary or profitable to discuss the principle embraced in the latter proposition. While a large latitude should be allowed in the cross-examination of a witness, for the purpose of developing the truth, and more especially where the witness is a party in interest, the court has the power, in the exercise of a sound discretion, to confine the examination within reasonable limits, and when we consider that the principal facts proposed to be shown by the witness were already before the jury, and that a searching and minute cross-examination had occupied more than a day, we do not think the court went beyond its discretionary powers in prohibiting its continuance on the line proposed by counsel.

4. It is urged by the defendant in error that the court allowed one of defendant's witnesses "to be recalled and examined by the plaintiff upon important matters, to lay a foundation for discrediting or impeaching her."

We have been referred to no authority, and can find none, which limits the power of the court, in its discretion, to permit a witness to be recalled for examination in chief or cross-examination at any time during the progress of the trial, whether for the purpose of proving or disproving a natural issue, or for the purpose of laying a foundation for impeachment. We cannot say, from anything contained in the transcript, that there was any abuse of this discretion. Nor can we say that the matters offered to be shown were impertinent, for the offer of the letters of the witness, the proof of which appears to have been the sole object of the re-examination, was withdrawn by consent of counsel for reasons which we can only conjecture, but must presume to have been sufficient.

5. The charge that the jury "have a right to consider in aggravation or enhancement of damages, whether or not the defendant has wantonly come into court and attempted to show the plaintiff guilty of improper conduct with other men, of which she was innocent," is claimed by the appellant to have been erroneous.

We think there was no substantial error in this charge. In Southard v. Rexford, 6 Cowen, 260, it was said: "When the defendant attempts to justify his breach of promise of marriage by stating upon the record, as the cause of his desertion of the plaintiff, that she had repeatedly had criminal intercourse with various persons, and fails entirely in proving it, this is a circumstance which ought to aggravate the damages. A verdict for nominal or trifling damages, under such circumstances, would be fatal to the character of the plaintiff, and it would be a matter of regret, indeed, if a check upon a license of this description did not exist in the power of the jury to take it into consideration in aggravation of damages."

We think the doctrine of this decision is correct. It is true the defendant has a right to plead criminal or disgraceful conduct of the plaintiff in justification of his breach of the contract; and this plea may have been interposed in the utmost good faith, notwithstanding he is unable to sustain it by evidence amounting to proof in the estimation of the jury. But it is a question of good or bad faith for the jury to determine. And the failure to offer any evidence whatever in support of the damaging averment, or the introduction of evidence apparently fabricated or so frivolous that it was equivalent to an entire failure of proof, would tend to show that bad faith on the part of the defendant which increases the injury, and ought to enhance the damages.

In the subsequent case of Kniffin v. McConnell, 30 New York, 289, the jury had been instructed, at the request of plaintiff, that "If the defendant had come into court and attempted to prove her guilty of misconduct with other men, of which he knew she was not guilty," it aggravated the injury and damages. There was no allegation in the answer of misconduct upon the part of plaintiff, and in this respect it differed from the case of Southard v. Rexford. But the majority of the court held that the charge was not erroneous, "and that attempting to give such matters in evidence, though not set up in the answer as a defence, if not made out, warrants the charge that it should aggravate the damages."

In the present case the charge of misconduct was distinctly made in the answer, and evidence upon the point was introduced. We think that if the jury should be satisfied, from the whole evidence, that this testimony was offered in bad faith, they should be permitted to consider that fact in enhancement of damages, both as tending to show the animus of the defendant and as being an injury to the feelings and wounded pride of the plaintiff.

It is urged by the appellant that this portion of the charge contains nothing to prevent the jury from inferring that evidence of unchastity would aggravate the damages, although offered in good faith upon the part of the defendant. The word "wantonly," although perhaps not the most apt term that could have been chosen, substantially expressed the idea of bad faith. In the connection in which it was used, it conveyed the idea of a charge made and sought to be maintained carelessly and recklessly and in a manner inconsistent with a sincere and well founded conviction of its truth. We think, taking into view the entire charge upon this subject, that the jury could not have been misled to the prejudice of the defendant by the language used.

8. The court charged the jury that it was their province "to take into consideration on the question of damages the pecuniary condition of the defendant." We do not understand the counsel for defendant to contend now that this charge is erroneous as an abstract proposition, although the only point made in the statement for a new trial was that the charge was an erroneous statement of the law, but it is claimed that it was error to give it in this case, because there was no legal evidence of the defendant's pecuniary condition. But the plaintiff testified fully to the defendant's declarations as to his wealth made to her immediately prior to the engagement. No exception was taken to this testimony at the trial, and this is a sufficient answer to the objection, now made for the first time, that the fact was not established by legal existence.

7. The alleged newly discovered evilence goes entirely to the point of the unchastity and improper conduct of the plaintiff. This was one of the questions in controversy at the trial, and upon which much evidence was introduced. The defendant now asks for a new trial, that he may multiply witnesses to acts upon the part of the plaintiff of the same general character as those proven at the former trial, and differing therefrom only in the times and manner of their commission. This evidence is merely cumulative, and is not good cause for a new trial. Waller v. Graves, 20 Conn. 310; Stoakes v. Monroe, 36 Cal. 388. Moreover, considering the character of the evidence proffered, we cannot say that the court might not have reasonably inferred that the verdict would have been the same if the evidence had been in.

Several other points were made in the case which we do not deem it necessary to discuss. We find no error requiring a reversal.

Judgment and order affirmed.

Messrs. *Clarke & Carpenter* and *John Currey*, for appellant.

Messrs. *McAllister & Bergin* and *Alexander Campbell*, for respondent.—*P. L. R.*

Recent Decisions.

PENNSYLVANIA.

[Head notes of cases in the Supreme Court of Pennsylvania, to appear in vol. 71 Pennsylvania State Reports. Received from P. F. Smith, Esq., State Reporter.]

SPROULL'S APPEAL.

1. Where the testimony before a master, who is also examiner, is conflicting, although the merits may appear contrary to his finding, if it has been confirmed by the court below, the Supreme Court will not reverse.

2. The credit to be given to the witnessess must depend much on their appearance and conduct before the examiner.

3. When the questions decided are inferences from clearly proved facts or conclusions from reasoning, the report has not the same weight.

4. The report of a master, approved by the court below, as a general rule will not be set aside by the Supreme Court.

February 27th and 28th, 1872. Before AGNEW, SHARSWOOD and WILLIAMS JJ. THOMPSON, C. J., at Nisi Prius.

Appeal from the decree of the Court of Common Pleas of Philadelphia: No. 100, to January Term, 1872.

THOMPSON, EXECUTOR OF SHALKOP, v. STEVENS.

1. On a trial an attorney, in discussing a question of evidence, stated in the hearing of the jury matters not evidence; the court refused the motion of the other side to withdraw a juror. *Held*, to be in the discretion of the court below, and not reviewable on error.

2. In an action for services of plaintiff in nursing, &c., a feeble man. *Held* proper to ask a witness whether plaintiff's appearance did not show her constitution broken down by her duties.

3. Contracts with nurses, housekeepers, &c., sought to be enforced after the death of the person to whom the services were rendered, ought to be very closely scanned, and juries instructed that they could be made out only by very clear proof.

4. The correction of verdicts not founded on such proof, or unreasonable in amount, is confided to the sound legal discretion of the court below.

5. Such contract must possess the element of certainty.

6. The maxim, *Id certum est quod certum reddi potest*, applied.

7. The promise to the plaintiff was, "If she would stay with him as long as he lived, he would provide and give her full and plenty after he was gone, so that she need not work." This was sufficiently certain and definite.

8. The measure of amount would be what would keep her without work, taking into consideration her condition in life.

9. Where services are gratuitously rendered under expectation of a legacy, there can be no contract, and therefore, no recovery for the services.

10. Where one does services on request, no matter what his expectations were, there may be a recovery for them.

11. Graham v. Graham. 10 Casey, 475; Sherman v. Kitsmiller, 17 S. & R. 45; Roberts v. Swift, 1 Yeates, 209, remarked on.

March 1st, 1872. Before AGNEW, SHARSWOOD and WILLIAMS, JJ. THOMPSON, C. J., at Nisi Prius.

Error to the District Court of Philadelphia: No. 145, to July Term, 1871.

KLASE v. BRIGHT.

1. Bright sold out to Klase, who was his partner, took his notes for the purchase money and transferred them, still retaining the ownership, to Dye, who transferred them to Bright. Suit was brought, Bright, to Dye's use, against Klase. Afterwards Dye settled with Klase, allowing Bright's alleged indebtedness on the partnership; a note for the balance from Klase to Dye was put into his attorney's hands; he was notified by Bright not to deliver it to Dye. *Held*, that the settlement did not prevent a recovery by Bright in the suit against Klase.

2. Klase, having given no value, was not prejudiced by the settlement with Dye, he not owning the note; the suit being to the use of Dye, did not estop Bright from repudiating Dye's settlement.

3. In this action evidence of partnership debts paid by Klase, was not admissible as set-off.

4. Whether Bright was indebted on account of that payment could be ascertained only by account render or bill in equity between the partners; not in assumpsit.

5. Bright sold to Klase his "right, title and interest" in the firm; a mill mentioned in the agreement as part of the firm property, was sold by the sheriff as the property of a third person. *Held*,

that Klase could not defend for a failure of consideration, his knowledge of ownership being the same as Bright's; and Bright sold his *right* only.

March 7th, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Error to the Court of Common Pleas of Schuylkill county: No. 108, to January Term, 1871.

THOMAS, TO USE OF HEEBNER, v. MOORE.

1. In a question of partnership, evidence that the connection between alleged partners had been formed fraudulently and for the purpose of covering the property of one from his creditors, is not admissible.

2. B. sold part of a coal lease with the personal property to M., who constituted O. his attorney; orders drawn for goods by B. on a firm, "B. & Co.," in favor of the plaintiffs, accepted by O., and goods furnished accordingly, were evidence of partnership between B. & M.

3. B. when alone kept blank assignments which were filled up by him to the plaintiff, a storekeeper, for the amount due laborers of B., and the laborers received goods to the amount from the plaintiff. There being evidence of partnership between B. and M., such assignments dated afterwards were evidence in a suit against the firm.

March 8th, 1872. Before THOMPSON, C. J., SHARSWOOD, and WILLIAMS, JJ. AGNEW, J. at Nisi Prius.

Error to the Court of Common Pleas of Schuylkill county: No. 299, to January Term, 1871.

FUNK v. FRANKENFIELD.

Funk, who was surety on a note, was discharged by the holder refusing to pursue the principal upon notice. He afterwards wrote to holder, "Have patience until about January 3d. I think you will receive your money;" again "I was at Esq.'s for money three times, but did not meet him; I will pay you as soon as the money is obtained. I will see you yet this week." Suit had been brought at the date of last note. *Held*, 1. That the letters were only a conditional promise to pay on obtaining the money from the justice. 2. If it had been absolute, the consideration of forbearance had not been performed.

March 8th and 9th 1872. Before THOMPSON, C. J, SHARSWOOD and WILLIAMS, JJ. AGNEW, J. at Nisi Prius.

Writs of error to the Court of Common Pleas of Bucks county: Nos. 412 and 413, to January Term, 1871.

THE FIRST NATIONAL BANK OF WELLSBOROUGH v. BACHE.

1. Bache employed Spicer to take timber from Bache's land, to allow Bache one cent per foot, he to have a lien on the timber for the payment; Spicer took the timber, sold it, and received a note for it in his own name; it was collected by a bank; Bache gave the bank notice that the proceeds were his, and not to pay to Spicer, and indemnified it. The bank paid Spicer. *Held*, that Bache could recover the amount with interest.

2. The lumber being Bache's, the fund was his, and could be followed through any transmutations so long as it could be identified.

3. Where notice with indemnity is given to a bank not to pay money to a depositor, the payment is at the bank's risk.

4. Farmers' and Mechanics' Bank v. King, 7 P. F. Smith, 202, adopted.

March 11th, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

THE FALL CREEK COAL AND IRON COMPANY v. SMITH.

1. A libel for materials, &c., was filed, and a writ of attachment was issued against five boats, which were attached by the sheriff. *Held*, if the attachment were irregular because joint, as the court had jurisdiction, it was a protection to the sheriff.

2. It was not for the sheriff to determine anything about the irregularity of the writ, but he was bound to serve it.

3. Where a court has jurisdiction of the action, their officers are not responsible for errors in the process.

4. It depends upon the action of the party in interest whether irregular process shall become void; if inherently without efficacy it is void as to all persons, whether interested or not.

March 13th, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Error to the Court of Common Pleas of Bradford county: No. 292, to January Term, 1872.

THORNTON v. THE ENTERPRISE INSURANCE Co.

1. An insurance was made to T. who gave a mortgage to W. T. assigned his policy to W. as security, and W. assigned to E. T. afterwards conveyed the property insured to C., and assigned him the policy; the insurance company refused to approve the assignment. E. afterwards became the owner of W.'s mortgage, and the company insured his interest as mortgagee. By the policy on payment of a loss the mortgagee was to assign the mortgage to the company; the property was burned, and E. received the amount of his insurance, and assigned the mortgage to the company: *Held*, that the assignment was properly made, that T. had no claim upon the money paid for the loss, and that the company might recover from T. the amount due on the mortgage.

2. Under the act of June 22d, 1871, supplement to act extending to Luzerne county, the Bradford county law of 1869 relating to reference, the Supreme Court is not authorized to review the evidence, and re-examine the decision of the court below as to facts.

3. Writs of error bring up questions of law, and appeals questions both of fact and law.

March 14th, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Error to the Court of Common Pleas of Luzerne county: No. 279, to January Term, 1872.

VAN STORCH v. GRIFFIN.

1. An exemplification of the record of the State of New York was certified by the clerk, and J. W. G. "Justice of the Supreme Court;" it appeared that there were other judges of the same court. J. W. G. did not appear to be Chief Justice. *Held*, not to be properly authenticated.

2. The record was of proceedings in divorce by the husband, in New York, on the ground of adultery; the respondent at the time of marriage, of the proceedings, and of the decree, resided in Pennsylvania, and there was no actual service on her. In an action by respondent against a person for breach of promise of marriage after a divorce in Pennsylvania on her own libel, *Held*, that the record was not evidence against her of adultery.

3. The decree in New York was that respondent should not marry again during the life of libellant; the decree as to this had no extra-territorial effect.

4. The plaintiff having been divorced on her own libel in Pennsylvania, it was lawful for her to marry again, and her marriage would be treated as valid everywhere.

5. In an action for breach of promise of marriage, evidence that the general character of the plaintiff for chastity previously, was bad, is admissible in mitigation of damages.

March 14th, 1872. Before THOMPSON C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Error to the Court of Common Pleas of Luzerne county: No. 353, to January Term, 1872.

ALDRICH AND WIFE v. BAILEY ET AL.

1. McConnell contracted for land, to pay $2.50 per acre and improve; he took possession and improved; he died without paying any money except the cost of surveying, leaving a widow and children; as between him and his vendor there was no abandonment of the contract. An equitable estate descended to his widow and children.

2. The widow applied to the vendor for a new contract; it was signed by her, and her signature witnessed by vendor's attorney in fact; but not signed by vendor; she paid no purchase money, but continued to live on the land until her death; she obtained no equity in the land.

3. Some of the heirs assigned to the widow their interest in the father's estate by writing not acknowledged nor recorded The plaintiff, one of the heirs, afterwards obtained a deed of their interest from a number of McConnell's heirs, and then paid the whole purchase money to the vendor who gave her a deed, which was duly recorded; she had no notice of the assignment to the widow. *Held*, that her title was best.

4. The widow divided the land and set off a portion to a son, who took possession of it; the widow gave him a quit-claim deed for it. This gave him no title as against the vendor.

5. The defendants claimed under a deed from the son and intervening deeds. One of the defendants holding the widow's imperfect contract, made payments on the purchase money to an authorized agent, who afterwards leasing plaintiff's claim, held the money, notified the defendant to receive it, and he declining, the deed was made to plaintiff. She acquired the legal title as her father's purchase.

6. The receipt of the money by the agent being by mistake, was not a ratification of the imperfect contract with the widow.

7. The vendor could not abrogate the contract with the father, and sell his land and improvements.

8. Inquiry is a duty, where there is no actual or constructive notice; where it is omitted notice will be presumed.

9. Pennsylvania Salt Manufacturing Co. v. Neel, 4 P. F. Smith, 9, adopted.

March 14th, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Error to the Court of Common Pleas of Tioga county: No. 301, to January Term, 1872.

EVERHART v. SEARLE.

1. Flagg employed Searle to sell land, the compensation to be all above $125 per acre. Everhart agreed in writing with Searle to pay him $500 "for services in assisting to negotiate a purchase of the land." Searle brought Everhart and Flagg together, and a contract was made for sale of the land at $150 per acre. Everhart and Flagg afterwards consummated the sale themselves. *Held*, that Searle acting for both without their consent could not recover the $500 from Everhart.

2. Searle alleged that the understanding was that the $500 was to give Everhart the preference. *Held*, that this was selling his discretion, was bad faith to Flagg, and being so, no contract would arise out of the transaction.

3. The fact that Flagg suffered no loss, did not vary the effect, the transaction being against public policy.

4. Mode of answering points stated in this case.

March 15th, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Error to the Court of Common Pleas of Luzerne county: No. 313, to January Term, 1872.

ARNOLD ET AL., POST No. 13, G. A. R., v. THE MACUNGIE SAVINGS BANK.

1. Hamersly deposited in bank the proceeds of an excursion, to the credit of himself and two others, as "trustees of Post 13, G. A. R.," the bank paid the deposit to Hamersly, after notice by the post not to pay him. In a suit by the post against the bank, the evidence was conflicting on the question of ownership. The court charged that if the plaintiff's did not satisfy them by evidence stronger than the defendants', that the money belonged to them, the verdict should be for the defendants. *Held*, to be error.

2. The money being deposited to the credit of the post, prima facie belonged to it, and the burden was on the defendant to show that it belonged to Hamersly.

3. Hamersly being on the stand was asked: "did you receive one-half of the profits of this excursion, a portion of which is the amount in dispute, and had you proposed before to the Grand Army of the Republic that they should have one-half of the profits?" *Held*, that the question was pertinent as bearing upon the question of the ownership of the fund.

March 18th, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Error to the Court of Common Pleas of Lehigh county: No. 37, to July Term, 1871.

LEGAL GAZETTE.

Friday, November 21, 1873.

JOHN H. CAMPBELL,
EDITOR.

THE NEW CONSTITUTION.

That the new constitution will be adopted by the people seems now to be a foregone conclusion. The opposition which was expected to it in the interior counties of the State has nearly died out, the prominent members of both political parties are joining hands to help it through, and nowhere scarcely, except in the large cities, and in the districts where the "ring" managers and corruptionists have control, is there any seriously organized opposition to it. Even in Philadelphia, where the ring politicians of both parties were confident of their ability to defeat it, the frantic efforts made by them to make the matter a partisan issue, and to render the instrument unpopular by the circulation of one-sided and fictitious statements of its contents, are merely having the effect of determining hundreds of voters to attend the election next month, who otherwise would not take sufficient interest in the matter to vote. Continued agitation will only bring out the vote and increase the majority in favor of the constitution. The futile efforts of the City Solicitor and some other gentlemen occupying prominent official positions, to raise a conflict of jurisdiction between election officers, are exciting but the pity and commiseration of the good citizens of Philadelphia, and raise a smile upon the lips of every well-informed constitutional lawyer. Perhaps if some of these gentlemen are too troublesome, the convention, which reserved to itself that right, might re-assemble prior to the election, abolish their official positions, blot out of existence certain judges and courts alike, and do a number of other unpleasant things that might lead persons to have a little more respect for the great powers of the people confided to the convention. The people would no doubt by their votes heartily appreciate such action, in case it became necessary, and would promptly endorse the action of the convention. We would deprecate such extreme measures, but then when the *power* of the people is doubted, it might please the people to overcome that doubt, by a practical demonstration of the kind mentioned. However, there is no danger of such an occurrence, as the doubts, etc., of political managers and leaders are not of the slightest importance. The people appreciate their weight and will act accordingly.

We stated when we published the constitution in our issue of the 7th inst, that we were emphatically in favor of its adoption. We propose in brief to give our reasons for such declaration.

First of all. The new constitution provides a remedy for a greater part of the municipal misgovernment, political corruption, bad legislation, and glaring election frauds, under which we have suffered for many years past.

Second. It creates a reform Legislature, an article of prime necessity to the people of a free State.

Third. It does away to a great extent with the interminable delays in judicial proceedings, by the creation of new courts, and the increase in the number of judges throughout the State, and the simplification of the system of courts in Philadelphia.

Fourth. It cuts up by the roots the special legislation so much complained of, general laws on mostly every subject being now necessary.

Fifth. It provides for stringent limitations upon the governor's pardoning power, which everybody admits is a necessity.

Sixth. It throws restrictions around the enormous powers and privileges of gigantic corporations and monopolies, properly bringing those institutions within the control of the State.

Seventh. It guards against extravagance and waste of the public funds.

Eighth. It provides against fraud and connivance in the passage of acts of Assembly.

Ninth. It prohibits the creation of irresponsible commissions empowered to tax the people for special objects without their consent.

Tenth. It provides an easy method of detecting election frauds.

Eleventh. It abolishes *special* registry laws, and gives the people a fair opportunity to record their votes.

Twelfth. It guards against a stoppage of the State machinery of government by the creation of the office of lieutenant governor.

Thirteenth. It cuts up by the roots the evils of the auditing system in Philadelphia, establishing a separate Orphans' Court for that city, and providing that the *judges themselves* shall hereafter audit all accounts, without expense to the parties.

Fourteenth. It judiciously allows women to be selected for positions connected with the government of our schools.

Fifteenth. It provides for the proper management of private corporations.

Sixteenth. It is immeasurably superior to the old constitution, which, no matter how perfect that instrument was at the time of its adoption, is now unsuited to the wants of this great commonwealth.

For these reasons, we are emphatically in favor of the new constitution. Can we help it?

INCREASING IMPORTANCE OF A KNOWLEDGE OF THE FEDERAL JURISPRUDENCE.

Our Washington exchanges come freighted with the "lectures" at the opening of the different law schools there. Though we suppose that they are presented immediately on delivery by the work of what is called the "reportorial corps," and therefore with occasional inaccuracies of diction, the merits of all are very discernible. We give, in this issue, the following extract of one by the Hon. S. F. Miller, who is a professor in the Catholic College of Georgetown. We select it, not because we agree or disagree with anything contained in it, but because we think it will be interesting to our readers.

"The time has been until very recently that a lawyer might attain a great practice and a very high reputation in the State courts, and, indeed, some of the first reputations in the country have been so made by men who never practiced at all in the Federal courts, and whose attention, if turned at all to the subjects I have named as being within the course of lectures for this winter, were only so turned incidentally; but that period in the history of a lawyer's progress has passed. The time has come when the Constitution and laws of the United States are not the mere theoretical object of the thoughts of the statesman, of the lawyer, and of the man of business. The time has come when the operations of that government reach to the recesses of every man's business, and force themselves upon every man's thoughts.

The history of the last twelve or fifteen years has taught the people, in a manner which, I trust, will never be again necessary that they shall be taught, that this government within its sphere is supreme, and that its sphere is a very extensive and a very pervading one. Leaving out of the question all that has been brought to our observation and experience by the events of the recent war of the rebellion and the operations of the government under what is called the system of reconstruction, other matters have brought the operations of the Federal government into play in the every-day affairs of business life in a manner almost unknown previous to that time.

As an illustration I refer you to the internal revenue system—a system under which, a few years ago, almost every species of property, every occupation and pursuit, and many things which had scarcely acquired the name of property or occupation, were taxed by the Federal government; taxed, necessarily, to pay the interest and principal of the debt incurred in the war, and the expense of the government largely increased by the operations of that war. Now, these taxes and these statutes—even if you suppose that everybody was willing to submit to them cheerfully—required construction. They were new to the country. When they were put in operation, the officers themselves were very much perplexed as to what they meant in a great many cases; and our government, being a liberal government, and desiring that no person should be injured, was ready, and afforded opportunities to have the laws tested by courts of justice. A man had but to pay his taxes, take an appeal to the commissioner of taxation, and then, if he failed there, he could sue the man who collected them, and recover if illegally assessed. The number of suits growing out of this class of cases was immense and has been in the Federal courts ever since that system of internal revenue was established. Though the list of articles subject to taxation has been very much diminished, it yet seems probable that some eighty, ninety, or perhaps a hundred millions of dollars will always be raised in this country hereafter by the taxation of the Federal government on the articles of spirits, tobacco and malt liquors,

But it is not only when a suit is brought or is to be brought, that the lawyer is called upon to understand these things, this jurisdiction and these laws. He is very often consulted as to what a party should do when no suit originates. And as this system permeates the entire country, the remotest village lawyer may be called upon to advise upon the Constitution, its construction or the construction of the statutes, or the manner in which the laws are enforced by the officers.

The bankrupt law, passed in 1867, has procured an entire modification in the system of enforcing contracts or collecting debts, in the case of persons who fail to pay for want of ability to pay, and all that law has to be administered under a Federal statute, under an act of Congress; and not only under an act of Congress, but under the rule of practice prescribed and adapted for the Federal courts; and the lawyer who does not know when a man has committed an act of bankruptcy and is liable to be punished in a court of bankruptcy, or who does not know how to institute a proceeding in a court of bankruptcy, can hardly expect to receive a full share of practice in any community.

In addition to this, the admiralty jurisdiction of the Federal courts has, within the last few years, by constructions placed upon it by the Federal courts, received an immense increase in its extent. Twenty years ago it was held that jurisdiction in admiralty was limited, in fact, to the sea-board, if not actually to the sea; it extended no further on the rivers than the tide ebbed and flowed in those rivers. It has been held since that time by the Supreme Court of the United States that the admiralty jurisdiction extended to all the navigable streams; that it was a system of laws intended to have operation upon the interests of navigation, and that whether the navigation took place upon salt water or upon fresh water was entirely immaterial, and that the Constitution of the United States, when it declared that the courts of the United States should have jurisdiction in admiralty, meant that they should have jurisdiction in all that class of cases which heretofore had been called admiralty cases, whether they grew out of salt water transactions and contracts or fresh water contracts and transactions. Now that has opened to the great interior of the country, the subject of the carrying trade by steamboats.

Every steamboat becomes, in regard to suits concerning its transaction, its contracts, to *torts* committed by its officers, subject to the admiralty jurisdiction of the Federal courts. By act of Congress passed in the earliest history of the country, where the case is, strictly speaking, an admiralty case—one known and recognized as belonging to the ancient jurisdiction of admiralty in England and on the Continent—the Federal courts have exclusive jurisdiction, and the State courts cannot exercise jurisdiction. If a lawyer expects to have a large practice in any part of the country now, he must know something of admiralty law and admiralty jurisdiction. Questions of constitutional law, especially of the law of the Constitution of the United States, have become matters of common occurrence in the courts. Whether it is that the Congress of the United States has taken a more liberal view of its powers than formerly, or whether it is that the people are disposed to question the exercise of power by Congress, is not for me

to say; but certain it is that hardly any act of Congress in modern times can be brought to bear upon an individual, to which he is reluctant to assent, that he does not attempt to raise the question of constitutional power to pass such an act. Our books of reports, both State and Federal, are filled with the decisions of the courts upon questions of constitutional law, Federal and State.

In the progress of this country in wealth, in its growth, in power and population, and especially in the increase of transportation of persons and property from one point of the country to another — out of this system of transportation arises a vast number of suits which, twenty-five or thirty years ago were almost unknown. The Federal government is exercising to some extent its powers over this subject of transportation, under the clause of the Constitution which declares that Congress shall have the right to regulate commerce with foreign nations, with the Indian tribes and among the several States. State governments and State Legislatures are constantly enacting laws for the promotion of their purposes, for the raising of money, for the protection of what they consider their individual rights, which are supposed to be in conflict with this right of Congress to regulate commerce among the States, and our Supreme Court has been filled of late days with questions upon the powers of the States to pass laws concerning taxation and other matters which are supposed to infringe upon the right of the citizen as a citizen of the Federal government.

By the three recent amendments to the Constitution, adopted since the war of the rebellion ended, new questions of constitutional law and of the relations of the Federal government to the States and the people of the States have been raised and are constantly arising which require attentive consideration. A mass of people, six or eight millions in number, who were not citizens, have been made citizens of the United States by those amendments. That class of people who were declared by the Dred Scott decision of 1854 to have no rights which a white man was bound to respect, have come to have all the legal or civil rights which a white man has; and a fight is going on in this matter in which the lawyer and judge are called upon to construe the law of the Constitution of the United States, and the conflict of State constitutions with that law. I might consume the balance of the evening by detailing to you the innumerable instances in which any lawyer might be called upon to advise about all these questions, and put in operation the machinery of the law of the Federal government for the protection of the rights of his client, but it is useless.

You may consider this matter, and you will find that no branch of law is of more importance to the lawyer, to the statesman and to the citizen, than a thorough acquaintance with the Constitution and laws of the Federal government as they are administered, and as they affect the rights of the people."

And still they come! A. A. Chase, editor, and A. H. Winton, associate editor, have launched upon the sea of journalism the Scranton Law Times, the first number of which lies before us. It gives promise of being a useful and interesting weekly to the legal profession of Luzerne and neighboring counties. Our friend Mr. Kulp of the Luzerne Legal Register will have to look to his laurels—but then a little friendly rivalry between Wilkesbarre and Scranton will do them both good. The new paper has our best wishes.

NEW PUBLICATIONS.

The Washington publishers announce as likely to appear by the second week in December, the 16th volume of Wallace's Supreme Court Reports. This volume comprises, they remark, some cases of great interest, including pre-eminently those from New Orleans, known as the Slaughter House Cases, 36–135, than which none of greater magnitude have yet been decided in this country. Mr. Justice Miller, who gave the opinion of the court, speaking of their importance, said: "No questions, so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States and of the several States to each other, and to the citizens of the States and of the United States, have been before this court during the official lives of any of its present members." The arguments and opinions were worthy of such questions. In the case of the Railroad Company v. Otoe County, and Olcot v. The Supervisors, 667, some important doctrines are laid down as to the subscriptions of municipal corporations to railroads, including the power to make gifts or donations, which is sustained in opposition to some decisions elsewhere made. In Mrs. Myra Bradwell's Case, the question of how far the refusal of a State Court to grant a license to a woman to practice law, was the subject of learned opinions. In Koontz v. Northern Bank, some important doctrines, as to the credit due to judicial proceedings regular on their face, are laid down. In Davis v. Gray, 203, the rights, powers, and duties of receivers in equity are treated of and a liberal view taken of them. Numerous cases, including specially the cases of Voorhees v. Bonesteel, 16; Marshall v. Knox, 551, and Wager v. Hall, 584, settle questions much disputed hitherto, as to what is "a contemplation of bankruptcy" within the meaning of the bankrupt act. In Walker v. Whitehead, 314, what is the impairing of the obligation of a contract? In Railroad Company v. Manufacturing Company, 318, some important doctrines on the law of common carriers, the court expressing itself not inclined to go any further than it has done in absolving them from responsibility. In Ripley v. Insurance Company, 336, a curious case in Life Insurance. In Tailor v. Tailor, 366, an important adjudication as to the liability of bail. In Huntington v. Texas, 102, a statement by the court defining and limiting its decision in the great case of Texas v. Chile & White, 7 Wallace, 700. In Steamboat Company v. Chase, 522, an important judgment as to the nature of admiralty jurisdiction in relation to the State and Federal government.

We shall give to our readers, as our space allows, an abstract of some of these and other cases in the volume.

PUBLICATIONS RECEIVED.

We have received from John M. Shirley, Esq., State reporter of New Hampshire, an elaborate brief prepared by himself in the case of Marston et al. v. Durgin, in the Supreme Court of that State. We are also indebted to him for advance reports of cases in the same court.

A TREATISE ON THE AMERICAN LAW OF LANDLORD AND TENANT, embracing the Statutory Provisions and Judicial Decisions of the several States in reference thereto, with a selection of Precedents. *Sixth* edition, revised and enlarged by John M. Taylor, Counsellor at Law. Boston, Little, Brown & Co., 1873. 8vo., pp. lxiii., 769. Received from the Publishers.

Taylor on Landlord and Tenant has long been accepted as an acknowledged American authority upon the subject of which it treats. One proof of this is the rapidity with which an edition of the work is exhausted. The copy now before us is from the *sixth* edition, five editions of the work having already been disposed of. The necessity for text books upon special subjects has long been acknowledged; the increase of business in the old courts, and the constant creation of new courts, with the attendant results of innumerable decisions and multiplicity of reports, rendering it absolutely impossible for the general practitioner to keep himself posted in the law, except by means of late text books, prepared by persons familiar with the decisions upon particular branches. Hence works like the one we are speaking of must be published. Mr. John W. Smith in England has done for the British bar, what Mr. Taylor has for the American, produced a book which is the leading authority upon the subject, and while we would recommend to the profession the reading of Mr. Smith's valuable work yet our partiality for publications by American authors leads us to prefer Mr. Taylor's work. Of course the law of landlord and tenant, is regulated in great measure by the various local statutes, and a text book which aims to give the general principles of that law applicable to all parts of the United States, must necessarily fail in some degree, by reason of the great diversity of regulations and practice in the different States. However, the work in question is useful anywhere, and especially to a student. As regards the mechanical execution of the work the names of its publishers are a sufficient guarantee in this regard.

THE SOUTHERN LAW REVIEW. Volume II., Frank T. Reid, editor. Nashville, printed by Roberts & Purvis, 1873.—8vo., pp. xxvi., 740. Received from the Editor.

We have several times noticed the Review, as it appeared in quarterly numbers. We commend the enterprise which has induced Mr. Reid and the publishers to issue a law magazine so creditable to their section of country, and hope that the Review will have a long and prosperous existence. We believe it is the only law periodical, (saving the St. Louis Journal of Law), which is published anywhere in the South and as such it demands a little extra attention, by reason of the position which it seems to occupy. Among the contributors to its columns, are W. F. Cooper, R. McPhail Smith, E. H. East, W. J. Hicks, Edmund S. Mallory, and R. Hutchinson of Tennessee, Henry B. Tompkins, of Georgia, J. W. Brockenbrough and John W. Daniel, of Virginia, Jas. Wyatt Oates, of Alabama, and Wm. H. Jack, of Louisiana. The articles furnished by them are generally well written, and contain much valuable information upon the topics treated of. The digests of recent English and American decisions, the selection of cases in the Tennessee and other State courts and the book notices, which we presume are all the work of the editor, Mr. Reid, are fairly done, credit able alike to himself and the magazine which he edits. We do not like the feature of publishing the chart of a Collection Union, with each number, as it makes the Review look too much like an advertising medium, but perhaps it may be discontinued in the future. Altogether we think the Review an excellant institution, and we thank the editor, for sending us a bound copy of the second volume.

Fifty-fifth Annual Report of the Trustees of the New York State Library, Albany, 1873; The Trial, Confessions and Conviction of Jesse and Stephen Boone, for the murder of Russell Colvin, and the return of the man supposed to have been murdered; by Hon. Leonard Sargeant, Ex-Lieutenant Governor of Vt., 8vo., paper, pp. 48, Manchester, Vt. Journal Office, 1873.

We have also received the following, which we will notice at length in our next issue: Story on the Constitution, *fourth* edition, 2 vols., Little, Brown & Co., Boston; Rawle on Covenants for Title, *fourth* edition, same publishers; Angell and Ames on Corporations. *Ninth* edition, same publishers; Vol. 15 Wallace's U. S. Supreme Court Reports, W. H. & O. H. Morrison, Washington, D. C.; Montesquieu's Spirit of Laws, new edition, 2 vols., Robert Clark & Co., Cincinnati; Taylor's Medical Jurisprudence, 7th American edition, By Dr. John J. Reese, Henry C. Lea, Philadelphia; New York Revised Statutes, Part III.; and sundry pamphlets, reports of cases, advance sheets, &c.

Recent Decisions.

United States Supreme Court.

[Abstract of cases recently decided in the Supreme Court of the United States, and to appear in 16th Wallace.]

ABSENCE.

Under a code which enacts (as does the code of Iowa), that in case of the "absence" of the county judge the county clerk shall supply his place, the said judge is not, when, owing to his absence from the State the county clerk is acting as county judge in the county—holding a term of the county court there, issuing county warrants, and doing other business, in the county, in discharge of his duties as acting county judge—so wholly superseded in his office as that he may not, when beyond the limits of the county, do certain ministerial acts, as *ex. gr.*, execute and issue bonds, whose purpose is to advance the concerns of the county; and for that purpose buy, at the place where he is, a new county seal; the code having authorized the county judge to procure one. Lynde v. The County, 6.

ACTION.

Where an incorporated company undertook to work in the streets of a city, agreeing that it would "protect all persons against damages by reason of excavations made by them in doing it, and *to be responsible for all damages which may occur by reason of the neglect of their employees on the premises;*" *held*, on the company's having let the work out to a sub-contractor, through the negligence of *whose* servants injury accrued to a person passing over a street, that an action lay against the company for damages. Water Company v. Ware, 566.

ADMINISTRATOR DE BONIS NON.

Cannot sue the former administrator or his representatives for a *devastavit*, or for delinquencies in office; nor can he maintain an action on the former administrator's bond for such cause. The former administrator, or his representatives, are liable directly to creditors and next of kin. The administrator *de bonis non* has to do only with the goods of the intestate unadministered. If any such remain in the hands of the discharged administrator or his representatives, in specie, he may sue for them either directly or on the bond. Beall v. New Mexico, 535.

ADMINISTRATOR'S SALE.

A purchaser at judicial sale by an administrator, does not depend upon a return by the administrator making the sale. of what he has done. If the preliminary proceedings are correct, and he has the order of sale and the deed, this is sufficient for him. McNitt v. Turner, 353.

ADMIRALTY.

A statute of a State giving to the next of kin of a person, crossing upon one of its public highways with reasonable care and killed by a common carrier by means of steamboats, an action on the case for damages for the injury caused by the death of such person, does not interfere with the admiralty jurisdiction of the District Courts of the United States, as conferred by the Constitution and the judiciary act of September 24th, 1789; and this is so, even though no such remedy enforceable through the admiralty existed when the said act was passed, or has existed since. Steamboat Company v. Chase, 522.

ATTORNEY AT LAW.

The power of a State to prescribe the qualifications for admission to the bar of its own courts is unaffected by the 14th amendment of the Constitution, and this court cannot inquire into the reasonableness or propriety of the rules it may prescribe. Bradwell v. The State, 130.

Its refusal, therefore, to admit a woman to practice is not a subject for review here. Ib.

BAIL.

The "act of the law" which will discharge bail from an obligation to surrender their prisoner, must be one which renders the performance impossible, and must be a law operative in the State where the obligation was assumed, and obligatory in its effect upon her authorities. Taylor v. Tainter, 367.

The fact that there has been placed in the hands of the bail, by some one not the person arrested nor any one in his behalf, nor so far as the bail knew, with his knowledge, a sum of money equivalent to that for which the bail and himself were bound, has no effect, in a suit against the bail, on the rights of the parties. Ib.

BANKRUPT ACT.

A creditor has reasonable cause to believe his debtor "insolvent" in the sense of the, when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor, as would lead a prudent business man to the conclusion that he, the debtor, is unable to meet his obligations as they mature in the ordinary course of business. Buchanan v. Smith, 277.

A debtor "suffers" or "procures" his property to be seized on execution, when, knowing himself to be insolvent, an admitted creditor who has brought suit against him—and who he knows will, unless he applies for the benefit of the, secure a preference over all other creditors—proceeds in the effort to get a judgment until one has been actually got by the perseverance of him the creditor and the default of him the debtor. Ib.

Such effort by the creditor to get a judgment, and such omission by the debtor to "invoke the protecting shield of the," in favor of all his creditors, is a fraud on the, and invalidates any judgments obtained. Ib.

The fact that the debtor, just before the judgments were recovered, may have made a general assignment which he meant for the benefit of all his creditors equally, does not change the case. Such assignment is a nullity. Ib.

The transfer by a debtor who is insolvent, of his property, or a considerable portion of it, to one creditor as a security for a pre-existing debt, without making any provision for an equal distribution of its proceeds to all his creditors, operates as a preference, and must be taken as *prima facie* evidence that a preference was intended, unless the transferee can show that the debtor was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. Wager et al. v. Hall, 584.

Such a transfer, if made within four months before the filing by the party of a petition in bankruptcy, is void. Ib.

A sale by a retail country merchant, then insolvent, of his entire stock, suddenly, is a sale "not made in the usual and ordinary course" of his business; and, therefore, *prima facie* evidence of fraud, within the 35th section of the bankrupt law. Walbrun v. Babbitt, 577.

This presumption of fraud can be overcome only by proof on the part of the buyer that he pursued in good faith all reasonable means to find out the pecuniary condition of the vendor. Ib.

One purchasing in such a case from a vendee who he knows has used no such means, but on the contrary has bought under other suspicious circumstances, takes with full knowledge of the infirmity of the title. And as against either or both purchasers the assignee in bankruptcy may set the sale aside if made within six months before a decree in bankruptcy, even though a fair money consideration have been paid by each. Ib.

The District Courts, sitting in bankruptcy, have no jurisdiction to proceed by rule to take goods seized, before any act of bankruptcy by the lessees, for rent due by them in Louisiana, under "a writ of provisional seizure"—and then in the hands of the sheriff, and held by him as a pledge for the payment of rent due—out of his hands, and to deliver them to the assignee in bankruptcy to be disposed of under the orders of the bankrupt court; neither the sheriff nor the lessor having been parties to the proceedings in bankruptcy nor served with process to make them such. Marshall v. Knox, 551.

Where, under the 41st section of the bankrupt act of 1867, a trial by jury is had in the District Court in a case of application for involuntary bankruptcy, and exceptions are taken in the ordinary and proper way, to the rulings of the court on the subject of evidence and to its charge to the jury, a writ of error lies from the Circuit Court when the debt or damages claimed amount to more than $500; and if that court dismiss or declines to hear the matter, a mandamus will lie to compel it to proceed to final judgment. Insurance Company v. Comstock, 258.

Where the goods of a tenant, seized by a landlord for rent, before any act of bankruptcy, have been taken out of his hands and given to the assignee in bankruptcy, by an order of the District Court acting summarily and without jurisdiction, and sold by such assignee, the Circuit Court, having got possession of the case by bill filed by the lessor, to be regarded as one in an original proceeding, will proceed and decide the whole controversy. Marshall v. Knox, 551.

And where the seizure for rent has been made under a statute like that prevailing in Louisiana, and where the landlord's lien is a perfected one, in the nature of a pledge or execution, it will give the lessor the full value of the goods sold clear of all expenses, whether the assignee obtained that value or not (limited, of course, by the amount of rent which he is entitled to have paid to him), and also to all the taxable costs to which he has been put by the litigation. Damages may be more appropriately claimed at law. Ib.

BOND.

A bond regular on its face cannot be avoided even by sureties (the obligee not having had knowledge thereof) by the fact that they signed it on a condition that other persons were to execute it who did not execute it. Dair v. United States, 1.

BONUS.

A *bonus* is not a gift or gratuity, but a sum paid for services upon a consideration in addition to or in excess of that which would ordinarily be given. Kennicott v. The Supervisors, 453.

CHARTER.

An amendment to a charter treated as part of the charter, in a subsequent statute giving certain privileges "granted by the charter." Humphrey v. Pegues, 244.

COLLISION.

A steamer condemned for not changing her course when meeting a sailing vessel. The Commerce, 33.

A steamer condemned also for an accident while taking a tow around a dangerous point with a too long hawser. The Cayuga, 177.

Though a sailing vessel having the wind is *prima facie* bound to adopt such a course as will prevent collision with other sailing vessels not having it, it is still the duty of these last in an emergency to make their courses so as not to render it difficult for the vessel having the wind to do her duty by rendering it doubtful what movement she should make. The Mary Eveline, 384.

COMMERCIAL BROKERS

Who act *wholly* as buyers, not liable under the internal revenue act of July 13th, 1866, to the tax of one-twentieth of one per cent. on the amount of "sales" made by commercial brokers. The Collector v. Doswell & Co., 156.

COMMON CARRIERS.

When goods are delivered to a common carrier to be transported over his railroad to his depot in a place named, and there to be delivered to a second line of conveyance for transportation further on, the common law liability of common carriers remains on the first carrier until he has delivered the goods for transportation to the next one. His obligation, while the goods are in his depot, does not become that of a warehouseman. Railroad Company v. Manufacturing Company, 318.

Although a common carrier may limit his common law liability by special contract assented to by the consignor of the goods, an unsigned general notice printed on the back of a receipt does not amount to such a contract, though the receipt with such notice on it may have been taken by the consignor without dissent. Ib.

The court expresses itself against any further relaxation of the common law liability of common carriers. Ib.

CONFLICT OF JURISDICTION.

A Circuit Court, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States. Davis v. Gray, 208.

Where a ship, then at sea, registered in one State (Massachusetts), her owner's place of residence, was on his becoming insolvent passed under statutory law, by an act of the insolvent court of that State to his assignee in insolvency, and on arriving from sea entered the port of another State (New York), where she was immediately attached by one of the owner's creditors in that State, *held* that the ship while at sea was to be considered as a portion of the territory of Massachusetts, and that the assignee in insolvency under its laws had the prior right, Crapo v. Kelly, 610.

A State statute giving to a person's next of kin a right to sue the owners of a steamboat for the injury done them by killing their relation on the public highways of the State (the same being navigable waters of the United States), does not conflict with the admiralty jurisdiction as conferred on the Federal courts by the constitution and the judiciary act. Steamboat Company v. Chase, 522.

CONSTITUTIONAL LAW.

A license tax by a city of one State, of a business carried on within the city, of an express company chartered by another State, which business so licensed included

the making of contracts within the first named State for transportation beyond its limits, is not a tax on interstate commerce, and is constitutional. Osborne v. Mobile, 479.

The thirteenth amendment to the Constitution, and the first clause of the fourteenth amendment, explained and construed, and *held* not to forbid the grant by a State Legislature of an exclusive right of a power to have and maintain slaughter houses within a considerable district, including a large Southern city, for a limited time, the same being under proper regulations and obligations prescribed, the grant being one of a character, as the court considered, necessary and proper to effect a purpose which had in view the public good. The Slaughter House Cases, 36; see also Bradwell v. The State, 130.

An exemption from taxation granted by one legislative act to a railroad company, as an inducement to it to build its road, cannot by a subsequent one be taken away. Humphrey v. Pegues, 244.

The laws which exist at the time of the making of a contract, and in the place where it is made and to be performed, enter into and make part of it. This embraces those laws alike which affect its validity, construction, discharge and enforcement. The remedy or means of enforcing a contract is a part of that "obligation" of a contract which the Constitution protects against being impaired by any law passed by a State. And so, if a contract when made was valid under the constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the Legislature or the judiciary will be regarded by this court as establishing its invalidity. Walker v. Whitehead, 314; Olcott v. The Supervisors, 678.

The statute of February 15th, 1855, of West Virginia (Acts of 1855, p. 20), by which persons having at that time a right to have cases in attachment reheard under particular circumstances, were deprived, for past misconduct and without judicial trial, of such right, was unconstitutional and void. Pierce v. Carskadon, 234.

Construction, Rules of.

An act of Legislature authorizing a municipal corporation to lend its credit to a railroad company specified, and to "*any other railroad company duly incorporated and organized* for the purpose of constructing railroads," leading in a direction named, "and which in the opinion of Common Council are entitled to such aid from the city," authorizes the lending of the city credit to a railroad company *thereafter* duly incorporated and organized, as well as the lending of such credit to those in existence when the act was passed. James v. Milwaukee, 159.

Deposit.

The rule that where *money* has been deposited with a bank, the bank where the deposit is made becomes the owner of the money and consequently a debtor for the amount, and under obligation to pay on demand, not the identical money received, but a sum equal in legal value, does not apply where the thing deposited is not *money*, but a commodity, such as "Confederate notes," and it was agreed that the collections should be made in like notes. Planter's Bank v. Union Bank, 483.

Enrolment of Vessels.

A temporary enrolment, from year to year, in the port of one State, does so affect the permanent registry of a vessel in the port of another State in which the vessel belongs and has her home, as to subject her to taxation in ports away from the latter State. Morgan v. Parham, 472.

Equity.

Affirmative relief will not be granted in equity upon the ground of fraud unless it be made a distinct allegation in the bill. Voorhees v. Bonesteel and Wife, 16.

Nor will a trust alleged in a bill to exist, be considered as proved when every material allegation of the bill in that behalf is distinctly denied in the answer; and the proofs, instead of being sufficient to overcome the answer, afford satisfactory grounds for holding that there was no trust in the case. Ib.

An "agreement of record," though not made part of the record by the pleadings, received as evidence; the suit being one in equity and not at law. Burke v. Smith, 390.

In a bill to foreclose a mortgage given to secure negotiable railroad bonds, the bonds having been transferred to a *bona fide* holder for value, no further defences are allowed as against the mortgage than would be allowed were the action brought in a court of law on the bonds. Carpenter v. Longan, 271; Kennicott v. The Supervisors, 452.

Error.

A. brought suit on a policy on vessel and freight, for a total loss. The jury found the whole amount insured *with interest* and $5,000 besides for damages, and judgment was entered accordingly. *Held*, that the party could not recover damages beyond legal interest, and that there was error on the face of the record. Insurance Company v. Piaggio, 378.

Under the "act to further the administration of justice," of June 1st, 1872 (17 Stat. at Large, 197), a *venire de novo* is not required for such error, and the court can reverse the judgment and modify it by disallowing the $5,000, and remanding the case with directions to enter judgment for the residue found by the jury with interest; the case being one where all the facts were apparent in the record. Ib.

It is not error to charge that a party assured has no right to abandon, when the insurers have accepted the abandonment. Ib.

Nor to refuse to charge that an abandonment made through error, and so accepted, is void if not warranted by the policy, when no evidence had been given of error by either side. Ib.

A judgment will not be reversed for want of a charge requested when the record contains no sufficient information that the charge requested was material to the issues. Ib.

Nor because the court charges in a way which, though right in the abstract, may not be so in application when the record does not show that sufficient evidence had not been given to warrant the jury in passing on the question. Ib.

Where on an information in which the party proceeded against was entitled to a trial by jury, his answer has been stricken out, the judgment will be reversed, and the cause remanded with directions to permit the claimants to answer, and to award a *venire*. Garnharts v. United States, 162.

When on the undisputed parts of a case a verdict is clearly right, an appellate court will not reverse, because on some disputed points the charge may have been technically inaccurate. Walbrun v. Babbitt, 577.

Evidence.

Notices required by statute presumed to have been given by a probate judge, he having made a conveyance of land which could have been properly made only after such notices given. Cofield v. McClelland, 331.

Where improper evidence has been suffered by the court to get before the jury, it is afterwards, properly, withdrawn from them. Specht v. Howard, 564.

On a suit by the indorsee of a negotiable note which has no place of payment specified in it, against the indorser who relied on a confessedly defective demand on the maker, of payment; that is to say, on a fruitless effort at demand, in the place where the note was dated, but in which place the maker did not live, parol evidence that at the time when the note was drawn, it was agreed between the maker and the indorsee that it should be made payable in the place where the effort to demand payment had been made, and that this place of payment had been omitted by the mistake of the draughtsman—being evidence to vary or qualify the absolute terms of the written contract—would be improperly let in to the jury, and, if let in, would be properly withdrawn. Ib.

Fourteenth Amendment, The.

History, purpose, extent, and effect of, stated. Slaughter House Cases, 36.

Insolvent.

Meaning of the term in the Bankrupt Law. Buchannan v. Smith, 277.

Internal Revenue.

The court in the absence of a clear, common conviction on the part of its members, as to meaning of a clause in a statute relating to the, adopted what was shown to have been the unvarying practical construction given to it by the commissioner of. Peabody v. Stark, 240.

Held accordingly, that under the 80 per cent. clause, in the 20th section of the act of July, 20th, 1868, the distiller is not liable until a survey in which the tax is assessed has been delivered to him, as provided in the 10th section. Ib.

Judicial Comity.

When in a case of collision between a steamer and a sailing vessel, the District and Circuit Court both condemning the steamer, agree in their estimate of the value of the sailing vessel, this court will not set aside their estimate without satisfactory evidence that they were mistaken. The Commerce, 33.

How far the Federal courts will follow, as of obligation, the decisions of the State courts. Alcott v. The Supervisors, 678.

NOTICE IS HEREBY GIVEN THAT AN APPLICATION will be made at the next meeting of the General Assembly of the Commonwealth of Pennsylvania for the incorporation of a Bank, in accordance with the laws of the Commonwealth, to be entitled THE AMERICAN EXCHANGE BANK, to be located at Philadelphia, with a capital of one hundred thousand dollars, with the right to increase the same to three million dollars. Jul 4-6m

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EASTERN DISTRICT.

United States Circuit Court.

ISAAC S. EASTBURN AND HENRY HAINES v. ELIZABETH YARDLEY, EXECUTRIX, et al.

1. An execution creditor having levied upon the personal property of the debtor, by virtue of a fi. fa. issued on a judgment entered more than six months before the levy, and before a petition in bankruptcy is filed, can, upon the debtor filing his petition in bankruptcy, be restrained by injunction on a joint bill in equity of the bankrupt, and a creditor in the Circuit Court of the United States, from selling the personal property of the bankrupt previously levied upon, until an assignee in bankruptcy be chosen or appointed, the lien of the levy remaining.
2. Where an execution creditor has a two fold security on real estate, as well as personal property. An injunction will be issued to prevent a sacrifice by sale of the personal property of bankrupt, at least until an assignee in bankruptcy can be chosen or appointed, or for a sufficient time to enable the unsecured creditors to raise money to pay off or take an assignment of the judgment of the execution creditor, although the judgment was entered more than six months before the fi. fa. issued, and the petition in bankruptcy filed after levy made.

In this case Elizabeth Yardley, executrix of the last will and testament of Mahlon Yardley, deceased. Issued a fi. fa. out of the Court of Common Pleas of Bucks county, and levied upon the real and personal property of Isaac S. Eastburn, her debtor, a levy was made thereon by John M. Purdy, Esq., high sheriff of the county of Bucks, and bills put up November 15th, 1873, advertising the personal property for sale on the 22d day of November, 1873. On the 17th day of November, 1873, the said Isaac S. Eastburn, filed his petition in bankruptcy in the District Court of the United States for the Eastern District of Pennsylvania, and afterwards on the 20th day of November, 1873, a joint bill in equity was filed in the Circuit Court of the United States for the Eastern District of Pennsylvania, by Isaac S. Eastburn, the then bankrupt, and Henry Haines an unsecured creditor, to the amount of $3000, praying (inter alia) that an injunction be issued to enjoin and restrain the execution creditor and sheriff from proceeding to sell the personal property of bankrupt, in order to prevent a sacrifice of the same, until an assignee in bankruptcy be chosen or appointed. November 21st, 1873, the case came on to be heard, and after hearing, injunction was granted.

Opinion by CADWALADER, J. Delivered November 21st, 1873.

The court as at present advised, does not see sufficient cause to order a temporary injunction except as to the personal effects levied upon. Nor as to those effects for any reason that should prevent them from being ultimately liable to the execution. But for as much as the execution creditor may have a two-fold security on real estate, as well as on the said personal effects, and the creditors in bankruptcy only a single security, to wit: on these effects, a brief period ought therefore to be allowed said creditors to pay the execution creditor and obtain a transfer of her judgment and execution, or to enable them to obtain such other equitable relief as may not impair her rights. Therefore the defendant Elizabeth Yardly, execution creditor, as aforesaid, is restrained until further direction from proceeding under the said execution as to the said personal effects, so, however, as not to impair any security under the levy thereon, which is to stand and avail her against the assignee and estate in bankruptcy as if this order had not been made.

Abram H. Jones, Esq., solicitor for complainants.

George Lear, Esq., solicitor for execution creditor and sheriff.

Court of Common Pleas.

EDDY et al. v. THE BOARD OF HEALTH.

The board of health of Philadelphia is not authorized to remove citizens from their houses, or close their houses up, except in cases of pestilence or contagious disease.

Motion to continue special injunction.

Opinion by PEIRCE, J. Delivered November 22d, 1873.

The plaintiff, Eddy, is the owner, and the other plaintiffs are tenants of the properties Nos. 629 and 631 Bainbridge street, in the city of Philadelphia. The board of health appointed a sanitary committee to inspect the district in which these properties are situate, who reported respecting these properties that the yards were to be cleansed, cellars cleaned, disinfected and closed; also, shanty or frame building in the rear to be thoroughly cleansed, vacated and closed. The board of health, therefore, gave notice to the tenants to remove therefrom or they would be forcibly ejected, and they ordered the said houses and premises to be at once closed. The power of the board of health to abate nuisances and the causes of them, and to enforce sanitary regulations, is very great, and the courts never interfere with the legitimate exercise of their power; but, on the contrary, excuse an exercise of the power in cases where there is great peril to the public health, even when the city of Philadelphia is responsible for damages for the unlawful exercise of their power, as is shown in the recent case of Gwinner v. The City of Philadelphia, vol. 5, page 332, Legal Gazette. But the exercise of a power which is clearly unlawful, and which has no great public necessity to excuse it, will be restrained by the courts, no matter how praiseworthy the motives may be which prompted it. The board of health, in view of the possible approach of cholera to our city last summer, took active and praiseworthy measures to guard the city against pestilence, and so far as relates to the lawful measures adopted by them for the removal of nuisances and all causes of disease, they have the hearty approval of all our citizens. When, however, they claim to remove citizens from their houses, and close up their houses, they must have either the sanction of law for it, or they must be justified by great public necessity, which demands such action, because there is no other way to avert the threatened peril—upon the same principle that buildings may be blown up to prevent the spread of a great conflagration.

This leads me to inquire into the law which would justify such action by the board of health. The powers conferred upon the board of health are statutory, and are to be found in the several acts of Assembly conferring those powers upon them. The constitutions of the United States and the State of Pennsylvania both provide that the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and that no warrant to search any place, or to seize any person or thing, shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation. The cases in which the board of health may enter private dwellings and remove persons therefrom, or close them up, are confined exclusively to cases of pestilence or contagious disease, by virtue of the 15th, 22d and 23d sections of the act of 29th January, 1818. Their powers to remove nuisances are also well defined, and before they can enter upon occupied or enclosed property to search for nuisances they must obtain a warrant in the manner prescribed by the 27th section of the act of 1818. Kennedy v. Board of Health, 2 Barr, 366; Baugh v. Sheriff, 7 Philadelphia, 82; and then if the owners or occupiers of the premises, on due notice, shall refuse or neglect to remove the nuisances, the board of health shall remove them and charge the expense to the owner of the property. In the cases of the bone-boiling establishments in certain wards of the city, the board of health appears to be empowered by the act of 29th March, 1865, to enter the premises without warrant and abate the nuisance. In this case the power of the board of health was limited to the removal of the alleged nuisance, or cause of nuisance, and did not extend to the removal of the plaintiffs from the houses and closing them up, as there was no existence or allegation of existence of a pestilential disease there to warrant them in so doing. The affidavits of the plaintiffs also exhibit that they were doing what the law required them to do, viz.: removing, or had removed, the alleged nuisances from the premises at the time they were required by the board to remove from and close up their houses. The most that the board of health could do in such a case would be to remove or cause to be removed the nuisances complained of. The law looks with too jealous an eye upon the rights of every man to the peaceful possession of his house, his castle, the dwelling place of himself and family; to permit him to be ejected from it, except in a clear case of right. No such right or authority in law has been shown in this case.

The special injunction is continued.

John A. Burton, Esq., for plaintiffs.
Robert N. Willson, Esq., for defendants.

Recent Decisions.

United States Supreme Court.

[Abstract of cases recently decided in the Supreme Court of the United States, and to appear in 16th Wallace.]

I. JURISDICTION. OF U. S. SUPREME COURT.

(*a*) It has jurisdiction—

Under the 25th section of the judiciary act, where, on a suit in one State, between a sheriff of that State and an assignee in insolvency appointed by the court of another State, to determine whether the sheriff acting for an attaching creditor or the assignee, has the prior right to certain personal property attached, the higest court of the State where the suit was brought decides that the right was with the sheriff. Crapo v. Kelly, 610.

(*b*) It has not jurisdiction—

Of an appeal on a libel *in personam* for a collision by the owners of a schooner against the owners of a sloop that had been sunk in the collision; where the decree was for but $1,292.84, and, therefore, "not exceeding the sum or value of $2,000." And this, although prior to the libel *in personam*, the owners of the sloop had filed in another district, a libel *in rem* against the schooner, laying their damages at $4,781.84, and that in the District and Circuit Courts below, both cases might have been heard as one; the cases never having, however, been brought into the same district or circuit, nor in any manner consolidated. Merrill v. Petty, 338.

Nor under the 25th section of the judiciary act, of a case where neither the record nor the opinion of the Supreme Court, which was in the record, shows any question before that court, except one re-

lating to the interruption of a "prescription" (statute of limitations) set up as a defence, and the opinion shows that this question was decided exclusively upon the principles of the jurisprudence of the State. Marquese v. Bloom, 351.

Nor under that section, nor under the 2d section of the act of February 5th, 1867, amendatory of it, of a case dismissed by a State court for want of jurisdiction in such court. Smith v. Adsit, 185.

II. Of U. S. Circuit Courts.

Where a proceeding in a State court is merely incidental and auxiliary to an original action there—a graft upon it, and not an independent and separate litigation—it cannot be removed into the Federal courts under the act of 2d of March, 1867, authorizing under certain conditions the transfer of "suits" originating in the State courts. Bank v. Turnbull & Co., 190.

The Circuit Court may, under the second section of the Bankrupt Act, entertain on bill, as an original proceeding, a case involving a question of adverse interest in goods seized by the sheriff before any act of bankruptcy by the tenant, for rent due and held by him, the sheriff, as a pledge for the payment thereof, and claimed, on the other hand, by the assignees in bankruptcy of the tenant. Marshall v. Knox, 551.

Laches.

A court of equity will, apparently, not be moved to set aside a fraudulent transaction at the suit of one who has been quiescent during a term longer than that fixed by the statute of limitation, after he had knowledge of the fraud, or after he was put on inquiry with the means of knowledge accessible to him. Burke v. Smith, 401.

Landlord and Tenant.

Under the Civil Code of Louisiana, a lessor has a right to seize, for rent in arrears, goods on the premises, and until he is paid his rent, retain them as against an assignee in bankruptcy subsequently occurring. Marshall v. Knox, 552.

Legislative Act.

Though of a general sort, repealable by another though special. Railroad Co. v. County of Otoe, 667.

Life Insurance.

Walking, for a certain distance at the end of a journey, *held*, not to be traveling by either public or *private conveyance*, within the meaning of an accident policy of insurance on life while "traveling by public or private conveyance." Ripley v. Insurance Co., 336.

Married Woman.

Under the laws of New York, may manage her separate property, through the agency of her husband, without subjecting it to the claims of his creditors; and when he has no interest in the business, the application of a portion of the income to his support will not impair her title to the property. Voorhees v. Bonesteel and Wife, 16.

Monopoly.

What does and what does not constitute. The whole matter largely considered, and an exclusive grant by the State to a corporation created by it, to have and maintain slaughter houses within a considerable district, including a large Southern city, for a limited time, and under limitations as to price, and under obligations to provide ample conveniences for all persons, and with permission to all owners of stock to land, and of all butchers to kill their animals at those slaughter houses, *held*, not to be one, nor to be forbidden by the thirteenth amendment to the Constitution, nor the first section of the fourteenth, but to be a police regulation within the powers of the State; as well since the adoption of the said thirteenth and fourteenth amendments of the Constitution as before. The Slaughter House Cases, 36.

Mortgage.

When held as security for the payment of negotiable paper, is not open as against *bona fide* holders of the paper for value, to defences to which the notes in their hands would not equally be open. Carpenter v. Longan, 271; Kennicott v. The Supervisors, 452.

Municipal Bonds.

The question whether a county shall borrow money for a particular purpose, and which question a statute required should be submitted to the voters of the county before the bonds of the county were issued, may be submitted by implication, as well as directly. Lynde v. The County, 6.

A submission implied in favor of *bona fide* holders of the instrument. Ib.

A power to issue county bonds carries with it a power to make them payable out of the State where the county is, and to sell them also out of the State. Ib.

As also to cancel bonds previously given to a contractor with the county, but not yet put by him on the market, and to issue new ones in a different form. Ib.

Unless restrained by a constitutional prohibition, the Legislature of a State may authorize a county to aid, by issuing its bonds and giving them as a donation, the construction of a road outside the county, and even outside the State, if the purpose of the road be to give to the county a connection with some other region which is desirable. Railroad Co. v. County of Otoe, 667.

Negotiable Paper.

The assignment of before maturity, raises the presumption of a want of notice of any defence to it; and this presumption stands till it is overcome by sufficient proof. Carpenter v. Longan, 271.

When a mortgage given at the same time with the execution of, and to secure payment of, is subsequently, but before the maturity of the paper, transferred *bona fide* for value, with it, the holder of the paper when obliged to resort to the mortgagee is unaffected by any equities arising between the mortgagor and mortgagee subsequently to the transfer, and of which he, the assignee, had no notice at the time it was made. He takes the mortgage as he did the paper. Ib.; and see Kennicott v. The Supervisors, 452.

Nudum Pactum.

A promise to pay in "Confederate notes" in consideration of the receipt of such notes and of drafts payable by them, is neither a *nudum pactum* nor an illegal contract. Planters' Bank v. Union Bank, 483.

Parties.

Where a State is concerned, it should be made a party if it can be so made. If it cannot be, the case may proceed to a decree against its officers. Davis v. Gray, 203.

Making an officer of the State a party does not make the State a party, though a law of the State may prompt the officer's action, and stand behind him as the real party in interest. To make a State a party the bill must be shaped with that view. Ib.

Where a minority of stockholders and bondholders of a railroad company seek to set aside as fraudulent, a sale made through the co-operation of the residue of the stockholders and bondholders with the trustees of a mortgage on the road, and an amicable foreclosure, a bill by the minority to set the sale aside as collusive, must make not only the purchaser a party but also the consenting stockholders and bondholders. Ripon v. Railroad Company, 446.

Patents, Assignments of, &c.

A patentee of certain machines, whose original patent had still between six and seven years to run, conveyed to another person the "right to make and use and to license to others the right to make and use four of the machines" in two States "during the remainder of the original term of the letters patent, *provided*, that the said grantee shall not in any way or form dispose of, sell, or grant any license to use the said machines *beyond* the said term." The patent having, towards the expiration of the original term, been extended for seven years, *held*, that an injunction by a grantee of the extended term would lay to restrain the use of the four machines, they being in use after the term of the original patent had expired. Mitchell v. Hawley, 544.

Practice, in U. S. Supreme Court.

This court cannot review a judgment given in the Circuit Court where, under the act of March 3d, 1865, that court has meant to act in the place of the jury, unless such court makes a special finding; that is to say, unless it states the ultimate facts of the case—*i. e.*, the facts which it finds that the evidence has proved — in some way having the form of a special verdict. Dickenson v. The Planters' Bank, 250.

When on the undisputed parts of a case a verdict is clearly right, so that if a new *venire* were awarded the same verdict would have to be given, a court will not reverse because on some disputed points a charge may have been technically inaccurate. Walbrun v. Babbitt, 577.

A principal suit having been decided in one way, a proceeding by way of intervention, and involving the same question, of necessity follows it. Tweed's Case, 505.

Where a subordinate court, which had no jurisdiction in the case, has given judgment for the plaintiff or defendant, or improperly decreed affirmative relief to a claimant, an appellate court must reverse. It is not enough to dismiss the suit. United States, Lyon et al. v. Huckabee, 414.

Where after judgment for a certain sum a *remittitur* is entered as to part, the *remittitur* does not bind the party making it, if the judgment be vacated and set aside. Planters' Bank v. Union Bank, 483.

Where after judgment for a certain sum, execution is allowed, during a motion for a new trial, to issue for a part of the sum, which part is admitted to be due, this, though anomalous, is not a ground for reversal, where no objection appears to have been made, and where it may fairly be presumed that the defendant assented to what was done; and where a new trial being afterwards granted, it was limited to a trial as to the excess of the claim above the amount for which the execution was issued. Ib.

Presumptions.

Notices required by statute will be presumed to have been given by a probate judge, he having made a conveyance of land which could have been properly made only after such notices given. Cofield v. McClelland, 331.

Where a statute enacted that "in all cases where an intestate shall have been a non-resident, &c., but having property in the State, administration should be granted to the *public administrator* of the proper county, and to no one else." *Held*, that where a person to whom letters of administration on the estate of a non-resident applied, under the statute, to have a sale of his property, and the court, having jurisdiction of the subject, ordered the sale, it is not to be presumed that he was not the *public* administrator. McNitt v. Turner, 352.

Where jurisdiction has attached, whatever errors may occur subsequently in its exercise, the proceeding being *coram judice*, cannot be impeached collaterally except for fraud. Ib.

Where, on an information for breach of the internal revenue laws, the record shows that an answer of a claimant was striken out by the court, in a case in which he was entitled to a trial by jury, and judgment rendered against him as upon default, this court will not presume that the order was passed for good cause, unless enough is shown in the record to warrant such a conclusion. Garnhart v. United States, 162.

Public Lands.

The principle that lands sold by the United States may be taxed before the government has parted with the legal title by issuing a patent, is to be understood as applicable only to cases where the *right* to the patent is complete, and the equitable title fully vested without anything more to be paid or any act done going to the foundation of the right. Railway Company v. Prescott, 603.

Public Law.

On a question of conflict of jurisdiction between the courts of two States, a ship on the high seas is to be considered as part of the territory of the State where she is registered, and where her owners reside. Crapo v. Kelly, 610.

Public Policy.

Where an illegal contract has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which was the price of

it, as *ex. gr.*, "Confederate bonds," may be a legal consideration between the parties for a promise express or implied, and the court will not unravel the transaction to discover its origin. Planters' Bank v. Union Bank, 483.

RAILWAYS

Are public highways, and though undertaken by private corporations may, in certain cases, properly be aided by money raised by taxation, and given as a donation to assist the building of the road. Olcott v. The Supervisors, 678.

RECEIVERS IN CHANCERY.

The effect of these reports when affirmed by the court considered, and the doctrine declared that though they may have acted improperly and have deceived the court, yet when the rights of innocent third parties have intervened an injured party cannot vacate what has been done, but must seek his remedy against the receiver personally, or on his official bond. Koontz v. Northern Bank, 196.

Their office and duties stated, and a liberal interpretation given to them in aid of modern chancery jurisdiction. Davis v. Gray, 203.

RES JUDICATA.

Where in ejectment a special verdict has been found and judgment entered on it in the court below for the plaintiff, which judgment, in an appellate court, is set aside with directions to enter judgment for the defendant, the special verdict can not, on the plaintiff's bringing a second ejectment upon a subsequently acquired title, be used to establish a fact found in it, as *ex. gr.*, the heirship of one of the parties under whom the plaintiff claimed. Smith v. McCool, 560.

SERVITUDE INVOLUNTARY.

Meaning of the term as used in the 13th amendment defined. Slaughter House Cases, 36.

SHIPS.

Are subjects, for the purposes of taxation, to the laws of the port where the vessel is regularly registered and belongs. The temporary enrolment of a vessel as a coaster in the port of another State does not give a right to such other State to tax her. Morgan v. Parham, 471.

TAXATION OF SHIPS.

The State in which is the home port of a vessel, that is to say, the port where she is regularly registered and nearest to which her owner, husband, or acting and managing owner usually resides, is the State which has dominion over her for the purposes of taxation. Morgan v. Parham, 471.

TRIAL BY JURY.

Presumptions as to the regularity of proceedings not indulged to deprive a person of. Garnharts v. United States, 162.

PENNSYLVANIA.

[Head notes of cases in the Supreme Court of Pennsylvania, to appear in Vol. 71 Pennsylvania State Reports. Received from P. F. Smith, Esq., State Reporter.]

BROSS V. THE COMMONWEALTH.

1. The act of December 9th, 1783, does not authorize an appeal from an order of the Quarter Sessions, refusing to moderate or remit a forfeited recognizance.

2. An appeal is given only when the proceedings on a forfeited recognizance are in the Common Pleas.

3. A certiorari not specially allowed by one of the justices of the Supreme Court, under the 33d sect. of act of March 31st, 1860, will not remove an indictment, &c., in the Quarter Sessions.

4. Commonwealth v. Rhoads, 9 Barr, 488, criticised.

March 15th, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Certiorari to the Court of Quarter Sessions of Susquehanna county: No. 334, to January Term, 1872, sur appeal from order of forfeiture of recognizance.

UEBERROTH V. RIEGEL AND BROTHER.

1. An order was: "Please give the bearer, Henry Fink, the goods which he will select, not exceeding over five hundred and fifty dollars, on my account." *Held*, not to be an agreement or establishing a contract until assent was given for the delivery of the goods, and it did not require a stamp.

2. Goods having been delivered to Fink on the order, the drawer was liable as principal, not as guarantor.

3. That the goods were charged to Fink was evidence that they had been delivered to him primarily on his own responsibility, but not conclusive.

March 18th, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Error to the Court of Common Pleas of Lehigh county: No. 82, to July Term, 1870.

LOWER MACUNGIE TOWNSHIP V. MERKHOFFER.

1. Miners had excavated into the side of a road, making a precipitous bank; no guard was put up; a wagoner in driving along the road broke the bank; his wagon and team fell over and were injured. *Held*, to be negligence by the supervisors for which the township was liable.

2. It was not a defence that the driver by careful driving could have avoided the accident.

3. A highway must be kept in such repair that skittish animals may be employed without risk.

March 18th, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Error to the Court of Common Pleas of Lehigh county: No. 412, to January Term, 1870.

STOPP V. SMITH.

1. In tort the plaintiff cannot, in the verdict for damages, recover compensation for the trouble and expense of establishing his right.

2. In tort only such damages can be recovered as arose out of the injury.

3. Barnett v. Reed, 1 P. F. Smith, 190, remarked on; Good v. Mylin, 8 Barr, 51, adopted.

March 18th, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Error to the Court of Common Pleas of Lehigh county: No. 403, to January Term, 1871.

HARTMAN V. SHAFFER.

1. A promissory note imports a valuable consideration.

2. In a suit on a note, the defence being want of consideration, without evidence to cast suspicion on the transaction, the pecuniary circumstances of the parties are irrelevant, and calculated to mislead.

3. The evidence in this case sufficient to submit to the jury the question of want of consideration of a note.

March 19th, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Error to the Court of Common Pleas of Northampton county: No. 194, to January Term, 1872.

BARRETT'S EXECUTOR'S APPEAL.

1. An assignee for the benefit of creditors, alleging that a judgment of a creditor had been discharged, obtained an issue to determine the fact; all proceedings to stay, &c.; the jury found for the creditor; a motion for a new trial was made and held under advisement till the assignee's account should be settled, which being done it was referred to an auditor. The creditor appeared before him claiming the full amount of his judgment, and insisting on his legal rights. The report of the auditor was referred back to him; the creditor appeared again protesting against evidence being heard against the judgment and claiming its allowance. *Held*, not to be a waiver of his right to have the facts decided in the issue.

2. The creditor was not bound to demand a new issue, one having been decided in his favor.

3. It seems that the assignee was precluded from a hearing before an auditor until the issue had been finally determined, and that the court below could not allow him to withdraw the issue without the consent of the creditor.

March 22d, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Appeal from the decree of the Court of of Common Pleas of Lehigh county: No. 319, to January Term, 1872.

METZGAR AND GERNERT'S APPEAL.

1. Where land is sold subject to purchase money and interest due a third person, it is a covenant by the vendee to pay such purchase money; it need not appear affirmatively that such encumbrance was payable out of the purchase money.

2. A father conveyed land to a son, subject to a widow's dower, and by his will directed that the annual interest should be paid to the widow out of his estate. This did not relieve the land from the payment of the principal.

March 22d, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Appeal from the decree of the Orphans' Court of Lehigh county: No. 323, to January Term, 1872.

WEILER, ASSIGNEE OF SMITH V. COLEMAN et al.

1. Under the act of April 10th, 1862, for the protection of logs on the Susquehanna, evidence that the stamps were those of a plaintiff in replevin, regularly registered, is not essential to prove that the logs were his property.

2. That the plaintiff was engaged in lumbering on a tributary of the west branch of the Susquehanna, that the logs were stamped with his mark, that no other logs had been known to be so stamped, and no other person had ever claimed from the boom company logs so stamped, was presumptive evidence that the logs were his.

March 26th, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Error to the Court of Common Pleas of Lycoming county: No. 288, to January Term, 1871.

THE PENNSYLVANIA RAILROAD CO. V. THE TITUSVILLE AND PITHOLE PLANK ROAD CO.

1. Whatever an agent does or says in making a contract is evidence against the principal, being part of the contract.

2. The admissions of an agent not made at the time of the transaction but subsequently, are not evidence.

3. Plank to construct a plank road was delivered at a station of a railroad, to be transported to another station; the company did not transport it; if liable in damages the measure would be the difference of value of the plank at the first station and the station to which it was to be carried, deducting cost of transportation; provided such lumber could be obtained at the latter station, and that the carrier should compensate for the delay from his failure.

4. The increased expenses of putting down the plank in consequence of the delay is too remote.

5. The measure is compensation. Such damage as might reasonably have been anticipated and been within view of the parties.

6. Plaintiffs contracted for the purchase of plank and employed defendants to deliver it at a certain point, in an action for failure to deliver, evidence was admissible for the defence that portable mills could have been erected, plank manufactured and delivered at the point within the time and at the price plaintiffs were to pay under their contract.

7. It was the duty of the plaintiffs, when they were notified of the inability of the defendants to deliver the lumber, to adopt every feasible means to supply themselves.

8. Hough v. Doyle, 4 Rawle, 291, adopted.

March 26th, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Error to the Court of Common Pleas of Warren county: No. 378, to January Term, 1871.

ARDERY V. ROWLES ET AL.

1. By a parol a vendor agreed to sell 90 acres of land at $3.50 per acre, to begin on one line at a point named, "and go to the creek." *Held*, that the creek was the boundary, whether there would thus be more than ninety acres or not, and the vendor would have to pay for the actual content at $3.50 per acre.

2. Evidence in this case sufficient to establish a sale of land by parol.

March, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Error to the Court of Common Pleas of Clearfield county: No. 14, to January Term, 1871.

(*Continued on page* 386.)

LEGAL GAZETTE.

Friday, November 28, 1873.

JOHN H. CAMPBELL, EDITOR.

"INTIMIDATING THE COURTS."

Several persons have put a construction upon our article of last week upon the new Constitution, that to us is rather surprising. They have mistaken a piece of *sarcasm* for an attempt "to intimidate the judges of our courts." Now, in all seriousness, lest these gentlemen may still labor under a false impression, we would say that we disclaim any such intention. In the first place we believe the judges of our courts have entirely to much good sense to allow themselves for a single moment to be intimidated by newspaper paragraphs, and in the next place we do now, as we have always done, earnestly deprecate any attempt, through the newspapers, or in any other manner whatever, to exercise an improper influence upon the judges. We have thought proper to allude to the subject in order that our motives might not be misconstrued.

We understand also that the city solicitor indignantly denies any intention on his part "to raise a conflict of jurisdiction between election officers," and states that his recent letter was merely indited in response to a request from the city commissioners for legal advice. As we do not wish to impugn any gentleman's motives, (we certainly did not intend to do so,) we hasten therefore to make the *amende honorable* to that gentleman.

CONSTITUTIONAL CONVENTION OF PENNSYLVANIA.

EXECUTIVE COMMITTEE ROOMS,
PHILADELPHIA, November, 18, 1873.

TO THE PEOPLE OF PENNSYLVANIA:

The convention assembled by your direction to reform the constitution of the State have finished the work which you gave them to do. In submitting it for your approval we invoke your careful consideration. That it is without fault we dare not affirm, but that it adds new and valuable securities to the rights of person and of property we confidently assert. The mode by which the members of the convention were elected secured a body of men who had neither the opportunity nor the inclination to mould the instrument in the interests of any party, or of any private interest whatever.

It would be maifestly inappropriate to attempt any detailed analysis of the proposed constitution, but it is proper that its leading features should be briefly indicated. It consists of eighteen articles, viz.: Article I. Bill of Rights. Article II. The Legislature. Article III. Legislation. Article IV. The Executive. Article V. The Judiciary. Article VI. Impeachment and Removal from Office. Article VII. Oaths of Office. Article VIII. Suffrage and Elections. Article IX. Taxation and Finance. Article X. Education. Article XI. Militia. Article XII. Public Officers. Article XIII. New Counties. Article XIV. County Officers. Article XV. Cities and City Charters. Article XVI. Private Corporations. Article XVII. Railroads and Canals. Article XVIII. Future Amendments.

To these is added the schedule, which embraces such temporary provisions as are necessary to regulate the changes which have been made, and to put the new constitution, if adopted, in effective operation. Under these heads are embraced all matters which were thought to be appropriate to constitutional provision. It has carefully avoided matters of detail, except in such particulars as it was supposed either from their great importance or the difficulty attending legislative enactment, might render legislation difficult or insufficient.

The committee desires to call attention to the following important particulars, in which the proposed constitution differs from that now in force.

The General Assembly will consist of fifty (50) senators, and such number of members of the House of Representatives as shall be determined by dividing the population of the State, as ascertained by the most recent United States census, by two hundred; but every county shall have at least one representative. Under this apportionment the House will consist of about two hundred members. This change is accompanied by such provisions as will for the most part avoid legislative apportionments, which experience has shown to be made usually in the interest of the dominant party and sometimes at the sacrifice of fair representation.

The regular sessions of the Legislature will be held only every other year, but the governor may, in an emergency, convene it in special session.

The increased number is not equal to the ratio of representation when the existing constitution was adopted, and was deemed important not only as maintaining a ratio of representation approximating to our increase of population, but because it was believed that an increase of members would render improper influences more difficult, and would ensure a more faithful exercise of legislative functions.

The article on legislation requires that every bill shall be read at length on three different days in each House, and no bill shall become a law unless passed by a majority of the members elected to each House; nor unless on its final passage the vote is taken by yeas and nays and the vote of each member entered on the journal. The Legislature is restrained from passing local or special laws upon a number of specified subjects, which it was thought could be much more appropriately embraced within general laws of uniform operation. Among the subjects upon which special laws are prohibited are: Laws regulating the affairs of counties, cities or townships, or prescribing the duties of their officers; changing the laws of descent or succession; granting divorces; regulating the practice or jurisdiction of courts, aldermen or justices of the peace; to change the methods of collecting debts or the lien of judgments; regulating official fees or remitting fines, penalties and forfeitures, or refunding moneys legally paid into the State treasury, or exempting property from taxation; or erecting corporations or granting special or exclusive privileges or immunities to corporations—all of which were fruitful sources of popular suspicion of legislative corruption, and all of which can be more efficiently and justly provided for by general laws, and some of which are peculiarly within the province of judicial determination, and ought not to be open to the shifting and uncertain action of the Legislature.

The Legislature is also restrained from limiting the amount to be recovered for injuries resulting in death, or for injuries to persons or property; or from exchanging or releasing any corporate obligation held by the State, except by payment of the money into the treasury. No local or special bill can be passed unless notice of the intention to apply therefor shall have been published in the locality where the thing to be affected may be situate, at least thirty days prior to the introduction of such bill, and evidence of such publication shall be exhibited to the Legislature before the act shall be passed.

To insure official fidelity, so far as possible, it is provided that any member of the General Assembly who shall solicit, demand or receive, or consent to receive, directly or indirectly, any money or thing of value or appointment, or personal advantage, or promise thereof, for his vote or official influence; or for witholding the same, shall be held guilty of bribery, and be disqualified from holding any office or position of profit in the State; and the like punishment is provided for any person who shall influence, or attempt to influence, corruptly, any member of the General Assembly.

Some important changes have been made in the executive department. The governor shall hold his office for four years, but shall not be eligible for the next succeeding term; but this provision does not apply to the term of the present governor. A lieutenant governor shall be chosen at the same time and for the same term, who shall be president of the Senate, but shall have no vote unless they be equally divided, and shall exercise the office of governor in the event of the death or disability of that officer.

Executive appointments are to be made by and with the advice and consent of two-thirds of the Senate, who, in confirming or rejecting nominations, shall sit with open doors, and the vote be taken by yeas and nays and be entered on the journal.

The secretary of internal affairs will take the place of the surveyor general after his term expires, and will have charge of the land office; his department will also embrace a bureau of industrial statistics and such duties relating to corporations, to charitable institutions, the agricultural, manufacturing, mining, mineral, timber and other material interests of the State, as may be by law assigned thereto. The duties which will devolve upon this department, will be of great advantage to the State, in presenting such reliable and valuable information of our natural resources and rapid development as will attract to the State both population and capital.

This article also authorizes the governor to veto any one or more items of any bill making appropriations of money, and to approve the rest. This is to correct an abuse of great magnitude and long standing, by which appropriations introduced into the general bill providing for the expenses of the State, and which of themselves could not be sustained, must be approved, or leave the State without appropriation for its support. It is a most valuable provision. This article also prohibits the governor from granting pardons or commutations of sentence, except upon the recommendation in writing of the lieutenant governor, secretary of the commonwealth, attorney general, secretary of internal affairs, or any three of them, after full hearing, upon due public notice, and in open session; and such recommendation with the reasons therefor at length, shall be recorded and filed in the office of the secretary of the commonwealth.

The judiciary article requires the election of all judges, and continues the term of all present judges, until the expiration of their commissions. The number of judges of the Supreme Court is increased to seven, and judges of that court elected under this constitution, will be commissioned for twenty-one years, and are ineligible to re-election. All patronage by appointment or otherwise is taken from them, and no duties can be imposed upon them except such as are judicial.

Each county having a population of 40,000, is constituted a separate judicial district and entitled to elect a judge. The office of associate judge not learned in the law is abolished in counties forming separate districts, but associate judges in office, when this constitution is accepted, serve for their unexpired terms.

The increase of judges under this provision is not large, and the increased expense not great. While some additional duties imposed upon judges will render this provision of great convenience to the people, more especially of sparsely settled districts, it is to be observed that whilst the provision entitles any county having the requisite population to be constituted a separate judicial district, it does not require that there shall be, as has been erroneously stated, a judge for every 40,000 of population.

The Court of Nisi Prius is abolished, and no court of original jurisdiction, to be presided over by any judge of the Supreme Court, can be established. The great inconvenience to which the appellate business of the Supreme Court was subjected by reason of this court is well known, both to counsel and suitors.

To the end that the judicial system of the State should be harmonized, and the law and practice of the courts brought into unison throughout the commonwealth. District Courts have been abolished, and their jurisdiction merged in that of the Courts of Common Pleas; and their judges will become judges of the Courts of Common Pleas.

The Register's Court is abolished as being supernumerary and useless.

In counties wherein the population exceeds 150,000, the General Assembly *shall* and in any other county *may*, establish a separate Orphans' Court, and thereupon the jurisdiction of the Court of Common Pleas in Orphans' Court matters in such county shall cease. The judge of the Orphans' Court, assisted by the register, who will be *ex officio* clerk of such Orphans' Court, shall audit all accounts which require auditing, *without expense to the parties.*

In civil cases, the parties may, by agreement filed, dispense with trial by jury, and submit the case to the decision of the

court, with right to writ in error, as in other cases.

Justices of the peace continue without any material change.

In Philadelphia the office of alderman is abolished, and, in lieu thereof, there shall be established for each 30,000 inhabitants one court, not of record, of police and civil causes, with jurisdiction not exceeding one hundred dollars. The magistrates are to hold office for five years, and to be elected by general ticket by the qualified voters at large. No voter shall vote for more than two-thirds of the number to be elected. They shall be compensated only by fixed salaries to be paid by said county, and all fines, fees, and penalties are to be paid into the county treasury. Under this system it is believed that competent and reliable aldermen, approved by official experience and integrity, will be retained, and only men of approved fitness will be elected, since the mode of election allows large discrimination in choice, which in so large a constituency will be freely exercised.

The sixth article subjects the governor and all other civil officers of the commonwealth to impeachment for misdemeanor in office, and subjects all appointed officers —other than judges of the courts of record and the superintendent of public instruction—to removal, at the pleasure of the power by which they shall have been appointed.

The seventh article requires senators and representatives, and all judicial, State and county officers, to take and subscribe the usual oath to support the constitution and discharge their duties of office with fidelity; and, in addition, that they have not knowingly violated any election laws of the commonwealth, or procured it to be done by others, and that they will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to such office other than the compensation allowed by law; and provides that any one convicted of having sworn or affirmed falsely shall be guilty of perjury and forever disqualified for holding any office of trust or profit within this commonwealth.

The article on suffrage and election provides that the general elections shall be held annually on the Tuesday next following the first Monday of November, but the General Assembly may by law fix a different day, two-thirds of all the members of each House consenting thereto. Elections for city, ward, borough and township officers, will be held on the third Tuesday of February. In elections by the citizens, every ballot voted shall be numbered in the order in which it shall be received, and the number recorded on the list of voters opposite the name of the voter. Soldiers in service may vote under such regulations as may be prescribed by law. All laws regulating elections by the citizens shall be uniform throughout the State. Any person who shall give or promise, or offer to give to any elector, or any elector who shall receive any money or other valuable consideration for his vote, or for withholding his vote, shall forfeit his right to vote at such election, and if challenged for such cause, shall be required to swear or affirm that the matter of the challenge is untrue, before his vote shall be received. Any candidate for office guilty of bribery, fraud or wilful violation of any election law, is disqualified from holding any office of trust or profit in this commonwealth, and to be deprived of the right of suffrage for a term of four years.

The Court of Common Pleas of the several counties shall have power upon petition of five citizens, lawful voters of the district, to appoint two overseers of election to supervise the proceedings of the election officers, and to make report to the court, as may be required.

The trial of contested elections of electors of President and Vice President of the United States, members of the General Assembly, and all public officers, judicial, municipal or local, shall be by the courts, as may be prescribed by general law.

The article on taxation and finance requires that all taxes shall be uniform upon the same class of subjects. All property shall be subject to taxation, but the General Assembly may, by general law, exempt public property used for public purposes actual places of religious worship, places of burial not held for private or corporate profit, and institutions of purely public charity.

Neither the State, nor any county, city, borough or township shall loan their credit or become stockholders in any company, association or corporation.

Municipal debts shall not exceed seven per cent. of the assessed value of its taxable property; but any city, the debt of which now exceeds seven per centum of such assessed valuation, may be authorized by law to increase the same three per centum; in the aggregate at any one time, upon such valuation.

The State sinking fund shall be maintained, and the debt reduced by not less than $250,000 per annum; and the money of the sinking fund shall not be invested or loaned upon the security of anything except the bonds of the United States or of this State.

The making of profit out of public money, or using it for any purpose not authorized by law, shall be a misdemeanor punishable by law—and part of the punishment shall be disqualification to hold office for a period not less than five years.

The tenth article requires the maintenance of an efficient system of public schools and an appropriation of one million of dollars each year for this purpose. It forbids the appropriation of any of the school fund to the support of any sectarian school, and renders women eligible to any office of control of the schools.

The eleventh article provides for the organization of the militia.

The twelfth forbids persons holding offices of profit under the United States from holding office of profit under the State, and disqualifies all persons who shall fight a duel, or send a challenge for that purpose, or be aider or abettor of a duel, from holding any office of honor or profit in this State.

The thirteenth article forbids the erection of any new county which shall reduce any county to less than four hundred square miles, or less than 20,000 inhabitants, or the erection of any county of less area or less population, nor shall any line thereof pass within ten miles of the county seat of any county proposed to be divided.

The fourteenth article provides for the election and qualification of county officers. In counties exceeding 150,000 inhabitants, all county officers shall be paid by fixed salaries, and all fees collected shall be paid into the county treasury. In the election of county commissioners in any county, each elector shall not vote for more than two persons, and the three persons having the highest number of votes shall be elected. This is to secure a representative of the minority party in every board of commissioners.

Under the fifteenth article, cities may be chartered whenever any town or borough of not less than 10,000 population shall vote in favor of it. They shall contract no debt except in pursuance of an appropriation previously made, and they shall create a sinking fund pledged for its payment.

By the article on private corporations, the State may, under its rights of eminent domain, take the property and franchise of incorporated companies and subject them to public use, the same as the property of individuals.

Foreign corporations are required to have a place of business and an authorized agent within the State upon whom process may be served. Corporations are confined expressly to the business authorized by their charters. Assessments of damages shall, on demand of either party, be determined by a jury. All fictitious increase of stock or indebtedness is forbidden.

Any association or corporation organized for the purpose, or any individual shall have the right to construct and maintain lines of telegraph within the State, and connect the same with other lines, subject to regulation by law.

The seventeenth article, on railroads and canals, provides for a free railroad law in the fullest and most explicit manner, and gives to every railroad company the right, with its road, to intersect, connect with, or cross any other railroad, and requires them to transport each the other's passengers, tonnage and cars loaded or empty without delay or discrimination. It requires them to maintain an office in the State, where transfers of stock are to be made, and where books shall be kept for inspection by parties in interest.

All persons shall have equal right of transportation, and no unreasonable discrimination shall be made in charges or in facilities for transportation, and persons and property shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class in the same direction to any more distant station.

Railroad companies are forbidden to consolidate with, or own, or control competing lines, or to engage in any other business than that of common carriers, or to own or acquire lands, except such as shall be necessary for carrying on its business; discriminations in charges by drawbacks or otherwise are forbidden. Free passes, except to officers and employees, shall not be issued.

Street passenger railroads shall not be constructed without the consent of local authorities.

The article on future amendments authorizes amendments to the constitution, when proposed by the act of two successive Legislatures and submitted to and approved by the people, but no amendment shall be submitted oftener than once in five years. When two or more amendments are submitted, they shall be voted upon separately.

The schedule provides that the constitution shall take effect on the first day of January, 1874. The first election for governor shall be in 1875, for a term of three years, and thereafter the term shall be four years. The lieutenant governor shall be elected in 1874, for four years. Provision is also made for the first election of senators and members, for judges and county officers and other matters of detail, but it is not deemed necessary to refer to them specifically.

This review of the proposed constitution gives a brief synopsis of its leading features, but it is not intended to supersede the examination of its full text. We confidently believe that the more carefully it is considered, and its dependent bearings understood, the more it will commend itself to public approval. It is the result of careful and impartial deliberation by the convention upon the true relations of the government to the people, and is submitted with full confidence that if adopted it will correct great abuses, ensure a more perfect system of popular elections, greater fidelity in the discharge of legislative and official duties, save vast sums of money to the treasury, reduce taxation and, by the additional securities it will afford to business investments, will insure to our State both population and capital. With hope and confidence that the new constitution will receive your approval, we submit it to your judgment.

W. H. ARMSTRONG, Chairman.
HARRY WHITE,
CHARLES R. BUCKALEW,
THOMAS HOWARD,
ROBERT A. LAMBERTON,
GEORGE V. LAWRENCE,
JAMES W. M. NEWLIN,
JOHN GIBSON,
JOHN R. READ,
JOHN PRICE WETHERILL,
JAMES P. BARR,
RASSELAS BROWN,
FRANK MANTOR.

Executive Committee of the Convention.

PUBLICATIONS RECEIVED.

THE SPIRIT OF LAWS by M. De Secondat Baronde Montesquieu. Translated from the French, by Thomas Nugent, LL. D. A new edition, carefully revised and compared with the best Paris edition, to which are prefixed a memoir of the life and writings of the author and an analysis of the work by M. D'Alembert. 2 vols., 8vo., cloth, xlvii., 381., xii., 455, Cincinnati. Robert Clarke & Co., Publishers, 1873.

"This is Montesquieu's greatest work. It was the mature fruit of all his previous study, and the result of twenty years' labor. So great was its success that, in eighteen months after its first publication, it passed through twenty-two editions, and was translated into most of the European languages, and has ever since held a prominent place in the philosophy of jurisprudence and politics."

The work is so well known to the legal profession that a discussion of its merits

would be almost superfluous. The interest which it still excites, the continual quotations from it that appear in the works of other writers. The regard which is still paid to it as an authority, all attest the high value of "Montesquieu's Spirit of Laws."

In regard to the copy now before us, we can say without the slightest hesitation that it is the most handsome, best printed, best gotten up edition of all those that we have ever seen, and we have seen a great many. We believe there has never yet been in the English language what might be called a respectable edition of this great work, and the want of one, has often been seriously felt by the profession. This one of Messrs. Clarke & Co., is everything that the reader can desire. The good taste and judgment displayed in the mechanical execution of the book, reflect credit upon the firm named, and we have no doubt that before many months, this new edition of Montesquieu will be the one preferred by every American and English lawyer. We have been induced to bestow praise, more than is our wont, upon this publication, but it is such a beautiful piece of work that we cannot help it. The low price at which it is published, viz.: $600 for both volumes, is another inducement to purchase it. We hope that it will meet with an extensive sale. Certainly the wonderful activity and enterprise of our western publishers, will be appreciated.

VICK'S FLORAL GUIDE for 1874. Published quarterly by James Vick, Rochester, New York.

A very tastefully gotten up pamphlet, beautifully illustrated.

WOOD'S HOUSEHOLD MAGAZINE for December, 1873. S. E. Shutes, Publisher, New York City and Newburgh, New York.

LITTELL'S LIVING AGE FOR 1874.

The fact is becoming generally recognized that *Littell's Living Age* affords the best and, all things considered, the *cheapest* means of keeping well informed in the most valuable current literature; the productions of the best writers in science, fiction, poetry, history, biography, politics, theology, philosophy, criticism and art.

The extra inducements to subscribers for the ensuing year are worth noticing. The amount of the best current literature of the world, thus offered, certainly cannot otherwise be obtained so economically.

The highest critical authorities pronounce *The Living Age* the "best of all the eclectics," presenting, as it does, with freshness and thoroughness, what is essential to American readers in a great and indispensable literature. In the multiplicity of quarterlies, monthlies and weeklies, all of which it represents with a satisfying completeness not elsewhere attempted, it has become almost a necessity to every person or family of intelligence and taste, and especially so to those who must limit the number of their periodicals, The prospectus should not be overlooked by our readers in making their selections of periodicals for the new year.

(*Continued from page* 383.)

COE v. VOGDES.

1. A surety became bound for a tenant's performance of a contract of lease for one year, the rent payable monthly, and if tenant continued after the term, the contract to continue for another year. *Held*, if the tenant held over the year, the sureties were responsible for the subsequent rent.

2. That the premises were in an untenantable condition was no defence to the surety, the tenant having continued in possession.

3. The surety being informed by the landlord that the tenant was in arrears, gave him notice that he would not be further liable: the tenant paid the arrears to that time; this did not discharge the surety from the subsequent rent

4. A mere notice by surety that he would not be liable was no defence; he could not dissolve the contract at his pleasure.

January 1872, Before THOMPSON, C. J., AGNEW and SHARSWOOD, JJ. WILLIAMS, J., at Nisi Prius.

Certificate from Nisi Prius: No. 33, to January Term, 1871.

BARBER v. RODGERS.

1. B., arrested under act of July 14th, 1842, gave bond to apply to be discharged as an insolvent: he appeared and the hearing was continued from time to time, and whilst pending he was adjudged a bankrupt in United States court. *Held*, that the condition of his bond was discharged, and the sureties released.

2. The adjudication suspended the operation of the State insolvent laws.

3. *Lex neminem cogit ad vana seu inutilia*, applied.

March, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Error to the Court of Common Pleas of Warren county: No. 432, of January Term, 1871.

MCCLINTOCK'S APPEAL. STRAWBRIDGE'S ESTATE.

1. S. conveyed land to M. "reserving timber for his own use and advantage: in case M. should want to clear the land, the owner of the timber to take it off by being notified thirty days previous." *Held*, that the timber was personal property.

2. In reservations of growing timber, whether it be personalty or realty depends on the nature of the contract and the intent of the parties.

3. If an immediate severance is not contemplated, such reservation is an interest in land; if an immediate severance is in view, it is personalty.

4. Costs of an audit charged to the accountant under the circumstances in this case.

5. Pattison's Appeal, 11 P. F. Smith, 294, distinguished and approved.

March, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Appeal from the Orphans' Court of Lycoming county: No. 82, to July Term, 1872.

GRAY v. HENDERSON ET AL.

1. A testator directed his land to be sold as soon as "the times will warrant, either publicly or privately, so as to make the best of it; should it be thought best by my executors to divide it into small lots and sell at public sale, my will is after the lots are tried at public sale * * * the whole property be set up together and the sale made in the best manner." He appointed three executors. By a codicil reciting the distant location of his executors, and difficulty of attention by them, he appointed M. "my acting executor * * * desiring him if convenient to consult the above executors in the sale of the real estate." *Held*, that a power of sale was expressly conferred on the executors.

2. By the act of February 24th, 1834, sect. 12, it is enough if in any part of the will the intention be expressed to confer a power of sale on executors.

3. The power is *implied* when the distribution and management of the fund arising from a sale is expressly confided to the executor, or when it is confounded by the testator in one common fund with the personalty, although there be no express direction to the executor to distribute it.

March, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Error to the Court of Common Pleas of Clinton county: No. 6, to January Term, 1872.

MORELAND TOWNSHIP v. DAVIDSON TOWNSHIP.

1. Under the act of March 16th, 1868, nothing is brought up by writs of error to orders for removal of paupers, but such matters of law and fact as have been excepted to in the court below.

2. Where one who is not a relation and not an object of charity, but able to earn wages, is employed in the service of another for any period of time, the law implies a contract of hiring and a promise to pay.

3. A pauper resided with her father in Davidson township; she left home and hired in Benton township; during many years afterwards she lived in different places without hiring or wages, and was afterwards living with friends in Moreland township, where she became a poor charge: she was taken thence to Davidson, and by an order of removal taken to Moreland. On appeal from this order, *Held*, that as between Moreland and Davidson, Moreland was liable for her support.

March, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius,

Error to the Court of Quarter Sessions of Sullivan county: No. 153, to January Term, 1872.

COMMONWEALTH EX REL. WINPENNY v. BUNN.

1. A register cannot at discretion dispose of *every* matter arising in the performance of his function, if objected to by a competent party.

2. Under the 25th sect. of act of March 15th, 1832, where objections are made to probate of a will, and no precept directed to the Common Pleas, or to granting administration, or a question of kindred or "other disputable or difficult matter comes into controversy," the register at the request of a person interested *shall* proceed no further, but call a Register's Court.

3. Sect. 13 of same act is designed for a caveat, and where a question of fact arises, the register has a discretion as to directing a precept for an issue to the Common Pleas.

4. The duty of the register under the 25th section is enforceable by mandamus.

5. Where there is nothing "disputable or difficult," the court would not interfere upon the refusal of the register.

6. On a question before the register as to the signature to a will, papers in the possession of the executor offering the will were called for and refused; the register not having power to compel the production, the party opposing the will asked him to appoint a Register's Court. *Held*, that this was a "disputable and difficult matter," the register was bound to appoint a Register's Court, and on refusal was compellable by mandamus.

7. In such matter the act of the register was ministerial: mandamus lies to enforce ministerial acts although to be performed by a judicial officer.

8. A register has no power to compel the attendance of witnesses other than those capable of proving the will: or to compel the production of any paper except the will itself,

9. The acts of a register are judicial where, without objections probate, of a will has been made or administration granted; these cannot be impeached collaterally: the remedy is by appeal.

10. Cozzens' Will, 11 P. F. Smith 196, adopted.

March, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

KELLER v. STOLTZ,

1. Keller declared in a case against Stoltz for backing water on him by erection of a dam on Keller's land, and asked the court to charge that Stoltz had no right to change the location of the dam on the plaintiff's land; the court answered, that the mere change of the dam was not an abandonment of the right to use the location for the purposes of his right; the important inquiry was, did the change increase the flow of water on plaintiff's land or cause new injury? *Held*, not to be a correct answer.

2. If changing the location was wrongful, it was a direct injury, and Keller's remedy was in trespass.

3. In case, the only question was whether the dam had produced the consequential damage declared on.

March 26th, 1872. Before THOMPSON C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

BARTHOLOMEW'S APPEAL.

1. In partition in the Orphans' Court at the return of the commissioners, all the heirs but two appeared; the land was offered to those appearing successively; one in open court offered $4 above the valuation, that being the highest bid; on a rule granted, those then absent afterwards appeared, and one offered $8 above the valuation; the heir who had offered $4 then offered $8.01, and the land was adjudged to her: *Held*, to be error, it should have been adjudged to the heir offering $8.

2. In "all cases of partition in any

court," a party having made one bid is not entitled to another.

3. The bid of a party should be made in writing.

4. It is irregular when part only of the heirs are present at the return of an inquest to offer the land to them; a rule should be granted on all to come in before offering to any.

5. Klohs v. Reifsnyder, 11 P. F. Smith, 240, adopted.

March 19th, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Appeal from the Orphans' Court of Northampton county: No. 193, to January Term, 1872.

KELLER v. COMMONWEALTH.

1. The local act (Lancaster and other counties) of February 27th, 1867, was repealed by the general act of April 13th, 1867 (Desertion), so far at least as the provisions are inconsistent.

2. The act of April 15th, 1869, was intended as a supplement to the act of April 13th, 1867, although entitled a supplement to the act of February; it did not revive the latter act.

3. A resident of one county is amenable to the Quarter Sessions of another in which the charge of desertion is made.

4. Complaints of desertion and decrees in favor of defendant in the Lancaster county sessions in 1867 were not a bar to a complaint in Berks county in 1871.

5. A grandfather sued a father in Lancaster county for maintenance of his children, and obtained an award which was appealed from. This was no bar to proceedings against the father on complaint of the grandfather in the sessions of Berks, for desertion and maintenance of the children.

6. On complaint by a grandfather against the father for desertion and maintenance, a decree could not be made against the defendant in favor of the complainant for a sum of money for past maintenance; the complainant's remedy for that was by action.

7. A defendant willing to take his children and maintain them is entitled to their custody, and should not be compelled to pay another for their support.

8. Demott v. Commonwealth, 14 P. F. Smith, 305, adopted.

March, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Appeal from the decree of the Quarter Sessions of Berks county: No. 56, to January Term, 1872.

NYMAN'S APPEAL. FICKES' APPEAL.

1. A sheriff returned to an execution, that "at the time of the levy, the defendant demanded" the $300 exemption "out of the real estate which consists of one tract and cannot be divided, and he claimed that amount out of the proceeds when sold." The sheriff also testified that there was no appraisement. *Held*, that the defendant was not entitled to the $300.

2. Mark's Appeal, 10 Casey, 36, followed.

3. Fickes sold land to Harman, and entered a judgment April 6th, 1861, for purchase money. Harman, March 14th, 1866, sold to Heagy, who then went into possession, and on the 6th of April, at 8 A. M., executed a deed to Heagy: on the same day at 12 M., Fickes entered judgment of revival on his purchase money judgment by amicable sci. fa., against Harman alone. Heagy being a witness to the agreement for the sci. fa, judgments were afterwards entered against Heagy. *Held*, 1. That the judgments took precedence of Fickes'. 2. Heagy's witnessing the agreement did not make him a party to the sci. fa.

March 9th and 10th, 1872. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Appeals from the Court of Common Pleas of Adams county: Nos. 79 and 80 to May Term: In the distribution of the proceeds of the sheriff's sale of the real estate of Eli G. Heagy.

BROUGH'S ESTATE. APPEAL OF GROVES ET AL.

1. Brough being indebted to Hinchman, gave him his own note with endorsers, and the note of Gabley as collateral security; they were discounted and the proceeds passed to Brough's credit. Brough afterwards assigned for the benefit of creditors; the notes were not paid at maturity, afterwards payments were made by the endorsers. In the distribution of Brough's estate, *Held*, that Hinchman was entitled to a dividend on the amount due at the date of the assignment irrespective of the notes.

2. The endorsers were not entitled to a dividend on the amount of the accomodation note, until Hinchman should be fully paid.

3. By the assignment Hinchman became the equitable owner of the assigned estate, which could not be diminished by the payment of the collaterals.

4. Hinchman had the right to exhaust both Brough's estate and the collaterals in payment of his debt.

5. The endorsers had no equity until Hinchman should be paid, when if any of the assigned estate remained, they would be subrogated to his rights,

May 15th, 1872. Before THOMPSON, C. J., AGNEW, SHARSWOOD and WILLIAMS, JJ.

Appeal from the decree of the Court of Common Pleas of Franklin county: No. 52, to May Term 1872.

BELL'S APPEAL. MUSSLEMAN'S ESTATE.

1. A testator ordered his land to be sold, but named no one to execute the power. The executor sold without authority from the Orphans' Court. *Held*, that the Orphans' Court had jurisdiction under the 12th section of act of February 24th, 1834, to compel specific performance by the vendee.

2. By the authority to control and direct sales under such powers in a will, the Orphans' Court has power to set aside or enforce a sale, as the court may deem will best serve the interests of the estate.

3. Specific execution enforced in this case against a vendee in favor of an executor not empowered by a will to sell.

May 16th, 1872. Before THOMPSON, C. J. AGNEW, SHARSWOOD and WILLIAMS, JJ.

Appeal from the decree of the Orphans' Court of Cumberland county: No. 28, to May Term, 1872.

BURGER v. THE FARMERS' MUTUAL INSURANCE CO.

1. The rules of an insurance company required that notice of the transfer of a policy should be given to the company; in an action by a transferee, who had not given notice, to recover for loss by fire, evidence that the company had "always permitted and do now permit such transfers to be made, *Held* to be inadmissible.

2. Evidence of a usage of trade is competent in construing the terms of a contract.

3. A policy in a *mutual* insurance company was assignable by its terms; its charter provided in case of alienation of the property insured, the policy should be void. *Held*, that an alienee of the property to whom the policy had been assigned, could not recover on the ground of want of knowledge of the provision.

4. The original party insured was bound to know the provision, and his assignee had no higher right.

May 6th, 1872. Before READ, AGNEW and SHARSWOOD, JJ.

Error to the Court of Common Pleas of Lancaster county: No. 1, to May Term, 1872.

DELLINGER'S APPEAL.

1. A husband, about 1825, received his wife's share of her father's estate; there was evidence before the auditor that frequently until his death in 1869, he declared he held the money for her children to be paid after his death. The auditor found that he held the money in trust for the children; the Orphans' Court confirmed the report. There being no "plain mistake" in the finding, *Held*, that the Supreme Court must accept the trust as the auditor found.

2. The husband of one of the children and the wife of the other were competent witnesses for them.

3. The exception in act of April 15th, 1869, does not embrace husband and wife testifying for each other.

May 6th, 1872. Before READ, AGNEW and SHARSWOOD, JJ.

Appeal from the decree of the Orphans' Court of Lancaster county: Of May Term, 1872, No. 4.

MORRIS v. ZEIGLER.

1. After a verdict for defendant, judgment *non obstante veredicto* cannot be entered for the plaintiff.

2. A husband conveyed land to his wife; a judgment afterwards recovered against him was purchased by a third person before the deed was recorded; there being no fraud in the conveyance. *Held*, that her title would prevail against the judgment.

3. Not recording her deed was not such laches as would estop her against a judgment creditor of the husband.

4. Coates v. Gerlach, 8 Wright, 43, distinguished: Reed's Appeal, 1 Harris, 478, Robinson v. Myers, 17 P. F. Smith, 9, followed.

May 14th, 1872. Before THOMPSON, C. J., AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Perry county: No. 74, to May Term, 1872.

M. THOMAS & SONS.
AUCTIONEERS.

Nos. 139 and 141, late 67 and 69 S. Fourth St.

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Supreme Court of Pennsylv'a.

PITTSB'H, VIRGINIA & CHARLESTON R. W. CO. v. ROSE.

On appeal from report of viewers appointed to assess damages under general railroad law, February 19th, 1859, P. L. 83, *Held:*

1. That the decrease in the rental value of the property, or the impossibility of procuring constant tenants, arising from the inconveniences to which such tenants are subjected by reasons of the construction of the railroad, are proper elements to be submitted to the consideration of the jury.
2. The true test of the value of property is the opinion of witnesses in view of the location, productiveness, and the general selling price in that neighborhood. Market value depends on the judgment of the community.
3. The plan of borough of Birmingham was not evidence that the house of defendant in error was or was not on line of street.
4. The jury may take into consideration ties of the road and the ballasting and filling in between the same, as being part of excavation.
5. If defendant in error had built his house over line of street, he was not precluded from recovering damages for so much as was not on street.
6. Improvements proposed by railroad unconnected with finishing road, not a matter to be considered in determining damages.
7. The burthen of proof on railroads to show that there is no change in grade of street by reason of construction of road, in order to prevent recovery for excavation.—21 *P. L. J.* 50.

Error to the Court of Common Pleas of Allegheny County.

Opinion by SHARSWOOD, J. Delivered November 10th, 1873.

In the court below this was an appeal from a report of viewers appointed upon the petition of August Rose, to assess the damages to his property arising from the construction of their railroad by the plaintiffs in error. The road did not take any part of the petitioner's land, but was constructed along a public road or street in the (then) borough of Birmingham. The provision of the tenth section of the general railroad law, act of February 19th, 1849, Pamph. L. 83, which relates to this controversy, is, "that whenever any company shall locate its road in and upon any street or alley in any city or borough, ample compensation shall be made to the owners of lots fronting upon such street or alley, for any damages they may sustain by reason of any excavation or embankment made in the construction of such road, to be ascertained as other damages are authorized to be ascertained by this act." That such an embankment was made directly in front of the petitioner's property, is not a fact in dispute, and the jury were confined by the learned judge below to the damages sustained in consequence of such embankment, a ruling which could not be a subject of complaint upon this writ of error. We will proceed to consider the several errors which have been assigned.

The first assignment is to the admission of the learned judge of evidence to show, that since the construction of the road there had been difficulty in renting the plaintiff's property, and that for a portion of the time it had remained uninhabited, it being impossible to procure tenants for the same. The objection raised to this offer was that it tended to the allowance of consequential damages, and because the only true measure of damages in law is the difference between the market value of the property before and after the location of the railroad, and this without reference to the purpose to which the property was applied before the building of the railroad, or the intention of its owners as to its future enjoyment. A further objection was made because the plaintiff was not in law entitled to damages resulting from any excavations or embankments which did not change the established grade of the street, and no offer was made to show that the street in question had any established grade. These objections were overruled by the learned judge and the testimony admitted. In this we think there was no error. Admitting the rule for the measure of damages, as stated, to be the correct one, there are many different ways by which the market value of property may be ascertained. It may be by the opinion of witnesses derived from actual sales in the neighborhood, but this certainly is not the only way. There may be few or no such actual sales before and after the alleged injury upon which to found such opinion. Surely the decrease in the rental of the property, or the impossibility of procuring constant tenants, arising from the inconveniences to which such tenants are subjected from the injury complained of, is an element in determining the difference in the value, very proper to be submitted to the consideration of the jury. How far it had resulted from the embankment, and how far from the other inconveniences caused by the construction of the road, excluded from the consideration of the jury in this case, was to be determined by them under the instruction of the court. The same objection would lie to direct evidence of the difference in market value. It was clearly not necessary for the plaintiff to show an established grade. It would follow that if a plaintiff had built his house upon a street which the borough had neglected or refused to grade, that he could recover no damages. It was for the defendants to show that there was an established grade, to which their road conformed, if the fact was so.

The second assignment of error is to the refusal of the learned judge to affirm the third point submitted by the defendants below. There was no error in this refusal. It asked the judge to charge, that in arriving at the value of plaintiff's property the jury are to inquire simply what the property would sell for at a fair open sale in the market, without reference to its being used for any particular purpose, and that the best evidence of market value is the price actually paid for land in that neighborhood, making due allowance for difference in position and improvement. Passing by the question whether the use to which a property has been applied, when that use is prevented or injured by the embankment, might not properly be considered, it is clear that the judge could not be required to instruct the jury that a sale of land in the neighborhood is the best evidence of market value. The selling price of land in the neighborhood is undoubtedly a test of the value. Searle v. Lackawanna & Bloomsburgh Railroad Company, 9 Casey, 57; East Pennsylvania Railroad Company v. Hiester, 4 Wright, 53. But that is very different from the price paid for any particular property or properties. The true test is the opinion of witnesses in view of location productiveness and the general selling price in the vicinity. Market value depends upon the judgment of the community, and a consideration of particular sales would lead to collateral issues as numerous as the sales.

The third and fourth assignments may be disposed of together. When the plan of the borough of Birmingham was first offered it was rejected by the learned judge, but this error, if it was one, was corrected, and the plan subsequently admitted. It is complained that the admission was restricted to the purpose of showing where the south line of Manor street is and was when the plan was made. It is not easy to perceive for what other purpose it was competent. Whether the plaintiff's property was on or over the line, the plan was incompetent to show. That must be made out by other testimony. There was nothing in this ruling to prevent the defendants from offering such other testimony.

The fifth assignment is that the court affirmed the fourth point of the plaintiff below—that the jury might take into consideration the ties used by the defendants in the construction of their railway in front of the plaintiff's property, and the ballasting or filling in between the same. There was clearly no error in affirming this point. The ties and filling in were surely a part of the embankment, the height of which was just that much increased by them.

Nor was there any error in affirming the plaintiff's sixth point, as complained of in the sixth assignment. What the railway company might propose thereafter to do in the way of improvements, unconnected with the finishing of their railway, was clearly not a matter to be considered in determining the damages. The embankment was made and the railway finished. The company might or might not, according to their pleasure, carry out their proposed improvements, and if the damages were reduced on account of them, and the company should afterwards fail to carry them out, it is manifest that the plaintiff would be remediless.

As to the seventh assignment, it cannot be contended, and has not been here, that the plaintiffs in error were entitled to an affirmance of their fifth point as it was presented. Had the learned judge simply refused to affirm it, no question could have been made about it. The plaintiff by having built his house over the line of the street did not thereby forfeit all claim to recover damages. All that could be claimed was that he was precluded from damages to so much of his building as had encroached upon the public highway. "The true rule," said the court, "is to estimate the damages to the property, houses and lots, taking and considering the houses to be on the proper line of the street." It is impossible that any reasonable jury could have construed this to be an instruction that in point of fact the houses were on the proper line. The main part of the evidence admitted and heard was as to the question of fact, what was the proper line of the street, and whether the houses were over it. The instruction, therefore, evidently was, if you believe that the houses did encroach upon the street, do not, as the defendants' point has stated, allow the plaintiff no damages at all, but only such as he would suffer if his houses were on the proper line.

The eighth assignment of error is in refusing to affirm the sixth point of the defendant below, that the map of Remington was conclusive of the line, and if the jury believed that the plaintiff's houses encroached on Manor street, as defined by said map, the plaintiff could not recover any damages for injuries resulting to houses built on the street. Without inquiring whether the map in question was such an official plan as was sufficient to fix conclusively the line of the street as between the plaintiff and defendants, it is manifest that the point was too broad, as it did not distinguish between so much of the houses as encroached on the street, and so much as were within its line. A house is built on a street when it is built on the line of it, in common as well as legal language. There was no error, therefore, in this refusal.

Judgment affirmed.

WEIR v. KIRK.

1. There are many kinds of business, useful and even necessary in every community, especially where manufacturing is carried on on a large scale, which certainly are not nuisances in themselves, but which nevertheless become so in view of the circumstances of the neighborhood in which it is proposed to establish them.
2. There is a very marked distinction to be observed in reason and equity between the case of a business long established in a particular locality, which has become a nuisance from the growth of population and the erection of dwellings in close proximity to it, and that of a new erection threatened in such a vicinity.
3. As a city extends, nuisances should be removed to the vacant ground beyond the immediate neighborhood of the residences of the citizens.
4. The Legislature has recognized that the storing of gun powder in large quantities in thickly settled places is a nuisance to be guarded against by public authority.
5. The circumstances of the neighborhood in which it is proposed to establish the powder magazine in question are such as to entitle complainants to the injunction prayed in their bill.—*P. L. J.*

This was a bill in equity praying for an injunction to restrain the defendant from erecting and maintaining a powder house or magazine in Indiana township, Alleghany county, Pa., on the line of the Sharpsburgh and Kittanning turnpike road, about half a mile north of the borough of Sharpsburg, and near the residences of the complainants. The answer admitted the fact that he was engaged in erecting the powder magazine, &c., but denied that there was any reason to apprehend danger to persons or property from an explosion. Charles S. Fetterman, Esq., who was appointed master, submitted the following as his conclusions, viz.:

First. "That the magazine in controversy, if erected and maintained, will not be a common nuisance.

"Second. That the complainants have failed to show, by any means whatever, any grounds upon which to base any reasonable apprehension of danger to themselves, their families and property from the present location of the magazine in controversy, or that they have sustained any real, actual damage to or depreciation in their property; or that there is any reasonable apprehension of an explosion of the magazine while being used with reasonable care for the purpose for which it is intended."

John Barton, A. M. Brown, S. Schoyer, Jr., for appellants, cited Rhodes v. Dunbar, 7 P. F. S. 290, and claimed the rule to be that a powder magazine is a nuisance whenever it is so located as to cause injury to persons and property in case of an explosion.

George Shiras, Jr., J. W. Kirker, Thomas M. Marshall, for appellee, cited The People v. Sands, 1 Johnson, 78; Carpenter v. Cummings, 2 Phila. Rep. 74; Rhodes v. Dunbar, p. 214; Richard's Appeal, 7 P. F. S. 105; Huckenstein's Appeal, 20 P. F. S. 102.

Appeal from the decree of the Court of Common Pleas of Alleghany county.

Opinion by SHARSWOOD, J. Delivered October 20th, 1873.

The great difficulty in all cases of this character is not in the ascertainment of the true rule of equity, but in the application of that rule to the facts. While it may be easy to draw the line between what is and what is not a nuisance, which equity ought to enjoin, it is by no means so easy to determine whether the circumstances of any particular case ought to place it on one side or the other of that line. It is rare that any number of men will be found to agree in their judgment upon such a question. One remark, however, may be hazarded, as preliminary to a brief consideration of the circumstances of this case, in which I think all will agree. There are many kinds of business, useful and even necessary, in every large community, especially where manufacturing is carried on on a large scale, which certainly are not nuisances in themselves, but which nevertheless become so in view of the circumstances of the neighborhood in which it is proposed to establish them. The present chief justice in his opinion at Nisi Prius in Rhodes v. Dunbar, 7 P. F. Smith, 275, enumerates twenty-nine kinds of such useful establishments which have been declared public nuisances. There is a very marked distinction to be observed in reason and equity between the case of a business long established in a particular locality, which has become a nuisance from the growth of population and the erection of dwellings in proximity to it, and that of a new erection threatened in such a vicinity. Carrying on an offensive trade for any number of years in a place remote from buildings and public roads, does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of which and travellers upon which it is a nuisance. As the city extends, such nuisances should be removed to the vacant grounds beyond the immediate neighborhood of the residences of the citizens. This, public policy, as well as the health and comfort of the population of the city, demand. 7 P. F. Smith, 275. It certainly ought to be a much clearer case, however, to justify a court of equity in stretching forth the strong arm of injunction to compel a man to remove an establishment in which he has invested his capital and been carrying on business for a long period of time, from that of one who comes into a neighborhood proposing to establish such a business for the first time, and who is met at the threshold of his enterprise by a remonstrance and notice that if he persists in his purpose application will be made to a court of equity to prevent him. In the case before us the defendant occupies this position.

It is not contended that a powder magazine—a building for storing large quantities of gun powder—in the midst of a thickly settled neighborhood is not a nuisance. By the act of Assembly of March 20th, 1856, Pamph. L. 157, it is made unlawful for any person or persons to have or keep any quantity of gun powder or gun cotton in any house, store, shop, building, cellar or other place within the city of Philadelphia (except in the public magazines or in a quantity not exceeding two pounds for private use), unless in the manner provided in the act, which provisions in the main are, that no person shall deal in the article without a license, and if licensed shall not keep on hand more than twenty-five pounds, and shall have a painted sign distinctly legible to all passers-by with the words "licensed to sell gun powder," and that every carriage for conveying the article shall have painted on each side, in letters distinctly legible to all passers-by, the word "gun powder." A public magazine has been erected, by the authority of the commonwealth, near the mouth of the Schuylkill, and a State superintendent appointed, whose fees are regulated by law. Act of May 5th, 1864, Pamph. L. 841. One of the general powers conferred upon boroughs by the act of April 3d, 1851, Pamph. L. 320, is "to prohibit within the borough the carrying on of any manufacture, art, trade or business which may be noxious or offensive to the inhabitants; the manufacture, sale or exposure of fire works or other inflammable or dangerous articles, and to limit and prescribe the quantities that may be kept in one place of gun powder, fire works, turpentine or other inflammable articles, and to prescribe such safeguards as may be necessary." Thus the Legislature has recognized that the storing of gun powder in large quantities in thickly settled places, is a nuisance to be guarded against by public authority. But it is not confined to cities and boroughs. This court has acknowledged and declared it as a case clearly within the general rule of equity upon this subject, in the opinion of the majority as pronounced by Mr. Chief Justice Thompson in Rhodes v. Dunbar, 7 P. F. Smith, 274. After remarking upon the particular character and danger of the establishment, which was the subject matter of the complaint in that case; which was a steam planing mill which had long been established in the neighborhood, had been burned down, and the injunction asked for was against its re-erection, and which the majority of the court thought was not within the rule—he proceeds: "These observations give no just grounds to draw the inference that a powder magazine or depot of nitro-glycerine or other like explosive materials, might not possibly be enjoined, even if not prohibited, as they usually are, by ordinance or law. It is not on the ground alone of their liability to fire, primarily or even secondarily, that they may possibly be dealt with as nuisances, but on account of their liability to explosion by contact with the smallest spark of fire, and the utter impossibility to guard against the consequences or set bounds to the injury which, being instantaneous, extends alike to property and persons within its reach. The destructiveness of these agents results from the irrepressible gases once set in motion, infinitely more than from fires which might ensue as a consequence. Persons and property in the neighborhood of a burning building, let it burn ever so fiercely, in most cases have a chance of escaping injury. Not so when explosive forces instantly prostrate everything near them, as in the instances of powder, nitro-glycerine and other chemicals of an explosive or instantly inflammable nature." This reason is so cogent that nothing could be added which would increase its force.

All that remains, then, is to inquire, whether the circumstances of the neighborhood in which it was proposed to establish the magazine in question, are such as to bring it within the rule. Let us remember that it is a new erection which is asked to be enjoined, not the continuance of an old one. Actual irreparable damages, actual depreciation of property, of course, does not exist. It is the prevention of these consequences which is the object of the process. Perhaps the immediate neighborhood is not so densely filled up—as in connection with the evidence in the case of the careful construction and location of the building to guard against the worst probable consequences of an explosion—as would justify the court in ordering its removal. But as we have shown, this is not the case. The neighborhood is not thickly settled, but it is fast filling up. Land is in demand for small buildings, villas and country residences, and its market value before this structure was contemplated was at a high figure. It is evident that it must sensibly affect that value and the growth of the district. This might not, however, be sufficient of itself. The borough of Sharpsburg is a thriving suburban village of this great western metropolis, where already many persons, engaged in professional, mercantile or manufacturing business, have purchased sites, erected houses, and permanently reside, in order to escape from the smoke, soot and noise of the city. The distance of the structure complained of from the line of the borough is about half a mile. An explosion might do serious injury, at least, by breaking glass, even at that distance, and it is not beyond the reach of projectiles. It is all futile to sit down and calculate, as if by a mathematical *formula*, the force size and direction of such a projectile. The natural laws which govern the direction of such forces as are as yet undiscovered. It must, in the nature of things, be the merest conjecture. The evidence in the cause in regard to the explosion which occurred near Maysville, Kentucky, showed this very clearly. The house of the witness, Isaac Swartzwelder, was counted seven-eighths of a mile from the magazine. He said: "The explosion bursted every window and door in my house right open; it took the windows right out. There was a rock weighed eighty pounds; some one weighed it next morning. It fell right back of where I was sleeping, within eighteen inches of where I was lying." Another witness testified: "At the time the powder house in Brooklyn, containing eight hundred or one thousand kegs of powder—eighteen to twenty tons—exploded, it broke glass at Fly-market, New York city, clear across the sound, about three-fourths of a mile." One of the complainants, Mr. Weir, has his residence within five hundred and ten feet of the magazine, and there are several other residences further off, but still within the reach of the consequences of an explosion, if reliance is to be placed upon such facts as these. Even the witnesses for the defendant—some of them military men of great experience and sound judgment—admit there would be some danger from an explosion if it should occur, but they consider the danger as very slight, and that the location and construction of the building are well calculated to guard against the worst consequences. But besides all this a public turnpike road runs very near the building. As the master reports, "from the centre thereof to the magazine the distance is one hundred and fifteen feet, or ninety-five feet from the inner edge." It is peculiarly exposed to danger, for the magazine is constructed in a ravine, fun-

nel-shaped, opening out towards the road. It presents, with its rocky bed and sides, a huge morter aimed directly at the turnpike. We may take what the master reports upon this subject. "Were the magazine in controversy to explode while four hundred to six hundred kegs of powder were stored in it, the direct effect of the explosive force would be to strike the walls of the excavation, blowing off all the surface and loose rock down to the solid slate rock. This dirt, rock, &c., would be thrown in all directions, and if any of it was large enough, would be converted into projectiles and thrown a considerable distance from the place of explosion, and might do considerable harm; but the main force of the explosion would be directed towards the open side of the excavation on the northwest side of the magazine, converting the excavation and ravine, as it were, into a large mortar, blowing all before it, and destroying everything that might be standing on the turnpike, or on the opposite hillside, within the focus of the mouth of the ravine."

We have come to the conclusion then, that the complainants in the bill in the court below were entitled to the relief for which they prayed.

Decree reversed, and now it is ordered and decreed, that this cause be remitted to the court below, with direction to issue an injunction conformably to the prayer of the bill restraining the defendant, Arthur Kirk, from maintaining a powder house or powder magazine on the premises described in the bill, and from erecting and constructing such a powder house or magazine in that vicinity.

Costs of the appeal to be paid by the appellee.

Upon the finding of the master, we think the bill in this case was properly dismissed, and would affirm the decree of the court below.

H. W. WILLIAMS,
ULYSSES MERCUR.

Recent Decisions.

NEW HAMPSHIRE.

[Head notes of cases in the Supreme Court of New Hampshire, to appear in Vol. 52, N. H. Reports. Received from John M. Shirley, Esq., State Reporter.]

COMMON CARRIER.

1. A common carrier of chattels is not bound to insure them against their own fault or the fault of their owner, and is not liable to him for loss or damage caused by an inherent defect in the thing or animal carried without any fault of the carrier, or by the manner of packing or loading, the responsibility of which the owner has assumed, or by any want of care which the owner was to exercise.

2. The liability of a common carrier of cattle is governed by the general legal principles applicable to the common carriage of other property. Rixford v. Smith.

1. At common law, it is the duty of a common carrier, in the performance of his public service of transportation, not to make or give any undue or unreasonable preference or advantage to or in favor of any person, and not to subject any person to any undue or unreasonable prejudice or disadvantage, in respect to terms, facilities or accommodations; and such carrier is liable for the damage caused by a violation of this duty.

2. This general rule of the common law is approved and confirmed by Gen. Stats., ch. 149.

3. An action lies in this State for damage caused by an unreasonable discrimination practiced in Maine in violation of the law of that State on this subject. McDuffee v. Railroad.

DOG.

If an action brought under section 8 of chapter 105, Gen. Stats., to recover of the owner or keeper of a dog double damages for an injury inflicted upon the plaintiff by such dog, the court, among other things, told the jury that "if the head of a family, having the possession and control of a house or premises, suffer or permit a dog to be kept on the premises in the way such domestic animals are usually kept—*as a member of the family*, so to speak (in so far as a house dog may be termed a member of one's family)—such head of a family may be regarded the keeper of a dog, within the meaning of the statute." *Held*, that these instructions were sufficiently favorable to the defendant. Cummings v. Riley.

EVIDENCE.

The prohibition of the constitution of the State against compelling a subject to accuse or furnish evidence against himself (Bill of Rights, art. XV.) may be waived by him, and is waived by his consenting to be a witness in his own behalf, under the act of 1869, in relation to respondents' testifying in criminal cases (ch. 23, Laws of 1869), and he thereby subjects himself to the rules and tests applicable to other witnesses. State v. Ober.

EXPERTS.

Upon the question whether a long account upon a party's books was written at different times, as it purported to be, or whether it was all written with the same pen and ink and at the same time, a witness testified that he had been in practice as a lawyer some forty years, and had had about the same experience as lawyers in general in the examination and comparison of handwritings; that he had been engaged in one or two cases which led him particularly to examine and compare handwritings, but he did not claim to be able to give an opinion upon which any great reliance could be placed. *Held*, that the admission of the witness to testify as an expert was erroneous. Killingwood v. Bragg.

MORTGAGE.

The owner of real estate mortgaged it while a builder was in process of erecting a house thereon under a contract previously made with the owner. The mortgage was seasonably recorded, but the builder had no actual notice of its existence. The mortgagee, at the time of taking the mortgage, was chargeable with notice that the builder was erecting the house under a previous contract with the owner. The builder completed the house without objection on the part of the mortgagee. *Held*, that, under Gen. Stats., chapter 125, the builder had a lien superior to the mortgage for all that he did by virtue of the contract—for what was done after the execution of the mortgage, as well as for what was done before.

Proof that a mortgagee, at the time of taking his mortgage, knew that a house was being built upon the premises by some person, is sufficient to justify a finding of the fact that the mortgagee was put upon inquiry as to the existence of a builder's contract and a builder's lien.

A builder, whose lien was superior to that of a mortgagee, brought an action to enforce his lien, and, without any fraudulent purpose, included in his judgment a claim for a small amount to which no right of lien attached. The builder, having levied an execution on the premises, the mortgagee brought a writ of entry against him, contending that he had forfeited his lien. *Held*, that the builder's lien could retain precedence over the mortgage, if the building would pay to the mortgagee the amount thus erroneously included in his judgment. Cheshire Provident Institution v. Stone.

PARTNERSHIP.

Under the provisions of chapter 106, General Statutes, upon the death of either partner, the copartnership affairs may be fully adjusted and settled in the probate court, either by the surviving partner, or the representative of the deceased partner, or by arbitration. But if not thus settled, they may be adjusted in a court of equity the same as before such statute was enacted.

Where, upon the death of one partner, his administrator has one-half of the partnership property appraised as belonging to his estate, and disposes of the same knowing that there are company debts outstanding, such administrator will be charged with the whole amount of such property as against creditors of the firm, and with his just proportion of the company debts, not exceeding the whole amount of such property, as against the other member of the firm, before any of such property can be taken to pay the private debts of the deceased partner.

In such case a creditor of the partnership may prove his debt against the estate of the deceased partner, or he may collect it of the surviving partner, and such claim will not be barred, except by the general statute of limitations. Scott v. Buffum et al.

UNITED STATES COURTS.

[Head notes of cases to appear in Vol. 2, Bissell's Reports. By courtesy of Josiah M. Bissell, Esq., official reporter, Chicago, Ill.]

BONA FIDE PURCHASER.

A mortgagee of real estate is a *bona fide* purchaser, even though the mortgage was given to secure a pre-existing debt. Partridge v. Smith.

CHATTEL MORTGAGE.

A mortgage of personal property being, under the laws of Wisconsin, ineffectual to pass after acquired property, the assignee in bankruptcy is entitled to such property as against the mortgagee. In re Eldridge.

Though a mortgage be valid as to property then in posession, the authority in a mortgage subsequently given to cover the property afterward acquired, does not enable the mortgagee, by taking possession of such property, to hold it as against the assignee. This would be in effect a preference, and against the spirit of the act. Ib.

A mortgagee in possession being entitled to retain all property upon which his mortgage was valid, on a sale of such property by order of the District Court, he should only be charged with the reasonable expenses of the sale of such property, and not with any portion of the costs in bankruptcy. Ib.

A chattel mortgage "of all the goods and merchandise" in a store, here held not to include fixtures. Ib.

A chattel mortgage, not valid as against creditors, under the State law, and under which the mortgagee had taken possession, having at the time reasonable cause to believe his debtor insolvent, is invalid as against the assignee in bankruptcy. Harvey, assignee, &c. v. Crane.

Though the mortgage be good as between the parties, and given to secure a *bona fide* debt, yet not having been acknowledged and recorded as required by statute, the mortgagee, having retained it until the insolvency of the debtor cannot, by then taking posession, be remitted to his rights as of the date of the mortgage. Ib.

Though possession was taken, before commencement of proceedings in bankruptcy, and was in accordance with the provisions of the mortgage, yet, being within the time limited by the bankrupt act, it operated as a preference, void as against creditors, and equally void as against the assignee. Ib.

In Illinois, recording a chattel mortgage in which material changes had been made since its acknowledgment gives it no additional validity. Ib.

COLLISION.

A vessel having lost her signal lights in a storm, and proceeding on her way with the prohibited white light, is not necessarily to be charged with all the damages in case of collision. The Gray Eagle.

The fact that she carried a light prohibited to vessels while sailing does not of itself absolve other vessels from the observance of that degree of caution, care, and nautical skill which the exigencies of the case require. Ib.

Though a white light usually represents a vessel at anchor, the officers of an approaching vessel have no right to conclude that it always does. Ib.

It was their duty, from the moment the light was seen, to watch it carefully in order to ascertain from its bearings whether the vessel was in motion; and if in the exercise of ordinary nautical skill and care this could have been done, and was omitted, and this omission contributed to the accident, then their vessel must share the loss, although the other vessel was in fault in running with a prohibited light. Ib.

INSURANCE.

A court of equity has power to reform and cancel an insurance policy issued by mistake for a greater length of time than was intended by the parties. North American Insurance Co. v. Whipple.

PROMISSORY NOTE.

The assignee of a promissory note (being otherwise competent) may maintain an action upon it if the assignor might have done so at the time of the commencement of the suit. Chamberlain v. Eckert.

LEGAL GAZETTE.

Friday, December 5, 1873.

JOHN H. CAMPBELL,
EDITOR.

The new constitution will be adopted. Even its opponents now admit it. Of the newspapers of the State, 208 have pronounced in favor of it, and *only* 28 against it. The bar of the State is also in favor of it. Men of all parties are uniting in its support and we have no doubt that in a fortnight from this time, we will have the gratifying intelligence to announce, that it has been carried by at least one hundred thousand majority.

BAR ASSOCIATION OF NEW HAMPSHIRE.

The following circular has been forwarded to us for insertion. As it contains some interesting items of news we willingly give it a place in our columns:

TO THE MEMBERS OF THE BAR IN NEW HAMPSHIRE:

At the last June session of our Legislature an act was passed to incorporate the Bar Association of the State of New Hampshire. And at the subsequent adjourned Law Term of the S. J. Court, in August, a meeting of members of the bar was held to take steps for the proper organization of the association accordingly. At that meeting a committee was appointed to prepare and distribute to the members of the legal profession throughout the State, a suitable memorial with reference to the objects of the proposed association. Hence this communication, which is respectfully submitted to your favorable regard.

The objects of the association are to be, to promote social and professional intercourse among the members of the bar, to provide facilities for professional studies and investigations, and in general to advance the honor and welfare of the legal profession in this State. We presume that it is not necessary for us to offer arguments to prove or illustrate the merit of these objects. Every member of the bar will appreciate them; and we hope that he will encourage and aid them by his participation in the association.

It is a singular fact that while other professions in the State, for many years past, have had general associations of the character proposed, yet the legal profession has not had any beyond local associations in each county and confined to its own limits. And yet, to say the least, no profession is more able to render such an association agreeable and successful in its social and professional relations. And the present arrangement of the law terms of our S. J. Court is very favorable for it. All those terms are held at one place, and thus afford very convenient and suitable opportunities for meetings of all the members of the bar in the State.

In these respects there is sufficient occasion for the Bar Association. But these are not all. It is a well known fact that, valuable and extensive as some of the private law libraries in the State are, yet there are none which afford the means for that extended investigation and research which the occasions of the profession frequently demand. The multiplication of text books, and especially of reports, is too rapid and great for the moderate incomes of the profession to keep pace with in purchases for private libraries. Hence has arisen, to a great extent, the necessity for going out of the State to obtain better advantages.

The State library has the most extensive collection of law reports to be found in this State; but it is greatly defective. It, however, presents a nucleus and opportunity for a law library, which with comparatively small expense could be enlarged to the extent necessary to meet most if not all the requirements of the profession. In fact, a more favorable opportunity could not be found, for the establishment of a library which would soon become an honor as well as a most profitable acquisition for the legal profession. The usual exchanges with the other States of the Union bring into the State library nearly all the reports of the different States as soon as they are published; and a small expense would be sufficient to supply what is desirable in addition. The location of the court, at its law terms, at the same place, render the library very convenient in that respect also.

We presume that suitable arrangements can be made with the State to secure for the association all desirable facilities in the State library. And the aid of the association will be very useful and advantageous for improvements and additions to that library.

We hope that regard for his profession, and pride in its prosperity and honorable standing, will induce all the members of the bar to aid the Bar Association, which has the objects we have mentioned in view. To these will be added the interest of those who have not extensive libraries of their own, to establish an excellent one to which they can have ready access. Besides this, we have no doubt that many members of the bar will be pleased to aid, by contributions of money and books, an institution connected with the profession with which they have been associated. And the Bar Association will present the opportunity, which has been too long delayed, to place the legal profession in this State in that position which it is entitled to and should occupy.

The organization of the association will be completed at the law term in December; and copies of its constitution and by-laws will then be distributed to the members of the bar for their information and participation in the association.

HARRY BINGHAM,
JOSIAH MINOR,
F. F LANE,
C. B. GAFFNEY,
THOS. COGGSWELL,
LEWIS W. CLARK,
ALBERT E. HATCH,
EDMUND BURKE,
OSSIAN RAY,
WM. M. WEED,
Committee.

November 25, 1873

TWENTY-FIRST JUDICIAL DIST.

Court of Common Pleas of Schuylkill County.

IN EQUITY.

PHILADELPHIA & READING COAL & IRON CO. v. TAYLOR et al.

1. Where there are two mining operations—one owner working on the upper level, and one on the lower level of the same vein—the owner of the upper level, operating in the most approved method and with care, is not required to control the natural flow of the water downwards, and may work his coal out down to his line, and the maxim of the common law *sic utere tuo ut alienum non laedas* applies.
2. And the owner of the subjacent level owes a servitude, and must leave a pillar of coal to support the gangway and keep out the water from the level above.
3. Adjoining owners on the same level of the same vein owe no special duty to each other.
4. When, however, the owner of the superjacent land has created a servitude upon his land, in favor of the subjacent owner, such as a right to drive an air-way through his works and to connect with the surface, such owner after he has worked all his coal out and is about to abandon his workings must give *reasonable* notice of this to the owner of the dominant tenement, and on failure so to do, equity will restrain him from permitting the water to fill up, if by so doing it will destroy the easement, the owner of the dominant tenement to be at the expense of pumping the water until the injury can be remedied. Reasonable notice is relative and depends upon the work to be performed.
5. A party having an easment on the land of another, may go upon the land for the purpose of the enjoyment of such easement to its fullest extent, either to construct or repair—or secure it from danger—doing as little damage as possible and responsible for that damage—for the grant of a privilege carries with it every thing necessary to its enjoyment.

Injunction.

Opinion by WALKER, J. Delivered October 27th, 1873.

This bill in equity was presented at chambers on 1st October, 1873, and a special injunction was asked for, preliminary until hearing, and thereafter to restrain the defendants from permitting their old workings on Little Mine Run Colliery to fill with water, until the plaintiffs can procure machinery of sufficient capacity to pump the same out of their own slope at the Bast Colliery.

The preliminary injunction was granted and the hearing fixed on October 7th, 1873, at which time it was ably argued by counsel.

The injunction is asked to prevent the defendants from allowing their old workings to fill up with water.

The reasons assigned for this writ are:

1. That the plaintiffs' operation at the Bast Colliery will be irreparably injured, and the lives of their men endangered, if the defendants be allowed to flood their old workings with water, and

2. That they will be deprived of the right and privilege of completing their air-way, and their purchase of that right will be rendered valueless and useless.

In the first place I am asked, on account of the great and irreparable injury to the plaintiffs' operation and danger to their workmen, to restrain the defendants from allowing their mines to fill with water, or to permit the plaintiffs to come upon their land and pump out the water.

Before this can be done, the plaintiffs must establish some right upon which to found equitable interposition. If they have no such right they are entitled to no remedy, though they may suffer irreparable injury. Chadwick v. Trower, 6 Bing. N. C. 256; 37 Eng. Com. Law, 255. It is not alleged that the defendants in the working of their operations have been guilty of any trespass, or that they have heretofore done any matter or thing inconsistent with the most approved method of mining.

Have the plaintiffs then a legal right to require the defendants to keep the water out of their levels, in order that they may enjoy and use their own works in the level below? In determining this it will be necessary to consider the relative rights of owners of upper and lower levels, and of adjoining lands to each other under the present system of mining coal.

It often happens that there are two estates in the same land, the surface right and the underground right. One owns the surface and another the minerals below the surface. These estates are well defined and are consistent with each other. (Caldwell v. Fulton, 7 Casey, 483.)

The owner of the surface, if not restricted by his deed, has a perfect right to erect his buildings and make his improvements on any portion of his land, even upon the crop of a coal vein belonging to another person, and which ultimately will be worked.

The owner of the coal has a servient right, and is bound in working it to leave a pillar to support the surface. Baron Parke, in Harris v. Ryding, 5 Meeson & Welsby, Exch. 60, remarks: "I do not mean to say that all the coal does not belong to the defendants *but they cannot get it out without leaving proper supports.*" See also The Earl of Glasgow v. The Alum Co., 8 Eng. Law and Eq. 13.

The upper and underground estate being several they are governed by the same maxim which limits the use of property otherwise situated. "*Sic utere tuo ut alienum non laedas.*" Jones v. Wagner, 16, P. F. S. 429. per Thompson, C. J.

The same doctrine obtains in the working of upper and lower levels on the same vein.

There are certain rights well known and recognized, as to the flow of water upon the surface of the ground. *Aqua currit et debet currere* is the common law maxim of water courses. The distinction between subterranean and surface rights, is ably discussed in Action v. Blundell, 12 Meeson & Welsby, 324, by Tendall, C. J., and seems to be, that as to the surface flows, parties acquire rights to them, because everybody who has an interest in the matter acquiesces in them, but as to underground percolations no rights are gained, because nobody knows anything about them. There is a marked and substantial difference between them, and it was there held that the owner of land through which waters flows in a subterraneous course, has no right or interest in it, which will enable him to maintain an action against a land owner who, carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first mentioned owner, and lays his well dry.

Under the English decisions the owner of the land, if he be the first who mines, may work his vein up to his line—without leaving a pillar stand—and the owner of the adjoining property is required to leave the pillar, to keep out the water. Clegg v. Drearden, 64 Eng. Com. Law Rep. 575.

"Adjoining owners owe no special duty to each other." The Locust Mountain Coal and Iron Company v. Gorrell, Leg. Int. 29th March, 1872.

Under the rule here laid down, the plaintiffs working on a lower level, were bound to leave a sufficient pillar of coal standing, to prevent the water in the upper level from breaking through. And if they, or those under whom they claim have not done so, it is their own neglect, and becomes *damnum absque injuria*, for they must have known that the coal in the upper level would ultimately be worked out and be abandoned, and the water following its natufal flow downward, would collect in the old workings, and *might* break through upon them.

The owner of a higher level may mine all his coal out down to his line, and he is not responsible for water that flows in the lower level by gravitation. Baird v. Williamson, 109 Eng. Com. Law Rep., p. 375. See Smith v. Kenrick, 7 M. G. & S. 514; (62 Eng. Com. Law Rep.) as the leading case on this subject in England. See also The Duke of Beaufort v. Morris, 6 Hare, 340; also as bearing on this subject, see Kaufman v. Griesemer, 2 Casey, 407; Martin v. Riddle, 2 Casey, 415; Bentz v. Armstrong, 8 W. & S. 40; Merrick v. Packer, 1 Coxe, 460; Williams v. Gale, H. John. Rep. 230. If this was the only reason, an injunction certainly could not be granted.

The second point made by the plaintiffs is, that having purchased from two of the defendants, and acquiesced in by the other partner, an easement or right to make an air-way through defendants' mines for ventilation of the Bast Colliery, they cannot be deprived of its use and enjoyment, after expending money in good faith for improvements, which must necessarily be the case, if the defendants allow the breasts in their old workings to fill up with water. *This is the strong point of the case.*

The plaintiffs claim an easement in the land of the Locust Mountain Coal and Iron Company, worked by and in the occupation of the defendants.

An easement is a right which one proprietor has to some profit, benefit or lawful use out of, or over the estate of another proprietor. Retgan v. Parker, 8 Cush. 145

It is incorporeal and must consist of two distinct tenements, the *dominant* to which the right belongs, and the *servient* upon which the obligation rests. Washburne on Easements, 2 Perrin v. Garfield, 37 Vt. 312; Taylor on Landlord and Tenant, § 212 and notes (as to the distinction between easements and servitudes, see Rogers on Mines, 444).

After the owner has created a servitude or burden upon his lands, he cannot restrict the dominant owner in his use and enjoyment of that privilege. It is as much protected as any other vested right, and carries with it every incident to its use and enjoyment. Rogers on Mines, 445; Washburne on Eas. 25, and authorities there cited, 1 William's Saunders, 323 and note 6. "*Whoever grants a thing, grants all that may be necessary to the enjoyment of the thing itself.* Broom's Leg. Max. 362.

When the plaintiffs bought the Bast Colliery from Bast & Steinhilbert, for $193,000, one of the chief inducements (according to the affidavit of Mr. Pleasants) was to obtain the right to make this air-way, through the workings of the Little Mine Run Colliery.

Mr. Bast obtained that privilege from Taylor & Lindsay, under whom Jeremiah Taylor (who has been made a defendant), claims, and transferred it to the plaintiffs.

The consideration money was one dollar, and both transfers were recorded within the statutory time.

The sale was made by Taylor & Lindsay to Bast on 18th November, 1872, while they were owners of five-sixths of the colliery and in possession. Bast assigned his interest to plaintiffs on 4th December, 1872; both instruments were recorded on 26th February, 1873. Jeremiah Taylor bought out Robert Taylor and Robert M. Lindsay's interest in the colliery 1st January, 1873, and he objects to the exercise of this right on the ground of notice.

Are the instruments within the operation of the recording acts?

The act of 18th March, 1775 (Purdon's Dig. 472, pl. 76), requires all deeds and conveyances made in this State *of or concerning* any lands, tenements or hereditaments whereby the same may be in any way affected in law or in equity, to be acknowledged and recorded in the county where such land lies, within six months after execution of such deeds and conveyances. This includes any agreement concerning lands, though not under seal. Hellman v. Hellman, 4 R. 440; Shortz v. Unangst, 3 W. & S. 54; Funk v. Haldeman, 3 P. F. S. 244. These instruments were concerning the land, and are clearly within the operation of the recording act.

The sale of this right was good as against R. Taylor and Lindsay, for they, as tenants for years, had authority to grant the easement. Wallace v. Fletcher, 10 Foster, 453.

And as these instruments were placed on record within six months, they were notice to Jeremiah Taylor. The right attaches to the estate, and not to the owner of the dominant tenement; and the easement followed the estate in the hands of the assignee. Taylor on Landlord and Tenant, § 238.

Jeremiah Taylor, therefore, took no greater interest in the colliery than Robert Taylor and Lindsay had at the time of the purchase. He took the operation not only subject to the covenants and conditions of the lease, but to all the restrictions placed upon it by his grantors. He took it subject to the charge, and the servient tenement followed in his hands. Taylor on Landlord and Tenent, § 238.

But Steinhilbert objects that he did not sign the instrument of 18th November, 1872, and should not be affected by it.

But this fact in my opinion cannot avail him under the circumstances of this case, for he was cognizant of the sale at the time; his interest in the Bast Colliery was enhanced by it; and he made no objection to it. *Qui non prohibet quod prohibere potest assentire videtur.*

It is therefore contended by the plaintiffs, that it was the act of the partners within the scope of the firm's authority, ratified by Steinhilbert, and as such, it is to be regarded as his own act. Story on Partnership, §§ 120, 121, 122; Cady v. Shepperd, 11 Peck, 400; Shinner v. Dayton, et al. 19 John's Rep. 513; Grum v. Seaton, 1 Hall Rep. 262; Lord Lovelace Case, W. Jones, 268; Orr v. Chase, 1 Mer. 729; 4 Term Rep. 313.

I think if he stood by and saw the plaintiffs pay more for the colliery than they otherwise would have paid without that privilege, and made no objection to it, but received the additional profit, it would be a fraud upon the plaintiffs to permit him to object now, and he is estopped from repudiating that contract, upon every principle of equity. Nuss v. Vanswearingen, et al. 10 S. & R. 146; Rerick v. Kern, 14 S. & R. 271; Hill v. Epley, 7 C. 331-334; Commonwealth v. Moltz, 10 Barr, 527, and cases cited; Meason v. Kaine, 17 P. F. S. 126; Miller v. Miller, 10 P. F. S. 16.

The title then of the plaintiffs to this easement or privilege is complete, and the right to exercise and enjoy it, is just as effectual in law as if they had paid a million of dollars for it.

Having this undoubted privilege, can the defendants now allow the mines to be flooded with water, and plaintiffs be deprived of their legal rights, without any default on their part? Before this can be done, it would seem right that reasonable notice should be given by the defendants, of their intention to enable the plaintiffs to put up sufficient machinery to pump out the water, if by allowing the water to fill up, the easement would be destroyed. (37 Eng. Com. Law Rep. 255; 6 Bing. N. C. 256.)

The servitude which the defendants created on their colliery, and the principle of the common law, *Sic utere tuo ut alienum non laedas*, require such notice to the owner of the dorminant tenement.

This appears to be recognized by the defendants themselves, for Jeremiah Taylor says in his affidavit, that a written notice of their intention to abandon the mines on the 1st September, was given the plaintiffs on the 14th August last.

This certainly was not *reasonable* notice for the work required to be done, for the bill alleges that it requires a year with despatch, and the defendants have not denied or controverted that fact.

It is argued that under the act 16th June, 1836 (Purden's Dig. 590, P. L. 789), and its supplements conferring chancery powers on our courts, an injunction is a *preventive* remedy, and cannot be used preliminarily to enjoin the performance of any act.

It, no doubt, is a restrictive or prohibitory process to compel the party to maintain his status. The Mammoth Vein Coal Co.'s Appeal, 4 P. F. S. 183. Per Thompson, J.; Farmers R. R. Co. v. Reno, 3 P. F. S. 224. Per Strong, J. Except upon a final hearing when the injunction becomes mandatory. Audenreid v. Phila. & Reading R. R. Co., 18 P. F. S. 370. Per Sharswood, J. But when the agreement of parties requires performance, the remedy falls within the terms of the sixth clause of the second specification of the 13th section of said act, P. L. 790, which confers upon the courts jurisdiction to afford "*specific relief*," when the recovery of damages would be inadequate.

For instances where certain acts upon a preliminary hearing have been required to be done. See Lane v. Newdigate, 10 Vesey, 193. The Baptist Congregation v. Scannel, 3 Grant, 48; Hepburn v. Landner, 2 Hem. & Mil. 321. See also 3 Blackstone's Com. 426, 427 and 428, and notes by Judge Snarswood; Lewis v. Comeford, 1 Vesey, Jr., 235, and notes; Fry on Specific Perf., §§ 765-6-7; Newmarch v. Brandling, 3 Sw. 99; 4 Am. 13; Whittaker v. Howe, 3 Beav. 383; Maxborough v. Bower, 7 Beav. 127.

But this case is different, for the plaintiffs have an easement through the workings of the defendants.

This is established by the bill, affidavits and transfers, and nowhere denied. Jeremiah Taylor says: "*that he and his partner never objected to the plaintiffs using the air-hole to ventilate their mine, nor to the plaintiffs pumping the water out of the slope level.*" This concedes the plaintiffs' right as fully as the written instruments establish it, and places them in a position if this water became a nuisance, to apply for this writ on those grounds. Rhea v. Forsyth, 1 Wr. 507. See Bainbridge on Mines, 509, where mines are in danger of being ruined. See King v. McCully, 2 Wr. 76, where Judge Thompson recognizes this position when the "*right is clear and undoubted.*" It is such a right that upon refusal to comply with the terms a court of equity might decree specific performance. Having this privilege or right, then the law is well settled that the dominant owner may go upon the land and do necessary repairs. Rogers v. Morris, 452; Washburne on Eastments, 25, 265, 566, 557; Taylor on Land. and Ten. § 214. For the express grant of an easement is accomplished by certain secondary easements, necessary for the enjoyment of the principal one. Gale and Whatley on Easements, 231.

By the civil law the right to a servitude drew with it the right to do whatever was required for the fullest enjoyment of the servitude, and a man having that right might enter upon his neighbor's soil for the purpose of doing necessary works, but the owner of the dominant tenement was bound not only to exercise ordinary care and skill, but also to repair as far as he could, whatever damage his labor might have done to the servient tenement. —Ib. 25. Prescott v. Williams, 5 Met. 429; Prescott v. White, 21 Peck, 341. (As to abatement of nuisance, see 6 Wharton, 597.) The plaintiffs having this privilege, these authorities go far to show that they have a right to go on the land for the purpose of enjoying and using this right to its fullest extent, doing as little harm as possible.

In the Mammoth Vein Coal Co.'s Appeal, 4 P. F. S. 189, Judge Thompson held *that it would have been proper to enjoin the defendants, had it been made manifest that the consequence of their operations would have the effect of letting water in large quantities in the plaintiffs' mine.* These views are strengthened by Judge Agnew's opinion in The Locust Mountain Coal and Iron Co. v. Gorrell et al., Leg. Intel., 29 March, 1872, before referred to, in which he says: "When the miner in his upper mine in carrying forward his gangway strikes into a breast, which has been wrongfully worked by a trespasser up the dip of his coal vein, he is not justified in emptying the water flowing down the drain or gutter of his gangway into the opening thus struck, if by reasonable means he can carry the

water into his own sump,"—and he holds that it is the duty of the upper owner to carry off his water even though a trespass had been committed upon him. He adds: "*To adopt the principle that an upper owner is liable for no act done within his own mine and no neglect, because it falls within his own proprietary right, would lead to results disastrous to mining in general and could not be tolerated.*"

If equity, upon a preliminary hearing in such a case, will require the owner of the superjacent mine to keep out his water though a trespass, be committed on his own land, *and though he has to do certain acts*, how much stronger is the present case, where the owners of the upper mine have sold the right to an air way which cannot be used and enjoyed unless the water is pumped out for a *reasonable* time.

It will be observed that adjacent owners working the same vein of coal *owe no special duty to each other;* that *subjacent* owners have a *servient* interest and *superjacent* owners a *dominant* interest; that a subjacent owner must receive the water in its natural channel downward, and must leave a pillar to support the works of the superjacent owner; while the superjacent owner working his mine with care and in the most approved method, is not required to control the natural flow of the water (the common enemy of the miner), and may work his coal down to his line. When, however, the superjacent owner has created a servitude upon his land in favor of the subjacent owner, such as a right to pass over it, or the right to make up an air-way through his workings, the relative position of the parties changes. The subjacent owner then ceases to be servient and becomes the dominant, and the superjacent owner becomes the servient, so far as the terms of their agreement prescribe the rights to the use of the same under it. This conclusion appears to be undeniable and gives the plaintiffs the advantage of the decisions upon this point; for if they have this right they should have some remedy if it be infringed.

In the absence of any adjudged case like the present one, it may well cause the mind of a chancellor to hesitate, not only on account of the magnitude of the interests involved, but for the principle of law to be established.

Should I, therefore, refuse the injunction, the plaintiffs would have no remedy; as it is an interlocutory order, and no appeal lies (Hilbish v. Catherman, 10 P. F. S. 444), and before a *final* decree could be made the mines of the plaintiffs would be irreparably destroyed; unless I should dismiss the bill before *answer* and *final hearing*, which the equities of the plaintiffs do not warrant. If the works be allowed to fill up, there would accumulate many millions of gallons of water, and with this superincumbent weight, the pillar or rib of coal at the top of the lower works must ultimately sink, and wide-spread ruin to the property of the plaintiffs and destruction to the lives of the men must inevitably follow.

I prefer, therefore to be reversed (if in error), rather than by sustaining myself by an interlocutory order (if the law were otherwise) to cut off the appeal of the plaintiffs. The weightiest reasons show that this is a case for the Supreme Court, in order to ascertain how far a court of equity may preliminarily go in *affording specific relief*, where a recovery in damages would be inadequate: where the right is clear and undeniable; where the loss would be irreparable and of great magnitude, and where the danger to life is inevitable.

If I allow the injunction to remain in the manner to prevent the water from accumulating, at plaintiff's expense, the defendants have an immediate remedy by appeal, without affidavit or security, and their damages can be readily compensated, for sufficient and approved bail have been entered to indemnify them; and as the Supreme Court have the final decision of this case, *let them assume the responsibility.*

And now, October 27th, 1873: This cause came on to be heard at this term, and was argued by counsel, and thereupon upon consideration thereof, it is ordered, adjudged and decreed as follows: that the special injunction issued against the defendants, remain until further order.

George deB. Keim, Esq., and *James Ellis, Esq.*, for plaintiffs.

Hon. F. W. Hughes and *James Ryon* and *J. W. Ryon, Esqs.*, for defendants.

Recent Decisions.

PENNSYLVANIA.

[Head notes of cases in the Supreme Court of Pennsylvania, to appear in vol. 71 Pennsylvania State Reports. Received from P. F. Smith, Esq., State Reporter.]

STILES v. GEESEY.

1. A women hitched her horse with a carriage to a tree on the road so that the carriage projected into the road. A wagoner not being with his horses, his wagon struck the carriage, injured it and the horse; there was evidence of negligence in leaving the carriage where it was struck. In a suit against the owner of the wagon, the court affirmed the following point of the plaintiff: "That Thomas Stiles cannot excuse the negligence of William Stiles by showing that the plaintiff's property was placed where it received the injury by want of ordinary care by Mrs. Geesey, if in the opinion of the jury such want is imputable to her, should the jury believe that William Stiles was chargeable with negligence in leaving his team and permitting it to go along the highway unattended." *Held*, to be error, being, except as to the negligence of the defendant, a binding instruction.

2. For an injury resulting from mutual or concurring negligence, no action will lie, because there can be no apportionment of damages.

May 8th, 1872. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of York county: No. 34, May Term, 1872.

NEW HOLLAND TURNPIKE CO. v. LANCASTER COUNTY.

1. Viewers reported in favor of a bridge, suggesting that a turnpike company should pay one-third the cost: the company agreed to do so: the report was confirmed and the bridge erected by the county at a cost of $16,500; inspectors reported the bridge well erected, &c., but valued it at $11,000; the Court of Quarter Sessions disapproved the report. *Held*, that the company could not take advantage of that proceeding which was *res inter alios acta*, but was bound for one-third of the bona fide cost of the bridge.

2. The company entered into a bond in the penalty of $4000, to pay "one-third of all reasonable and proper expenses in building the bridge." *Held*, that the county in covenant could recover one-third of the expenses, although beyond the penalty of the bond.

3. The obligee in such bond may elect to proceed in debt for the penalty, but cannot then go on the covenant; or on the covenant, when he may recover as often as injury arises.

May 8th, 1872. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Lancaster county: No. 49, to May Term, 1872.

MEILY ET AL., TERRE-TENANTS, v. WOOD.

1. Where land is held by a firm by deed expressing that it is partnership stock, an encumbrance against a member of the firm is not a lien upon any interest in it, so as to prevent the firm conveying to a purchaser clear of the encumbrance.

2. Wood conveyed to Meily & Co., declaring in the deed that the land was for partnership purposes; a judgment was entered by Wood, a few days afterwards, against one of the firm for his proportion of the purchase money; the partner conveyed his interest in the partnership to his fellows and withdrew; they conveyed the whole. *Held*, that the judgment was not a lien against the terre tenants.

3. The land was personal property to be applied according to the equities between the partners in payment of the partnership debts in the first instance.

4. Each partner's interest was, as in any other property of the firm, what should be due him on a final settlement.

5. An execution by a separate creditor would sell not an interest in realty, but the balance due his debtor, with right by bill in equity to compel a settlement.

6. Where land is agreed to be made partnership stock there is an out-and-out conversion.

7. Erwin's Appeal, 3 Wright, 535; Kramer v. Arthurs, 7 Barr, 165; Lancaster Bank v. Myley, 1 Harris, 544, approved.

May 22d, 1872. Before THOMPSON, C. J., AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Dauphin county: No. 6, to May Term, 1872.

GRANT v. THE COMMONWEALTH.

1. Under the act of February 15th, 1870, allowing writ of error as of right in cases of homicide, the Supreme Court will not consider the case as on a motion for a new trial.

2. On a motion for a new trial the court considers the testimony on both sides, and judges whether the jury have given undue weight to either side under all the circumstances of the case as presented to them.

3. The duty of the Supreme Court under the act is to see whether there was evidence which if believed by the jury would furnish the elements of murder in the first degree.

4. If there be in the evidence ingredients to constitute murder in the first degree, the power of the Supreme Court as to awarding a new trial ceases.

5. Under the act of 1870, errors alleged to any portion of the charge or rulings on evidence, can be brought before the Supreme Court only by bill of exception as in civil cases, and the court cannot reverse unless the exception be taken at the trial.

6. In this respect the act of 1870 does not alter or supply the criminal code of March 31st, 1860.

7. The act of 1870 dispenses with a bill of exceptions, only so far as to ascertain whether the facts constitute murder in the first degree.

8. Hopkins v. The Commonwealth, 14 Wright, 9, followed; Schoeppe v. Commonwealth, 15 P. F. Smith, 51, remarked on.

May 27th, 1872. At Harrisburg. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Oyer and Terminer of Chester county (Eastern District): Of July Term, 1872.

WILLIAMS AND CONER v. BAKER ET UX.

1. By 2d sect. of act of February 24th, 1770, the official certificate is the only evidence that the wife has acknowledged the deed in the statutory form so as to convey her estate.

2. Except in cases of fraud and duress, the official certificate of acknowledgment is conclusive of every material fact on its face.

3. The certificate is conclusive even in cases of fraud, &c., as to subsequent purchasers for a valuable consideration without notice.

4. The certificate is conclusive only of such facts as the magistrate is bound by the statute to certify.

5. The general rule as to certificates given by officers is that a certificate of fact not coupled with matter of law is not evidence.

6. If the officer is bound to record a fact, the proper evidence is a duly authenticated copy of the record.

7. If an officer's certificate is made evidence of certain facts, he cannot extend its effects to other facts by stating them in it.

8. A wife is not concluded by the certificate of acknowledgment under the act of 1770, that she was of age: she may show she was a minor when she acknowledged the deed.

9. A minor executed a deed, and during her minority gave an order on the grantee in favor of her husband, for the purchase-money; the husband received it. *Held*, not to be a ratification of the deed.

10. A suit was brought in her name without her knowledge or consent; this was not an estoppel to her in an ejectment for the land.

11. The wife could not ratify the deed exept in the manner prescribed by the act of Assembly.

12. A wife, a minor, owned a remainder in land after the death of a life tenant. During her minority and the particular estate, she joined her husband in conveying the remainder. She came of age after

1848, after which the tenant for life died. *Held*, that she and her husband could maintain ejectment for the land, the husband not being tenant by the curtesy till the particular estate expired, when he took his curtesy with its qualities under the act of 1848.

13. Her estate could not be taken in execution for his debt on account of his curtesy; he therefore could not alienate it during coverture, and she was not estopped by his deed or warranty from maintaining ejectment.

May, 1872. Before THOMPSON, C. J., AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Blair county: Of May Term, 1872, No. 23.

CALIFORNIA.

The Supreme Court of California, at October Term, 1873, decided the following cases:

ATTORNEY AT LAW.

In an action by an attorney at law for money due on a contract for professional services, a judgment in any sum for the services raises the presumption that the court found there was no breach of the contract by the attorney. Wheeler v. Turner, 6 Pacific L. R. 138.

MUNICIPAL CORPORATION.

1. A municipal corporation cannot tax its own property.

2. A tax deed made in pursuance of a sale for such a tax conveys no title. Low v. Lewis, Ib. 143.

TECHNICAL WORD.

Whenever it is apparent that a grantor has used a technical word to express an idea different from its technical signification, it will be construed accordingly. Pacific Railroad Co. v. Beals, Ib. 142.

NEGLIGENCE.

M., while employed as a sub-porter by H., a merchant, was injured by the falling of a hoisting apparatus. *Held*, that evidence that the apparatus had fallen before from a similar cause was admissible to show knowledge of defect on the part of defendant.

Where an employee was injured by the falling of a hoisting apparatus, *held* that the liability of the defendant depended upon three facts: 1. That the method of attaching the hoisting rope was defective and unsafe, and that the injury was caused by the defect. 2. That the defendant knew or ought to have known of the defect. 3. That the plaintiff did not know of it, and had not equal means of knowledge.

It is competent for a jury in fixing damages to an employee, resulting from negligence of the employer, to consider what, before the injury, was the health and physical ability of the plaintiff to maintain himself and family, as compared with his condition in such particulars afterwards; his loss of time, and how far the injury was permanent in its character and results, as well as the physical and mental suffering he sustained by reason of the injury; and they should allow such damages as they think will fairly and justly compensate him for all loss and injury sustained. But the jury cannot consider the plaintiff's "condition in life," whether he is rich or poor. [Shea v. Potrero & B V. R. R. Co., October, 1872, approved.] Malone v. Hawley, Ib. 148.

NEW HAMPSHIRE.

The Supreme Court of New Hampshire have decided, in Winchester v. Nutter et al., that

1. The common law allowing actions to be maintained upon a wager, in cases not contrary to public policy, or prohibited by statute, has never been adopted in this State.

2. In this State all wager contracts are void; but a bet or wager unconnected with a criminal offence, is no offence against the criminal law.

3. A bet upon the result of a squirrel hunt is not a violation of any law of this State.

4. The plaintiff presided at a meeting at which it was agreed to have a squirrel hunt. The side that should be beaten in the contest was to pay for supper for both sides. It was arranged that each man should pay for his own supper, and for that of one man on the victorious side; but the two captains (the defendants) were to engage and be responsible for the suppers for all the men, and the matter was to be afterwards adjusted between the captains and their men. In pursuance of this arrangement, the plaintiff furnished suppers for all the men, knowing and understanding fully how the suppers were to be paid for in the end. *Held*, that the plaintiff was entitled to recover of the two defendants the price of all the suppers.

NEW YORK.

The Court of Appeals, per Rapello, J., in Baker v. Drake et al., decided as follows:

The plaintiff and defendants, who were stock brokers, entered into an agreement whereby the plaintiff was to deposit with the defendants such collateral security or margin as they should from time to time require, and they were to purchase certain stocks, and to hold and carry the same, subject to the plaintiff's direction as to the sale and disposition thereof, as long as he should desire, and would not sell or dispose of the same unless plaintiff's margin should be exhausted or insufficient, and not then unless they should demand of him increased security, or require him to take and pay for the stocks. In an action to recover damages for a wrongful sale by defendants of said stocks, the judge instructed the jury that the plaintiff, if entitled to recover, was entitled to the difference between the amount for which the stock was sold by the defendants and the highest market value which it reached at any time after such sale down to the day of trial. *Held*, error. Markham v. Jaudon, 41 N. Y. 235, overruled as to the rule of damages.—8 A. L. J., 340.

PENNSYLVANIA.

The Orphans' Court of Lancaster county, per LIVINGSTON, J., November 15th, 1873, decided that,

1. Specific legacies and legacies in their nature specific, will not be under the necessity of abating with the general legacies. If the fund provided for the discharge of the legacies, in their nature specific, fail or be deficient, they are so far general as to call upon the general legatees proportionally to contribute towards the loss or deficiency.

2. Where a debtor bequeaths a legacy to his creditor of equal or greater amount than the debt, *and of the same character*, and payable after the debt becomes due, it is the practice of courts of equity to regard it *prima facie* as intended to be in satisfaction of the debt. However, where the legacy and the debt are of different natures, as lands and moneys, the former will not be a satisfaction of the latter.

3. One may give a present bond to pay a sum of money at his or her death, and a delivery of it to the obligee renders it perfect as a present obligation, though payable as a subsequent, whether a fixed or uncertain period to be afterwards ascertained and made certain. It is strictly "*debitum in presenti, solvendum in futuro*," and is as irrevocable as any other obligation under seal, which in law imparts consideration.—Hershey's Estate.

ILLINOIS.

The Supreme Court of Illinois, in Yocum v. Smith, 6 Legal News, 51, decided,

The note in suit was purchased in good faith by the holder before maturity, and was duly endorsed to him. When the note was signed, a blank space was left between the words hundred and dollars, which it was claimed was filled by adding the words "and twenty:" *Held*, under the evidence, if the note has been altered, the maker has acted with too gross carelessness to be entitled to protection; that the maker placed it in the power of another to do an injury, and if any loss result, he must suffer who is the cause of it.

ENGLAND.

LIBEL.

The Court of Common Pleas, England, 28 L. T., N. S. 598, April 25th, 1873, in Gourley v. Phin, decided,

1. As a general rule, in actions for defamation, the ordinary plea that the matters complained of by the declaration are true in substance and in fact, is sufficient, and will be allowed.

2. Therefore, when the plaintiff charged as a libel, and set out in his long declaration passages from a book written by the defendant, imputing to the former that he, being a ship owner, sent vessels to sea overloaded and unseaworthy, and over insured, with a wilful and reckless disregard of the lives on board, and with the object of losing the ships, and a general plea of justification was pleaded, and the court allowed the plea, on the ground that particulars thereof might be obtained, and that such a plea with particulars is in practice preferable to a special plea.

MENTAL CAPACITY.

The Court of Probate, 28 L. T., N. S. 562, June 21st, 1873, in Boughton et al. v. Knight et al., decided, that

Mental capacity is a question of degree, but the highest degree of capacity is required to make a testamentary disposition, inasmuch as it involves a larger and wider survey of facts than is needed to enter into the ordinary contracts of life. A sound mind in contemplation of law does not necessarily mean a perfectly balanced mind.

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REAL ESTATE SALE, DECEMBER 9th.

Will include—

Market, No. 3501—Business Stand—Three-story Brick Store and Dwelling. Administrator's sale—Estate of John Thornton, dec'd.

Keefe, Nos. 121 and 123—2 Three-story Brick Dwellings. Executors Peremptory Sale—Estate of John Nolen, dec'd.

Marion and Wheat, S. E. corner—Lot. Same Estate.

Marion No. 124—2½-story Brick Dwelling. Same Estate.

REAL ESTATE SALE, DECEMBER 16th.

Will include—

Ridge avenue, above the 8 mile stone, Roxborough—Modern Three-story Stone Residence, 3 acres, with barn and carriage house. Orphans' Court Peremptory Sale—Estate of Thos. B. and Lydia E. Blynn, Minors.

Ridge avenue, adjoining the above—2 Two-story Stone Dwellings. Same Estate.

Ridge avenue, adjoining the above—Lot. Same Estate.

GOVERNMENT SALE OF ARMY CLOTHING AND MATERIALS.

DEPOT QUARTER MASTER'S OFFICE,
PHILADELPHIA, November 21, 1873.

Will be sold at public auction at the Philadelphia Depot of the Quarter Master's Department (Schuylkill Arsenal), commencing on Wednesday, January 7th, 1874, at 10 o'clock, A. M., under the direction of Captain John F. Rogers, M. S. R., United States Army, a quantity of damaged and irregular army clothing and materials, consisting in part of 4,000 flannel shirts, 31,000 yards ¾ sky blue kersey, 58,000 yards ¾ blue wool flannel, 3,000 yards 6-4 blue wool flannel, 4,400 yards ¾ white wool flannel, 8,000 yards ¾ gray twilled flannel, 19,000 yards linings, 32,000 yards black alpaca, and various other articles, including a quantity of woollen, cotton, linen and other cuttings; and also about 20,000 feet of old lumber, sash, doors, &c., and an old frame tent-loft building, consisting of about 41,000 feet of lumber, sash, &c.

The terms of sale will be stated in the catalogues, which can be obtained at this office, or at the Schuylkill Arsenal, or at the auction rooms of M. Thomas & Sons, Nos. 139 and 141 South Fourth street, Philadelphia.

L. C. EASTON,
Assistant Quarter Master General, U. S. A.

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JUDICIAL DISTRICTS
OF PENNSYLVANIA;
Originally reported in the LEGAL GAZETTE, from July 2d, 1869, to January 5th, 1872, inclusive.
BY JOHN H. CAMPBELL.
VOLUME I.
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VOL. V. PHILADELPHIA, FRIDAY, DECEMBER 12, 1873. No. 50.

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[Our thanks are due to Hon. T. H. Baird Patterson, of the Pittsburg bar, for a copy of the following opinion]

FOURTH JUDICIAL DISTRICT.

Court of Common Pleas of Alleghany County.

IN EQUITY.

WOODS et al. v. HARE et al.

1. The act of Assembly of 1871, providing for a vote of the people upon the question of calling a constitutional convention, and the act of 1872, which provided for calling it, were both constitutional and valid.
2. There is underlying our whole system of government, a principle of acknowledged right, in the people to change their constitutions, *except where specially prohibited in a constitution itself*, in all cases and at all times, whether there is a way provided in their constitution or not.
3. A convention to amend the constitution without the power passed upon by the people, in determining the question of amendments, has inherently, by the very nature of the case, under the great principle, quasi-revolutionary in its character, above mentioned, absolute power, so far as may be necessary to carry out the purpose for which they were called into existence by the popular will.
4. Unless prohibited or restricted in the manner specified by the people, the convention has a right, untrammeled by mere legislative limitations, to propose to the people for their consideration and adoption any plan they may see fit.

Demurrer to plaintiffs' bill.

Opinion of the court by STOWE, A. L. J. Delivered December 6th, 1873.

Waiving for the present, the minor questions involved in this demurrer with reference to the right of the plaintiffs to have the relief they ask, in case the allegations of the bill regarding the unconstitutionality of the acts of Assembly through which the constitutional convention of 1872 was convened, are correct, we come at once to the great question of the legal force and effect of the several acts of Assembly specified in the bill. It is undoubtedly correct as claimed by counsel for respondents, that the demurrer admits only the truth of the several *facts* alleged, and not the conclusions of law set out as arising from those facts; and, therefore, we are bound to determine for ourselves, as a constituent part of the cause, whether these conclusions are warranted by the facts, and not to assume that these acts of Assembly are unconstitutional, simply because it so alleged in the bill.

I have no difficulty in concluding that if the acts of Assembly in question are unconstitutional and void, the convention was an illegal body and its acts revolutionary; and that in such case it would be the duty of courts to exercise all their authority to prevent its mandates being carried into effect to the injury of any individual; that the Legislature would be bound to enact such laws as might be necessary to punish any attempt to force upon the people its revolutionary work, and the executive officers of the State to use all their powers, civil and military, to suppress it.

If, however, in the face of all this, such force, moral or physical, was brought to bear as to overawe or compel the submission of the legal authorities of the State, then, indeed, the arm of the law would be paralyzed, and the proposed constitution would become effective, not by the law, but by that higher right of revolution, which is above all law, but is nowhere recognized by it. Courts can know nothing by anticipation. They are bound to determine the law as it is previous to the successful accomplishment of revolution, as though such a fact was impossible; but when accomplished and duly recognized by the political powers of the government, the courts have no alternative but to accept the fact without question, and act accordingly.

While these courts must recognize the powers that be, though the product of revolution, they are bound to use all their legitimate authority to suppress acts actually or ostensibly revolutionary, as though they were simply rebellious, and could never become legitimate.

Coming then to the question of the constitutionality of the act to authorize a popular vote upon the question of calling a convention to amend the constitution, approved June 2d, 1871, and also the act passed subsequent to the election held in pursuance of same, entitled "An act to provide for calling a convention to amend the constitution," approved April 11th, 1872, raised by the 2d, 3d, 4th, 5th, 6th and 7th sections of complainants' bill, it is claimed that they are both unconstitutional and invalid, because—

First. There is no power given by the present constitution to the Legislature authorizing such a proceeding.

Second. There is a different method provided by the constitution by which it may be amended, and therefore, upon well recognized principles of law, the legal conclusion arises that no other exists.

It cannot be claimed that the authority for the legislation and proceedings taken in reference to calling this convention are expressly set out in the constitution, but it is argued that the power arises under the second section of the declaration of rights, which declares that "All power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper," all of which is, *inter alia*, excepted out of the general powers of government, and is to "forever remain inviolate."

It is difficult to see how such a withholding of power from the government can, strictly speaking, create a right in the Legislature from which it is thus withheld, to exercise that power; but if it should appear that such power exists above and before the constitution as a great natural and indefeasible right, and has been so recognized and acted upon frequently as a fundamental principle underlying all free government, this provision will sufficiently appear to be a solemn declaration of the existence of such right, and may in ordinary parlance fairly be said, and without any great breadth of legal accuracy, to confer a power under the constitution.

Before, however, entering into a consideration of this question, it will be necessary to examine whether there is anything in the constitution, as urged in the second proposition, which directly, or by necessary legal implication, takes away such a fundamental right as we have suggested, in case it existed where there was not constitutional restriction.

It is urged, and with much apparent force, that because the constitution, in the tenth article "of amendments," provides a certain and carefully defined way of amending the fundamental law, the well recognized legal maxim ordinarily applied to the construction of deeds and written instruments, as well as acts of legislation —*expressio unius est exclusio alterius*— leads to the fixed legal presumption that no amendment can, under the constitution, be made to it, except in the way thus specially provided.

The rule enunciates one of the first principles applicable to the construction of deeds and ordinary instruments between parties (Lord Denman, C. J., 5 Bing. N. C. 185); but great caution is requisite in its application (Price v. The Great Western Railway Company, 16 M. & W. 244, Broom's Legal Maxims, 595), and it has long been settled in commercial transactions that custom and usage are allowed to control or rebut the implication arising under the rule.

Mr. Broom says: "While this rule is of important and extensive application, both in the construction of written instruments and verbal contracts, as also in determining the inferences which may be fairly drawn from expressions used or declarations made with reference to particular circumstances, it is by no means of universal conclusive application. For example, it is a familiar doctrine that though where a statute makes unlawful that which was lawful before, and appoints a specific remedy, that remedy must be pursued and no other, yet where the offence was antecedently punished by a common law proceeding, and a statute prescribes a particular remedy in case of disobedience, that such remedy is cumulative, and proceedings may be had either at common law or under the statute."

Custom and usage have also been allowed to aid in interpreting acts of parliament, and that exposition, says Lord Cooke, shall be preferred which is applied by constant use and experience. It is by no means certain that the maxim alluded to should find any favor as a general rule of interpretation of an instrument like a constitution, which must of necessity deal in generalities; but at all events, if so applied, it must in all such cases be considered as overcome by an established or common usage or understanding indicating a different conclusion.

Mr. Jameson, in his work on constitutional conventions, page 572, says with great force upon this question: "Viewed upon principle, were there no authority upon the point, it would be doubtful whether in dealing with great questions of politics and government, the same maxim ought to prevail which regulates the construction of contracts between man and man. As a matter of speculation, it may be admitted that the rule expresses the weight of probability equal in cases of great and small magnitudes. But there is always a doubt, and between the cases indicated there is the wide difference, that in ordinary contracts it is impossible to enforce the construction which the courts shall pronounce the true one, whilst in the case of constitutional provisions regulating great organic movements, to hold such a maxim applicable, would be, by presenting barriers to the attainment of what the people generally desire, to make that revolutionary which perhaps was not so. Where the intention of the framers of a constitution is doubtful, the people assuming power under the broader construction should have the benefit of the doubt; and that all the more because in opposition to them our courts are comparatively powerless. It is infinitely better where no principle is violated, that a constitution should be so construed as to make their action legal rather than illegal."

So far as judicial opinion is concerned, it has been said by the Supreme Court of New York, that the maxim is to be applied to ordinary contracts rather than constitutional provisions. Barto v. Himrod, 4 Selden, 433. While the judges of the Supreme Court of Massachusetts have expressed a different opinion, 6 Cushing, 573, holding that under the constitution of Massachusetts, containing a provision substantially like our own, no power existed to amend, except as provided in the article of amendments. As the matter of history, however, a convention was called by the Legislature in 1853, twenty years after his opinion was given to propose a constitution; and while the question was raised as to the legality of such convention, it was ably vindicated by the best lawyers in the State, among them, Choate, Parker and Morton—the latter one of the judges of the court at the time the opinion was given, and a constitution proposed and submitted to the people.

Turning now to the history of the government of the various States for the purpose of discovering what the usage in such cases has been, we find the practice has been so frequent and uniform as to clearly indicate what the common understanding of the people, lawyers and laymen, has uniformly been in regard to this question.

So far as I am able to learn, there has been until 1865 (throwing out of consideration the rebel States during 1861 and afterwards, while undergoing reconstruction) twenty-five constitutional conventions called by the Legislatures of the various States without any special authorization in their constitutions. In Georgia, January 4th, 1789, May 4th, 1798 and 1838; in South Carolina, 1790; in New Hampshire, 1791; in New York, 1801, 1821 and 1846; in Connecticut, 1813; in Massachusetts, 1829, 1853; in Rhode Island, 1824, 1834, 1841 and 1842; in Virginia, 1829, 1854 and 1864; in North Carolina, 1835; in Pennsylvania, 1837; in New Jersey, 1844; in Missouri, 1845, 1861 and 1865; in Indiana, 1850.

Mr. Webster stated in 1848, in his argument before the Supreme Court of the United States, in the case of Luther v. Borden, "That of the old thirteen States their constitutions, with but one exception, contained no provision for their own amendment, yet there is hardly one that has not altered its constitution, and it has been done by conventions called by the Legislatures, as an ordinary exercise of power." If this is true, and my own examination, so far as, with the time and opportunity since the argument of this case, I have been able to make it, has verified it, as well as shown the continuation of the same practice to the present day—it would seem as though the question as to whether the calling of a constitutional convention was a legal exercise of power by the Legislature, should now be considered by all judicial tribunals as settled so firmly as a part of the common law of our government, that any attempt to disturb it at this day would savor more of revolution than legitimacy. He would be bold indeed who would now assert that all these conventions were usurpations, and that all the constitutions proposed by them and adopted by the people were revolutionary.

The conclusion that I have drawn from all this is, that there is underlaying our whole system of American government, a principle of acknowledged right in the people to change their constitutions, *except where specially prohibited in a constitution itself*, in all cases and at all times, whether there is a way provided in eir constitutions or not, by the interposition of the Legislature and the calling of a convention, as was done in the case in hand.

The offspring of revolution originally, but restrained and modified by the necessity arising out of the new principle established in this country by the accomplishment of our national independence, that the people and not the king are the government, and the source of all political power, it has become legitimated, and without mention in our constitution, is as much the law of the land as if specifically set out in them; and that as a solemn recognition of *this*, and not as a revolutionary right, the *second* section of our declaration of rights in our own, and similar clauses in other State constitutions, were inserted.

The somewhat similar expression contained in the Declaration of Independence was clearly revolutionary, and so intended to be; but that was a paper published to the world to justify our refusal to longer submit to governmental authority, and spoke of the rights of the people as against the oppression of constituted authorities; but in all instruments established by the people themselves for their own government, the only rational view is to consider it as above stated, the introduction of a constitutional and legal revolution, by the *consent* of the constituted authorities of the State. This is absolutely indispensable, as is now admitted by all. To give the force and effect of law to the proceeding, it must emanate from the legislative authority, and be the result of its permission or direction. The only way the people can legally act under a constitution such as ours, is through their representatives, and, therefore, no matter how many may favor a convention to change the constitution, if one should be called and convene without proper authority from the existing government, its action would be clearly illegal and the result of illegitimate power. It follows, then, that the action of the Legislature in authorizing a vote of the people on the question of the amendment of their constitution, and subsequently by another act authorizing the election of delegates, was a legal exercise of legislative power, and constitutional, unless something in the acts themselves is in conflict with some constitutional provision.

This is claimed by the plaintiffs in the fourth section of their bill, because they say these acts are in violation of the first section of the third article of the constitution, which gives, as they allege, to every qualified voter the right to vote for as many persons as are to be chosen to fill offices, and of the fifth section of the ninth article, which provides that "elections shall be free and equal."

Suffice it to say as to the first suggestion, that the constitution nowhere provides that every elector shall have a right to vote for as many as are to be chosen; nor do I think it at all necessary that implication in cases of offices which may be created and made elective by the Legislature. In cases of what are called constitutional offices, a different question is presented, which we need not now consider.

The second objection is that it violates the clause requiring elections to be free and equal. A careful consideration of this provision, and a comparison of it with similar and kindred provisions of the constitution of other States, satisfy me that no such limitations as were suggested is contemplated by the provision. I understand it to be nothing more than a declaration that elections shall be public and open to all duly qualified alike, without discrimination as to individuals or classes. From these views it appears that the objections raised to the manner of electing the delegates to the convention are not valid, and both the acts mentioned, are in our opinion constitutional, and the delegates to the convention were legally elected.

The eighth, ninth, and tenth paragraphs of the bill complain of illegal acts done by the convention. *First*, in refusing a separate submission to a popular vote of the fifth article relating to the judiciary, the contingency having arisen under which, by the act of the Legislature, they were bound to do so; and *second*, in altering several of the provisions of the bill of rights contrary to the limitations imposed in the fourth section of the act of April 11th, 1872; and *third*, in disregarding the act of Assembly under which the convention was called, in regard to submitting the amended constitution to a vote of the people and ordaining a different method.

These objections are all consistent with the conclusions already arrived at, and if valid would raise further questions under the bill, notwithstanding what has been already said, and should therefore be considered.

In examining these questions, the first and second may be taken together.

Looking upon general principles at the real questions involved, which is how far, if at all, a constitutional convention, regularly called, may legally disregard limitations upon its action by the Legislature, I have no difficulty in arriving at what seems to me to be the correct rule. A convention to amend the constitution, without the power passed upon by the people in determining the question of amendment, has inherently by the very nature of the case under the great principle peculiar to America, and quasi-revolutionary in its character heretofore mentioned, absolute power, so far as may be necessary to carry out the purpose for which they were called into existence by the popular will, unless prohibited or restricted in the manner specified, by the people, the convention has a right, untrammelled by mere legislative limitations, to propose to the people for their consideration and adoption any plan they may see fit. In saying this we are not to be understood as holding that the convention is in any respect the supreme power of the State. We take it to be simply the attorney for the people, with plenary power to do what is required of it, but nothing beyond, subject to the limitations by the people just mentioned. A constitution's convention, in the language of Mr. Wilson, in the Federal convention of 1787, has the power to conclude nothing, but to propose anything.

Such too is the inevitable result of the views already expressed as to the purpose and effect of the second section of the declaration of rights. If it be taken as a constitutional recognition of the principle of legal revolution (so to speak) and of a popular power as we believe, the obvious result follows, that when once called into operation by the power authority it cannot be subversed nor restrained by the Legislature?

If this is correct the convention was right in disregarding the limitations sought to be imposed upon its power, both as to what it should propose to change in the present constitution and how the proposal should be submitted to the people for their adoption or rejection.

The third point, raising the question of the right of the convention to provide a way by an ordinance differing from and substantially repealing the act of the Legislature, presents a very different question from the one we have just considered. It is, however, immaterial to the determination of the real issue in this case. Assuming it to be an excess of power, the complainants can be in no wise affected by it as taxpayers. It is entirely immaterial to them in that respect whether the ordinance is legal or illegal. Their own interest is that of knowing whether the convention had such a power or not as a mere abstract question, which gives them no standing in court. So far as the county is concerned, there was no attempt by the convention to change the law made by the Legislature. The election which will be held within our jurisdiction, and for which the complainants as taxpayers may be called upon to pay, will be held under what the complainants themselves say is the law, unless the submission of the proposed new constitution is itself, as it stands to-day, illegal and unconstitutional.

There are other questions involved in the case, as to the standing and equity of the plaintiffs under this bill, in view of the relief prayed for, but the conclusions already expressed render it unnecessary to examine them.

The result is, the demurrer must be sustained and plaintiff's bill dismissed.

COLLIER, A. L. J., concurred.

His honor, Judge Stowe, then read the following remarks: "We have no particular apology to offer for the hasty and crude opinion just delivered in this case. The emergency, as well as what was due, not so much to the parties named in the bill as to the public, have induced us not only to decide but to present our views upon the main questions involved at the soonest practicable moment. In this great haste details of date and some minor matters in regard to historical facts may be slightly inaccurate, by reason of want of time and opportunity to obtain absolutely correct data. But however this may be, we have no doubt that the great facts upon which our views are founded are absolutely reliable, and whether we may be able to convince others or not of the correctness of our views, we have been unhesitatingly led to believe them correct ourselves."

[Act of June 2, 1871.]

AN ACT

To authorize a popular vote on the question of calling a convention to amend the constitution of Pennsylvania.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same*, That the question of calling a convention to amend the constitution of this commonwealth be submitted to a vote of the people at the general election, to be held on the second Tuesday of October next, the said question to be voted upon in manner following, to wit: In counties and cities in which slip-ticket voting is authorized by law, votes for and against a convention may be expressed and given upon the ticket, headed or endorsed with the word "State," and not otherwise; and the words used shall be "constitutional convention," and underneath "for a convention" or "against a convention;" and in counties or districts in which slip-ticket voting shall

not be authorized by law, each elector voting upon said question shall cast a separate ballot, endorsed on the outside "constitutional convention," and containing on the inside the words "for a convention" or "against a convention;" and all votes cast as aforesaid shall be received, counted and returned by the proper election officers and return judges as votes for governor are received, counted and returned under existing laws.

SECT. 2. That the election aforesaid shall be held and be subject to all the provisions of law which apply to general elections; the sheriffs of the several counties shall give notice of this act in their election proclamation the present year, and the governor shall cause all the returns of the said election, as received by the secretary of the commonwealth, to be laid before the Legislature at its next annual election.

[Act of April 11, 1872.]

AN ACT

To provide for calling a convention to amend the constitution.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same*, That at the general election to be held on the second Tuesday of October next, there shall be elected by the qualified electors of this commonwealth, delegates to a convention to revise and amend the constitution of this State; the said convention shall consist of one hundred and thirty-three members, to be elected in the manner following: twenty-eight members thereof shall be elected in the State at large, as follows: Each voter of the State shall vote for not more than fourteen candidates, and the twenty-eight highest in vote shall be declared elected; ninety-nine delegates shall be apportioned to and elected from the different senatorial districts of the State, three delegates to be elected for each senator therefrom; and in choosing all district delegates, each voter shall be entitled to vote for not more than two of the members to be chosen from his district, and the three candidates highest in vote shall be declared elected, except in the county of Alleghany, forming the twenty-third senatorial district, where no voter shall vote for more than six candidates, and the nine highest in vote shall be elected, and in the counties of Luzerne, Monroe and Pike, forming the thirteenth senatorial district, where no voter shall vote for more than four candidates, and the six highest in vote shall be elected; and six additional delegates shall be chosen from the city of Philadelphia, by a vote at large in said city, and in their election no voter shall vote for more than three candidates, and the six highest in vote shall be declared elected.

SECT. 2. The following regulations shall apply to the aforesaid election to be held on the second Tuesday of October next, and to returns of same:

First. The said election shall be held and conducted by the proper election officers of the several election districts of the commonwealth, and shall be governed and regulated in all respects by the general election laws of the commonwealth, so far as the same shall be applicable thereto, and not inconsistent with the provisions of this act.

Second. The tickets to be voted for members at large of the convention shall have on the outside the words, "delegates at large," and on the inside the names of the candidates to be voted for, not exceeding fourteen in number.

Third. The tickets to be voted for district members of the convention shall have on the outside the words, "district delegates," and on the inside the name or names of the candidates voted for, not exceeding the proper number limited as aforesaid; but any ticket which shall contain a greater number of names than the number for which the voter shall be entitled to vote, shall be rejected; and in the case of the delegates, to be chosen at large in Philadelphia, the words "city delegates," shall be on the outside of the ticket.

Fourth. In the city of Philadelphia the return judges shall meet at the State House, at ten o'clock on Thursday next following the election, and make out the returns for said city, of the votes cast therein for delegates at large and city and district delegates, to be members of the convention; the return judges of the several election districts within each county of the State, excluding Philadelphia, shall meet on the Friday next following the election, at the usual place for the meeting of the return judges of their county, and shall make out full and accurate returns for the county, of the votes cast therein for members of the convention and for district members of the same; and the proceedings of the return judges of the said city of Philadelphia, and of the several counties of the commonwealth, in the making of their returns, shall be the same as those prescribed for return judges in the case of an election for governor, except that returns transmitted to the secretary of the commonwealth, shall be addressed to that officer alone and not to the speaker of the Senate.

Fifth. The prothonotary of Philadelphia, and the prothonotaries of the several counties, shall, with reference to such returns, promptly and faithfully perform all the duties enjoined upon them by the eighty-fourth and eighty-fifth sections of the general election act of July second, one thousand eight hundred and thirty-nine.

Sixth. The secretary of the commonwealth shall as soon as the returns of said election shall be received by him, and at all events within fifteen days after the election, in the presence of the governor and auditor general, open and compute all the returns received of votes given for members of the convention, and the governor shall forthwith issue his proclamation, declaring the names of the persons who have been chosen members of the convention.

SECT. 3. It shall be the duty of the delegates, elected as aforesaid, to assemble in in convention in the hall of the House of Representatives, at the State capitol, in Harrisburg, third Tuesday of November, one thousand eight hundred and seventy-two, at twelve o'clock M., that day, with general powers of adjournment as to time and place; and it shall be the duty of the secretary of the commonwealth to call the convention to order at that time of its assembling, and to submit all the returns of election in his possession, and to read the aforesaid proclamation of the governor; and thereupon said convention shall proceed to organize by electing one of their number as president, and after the members are sworn in, such other officers as may be needed in the transaction of business.

SECT. 4. Said convention, so elected, assembled and organized, shall have power to propose to the citizens of this commonwealth, for their approval or rejection, a new constitution or amendments to the present one, or specific amendments to be voted for separately, which shall be engrossed and signed by the president and chief clerk, and delivered to the secretary of the commonwealth, by whom and under whose direction it or they shall be entered on record in his office, and published once a week in at least two newspapers in each county where two papers are published, for four weeks next preceding the day of election that shall be held for the adoption or rejection of the constitution or amendments so submitted: *Provided*, That one-third of all the members of the convention shall have the right to require the separate and distinct submission, to a popular vote, of any change and amendment proposed by the convention: *And provided further*, That nothing herein contained shall authorize the said convention to change the language, or to alter in any manner the several provisions of the ninth article of the present constitution, commonly known as the declaration of rights, but the same shall be excepted from the powers given to said convention, and shall be and remain inviolate forever: *And provided further*, That the said convention shall not create, establish or submit any proposition for the establishment of a court or courts with exclusive equity jurisdiction.

SECT. 5. The convention shall submit the amendments agreed to by it, to the qualified voters of the State for their adoption or rejection, at such time or times, and in such manner as the convention shall prescribe, subject, however, to the limitation as to the separate submission of amendments contained in this act; and all amendments accepted by a majority vote of the electors voting thereon, shall become a part of the constitution.

SECT. 6. The election to decide for or against the adoption of the new constitution or specific amendments, shall be conducted as the general elections of this commonwealth are now by law conducted; and it shall be the duty of the return judges of the respective counties, first having ascertained the number of votes given for or against the new constitution or separate specific amendments, if any, to make out duplicate returns thereof, expressed in words at length, one of which returns so made shall be filed in the office of the prothonotary of the proper county, and the other sealed and directed to the secretary of the commonwealth; which said returns shall be opened, counted and published, as the returns for governor are now by law counted and published; and when the number of votes given for or against the new or revised constitution, or for or against separate and specific amendments, if any, shall have been summed up and ascertained, and the duplicate certificates thereof delivered to the proper officers, the governor shall declare, by proclamation, the result of the election; and if a majority of the votes polled shall be for the new or revised constitution, or for any separate specific amendments, such new or revised constitution and separate specific amendments shall be thenceforth the constitution of this commonwealth

SECT. 7. The entire compensation and allowance to each member of the convention shall be as follows: For salary, one thousand dollars; for mileage, ten cents per mile circular, not to be allowed at more than two sessions; for postage, stationery and contingencies, fifty dollars; the clerks and other officers to be allowed such compensation as the convention shall direct. Warrants for compensation of members and officers, and for all proper expenses of the convention, shall be drawn by the president, and countersigned by the chief clerk, upon the State treasurer for payment.

SECT. 8. That in case of vacancies in the membership of said convention, the same shall be filled as follows: If such vacancy shall be of a member at large of the convention, those members at large who shall have been voted for by the same voters, or by a majority of the same voters who shall have voted for and elected the member whose place is to be filled, shall fill such vacancy; if such vacancy shall be of a district or city member of the convention, those members at large of the convention who shall have been voted for by the same, or by a majority of the same voters who shall have voted for such district or city member, shall fill such vacancy; in either case, the appointment to fill a vacancy shall be made by the members at large aforesaid, or by a majority of them, in writing; and all such written appointments shall be filed among the convention records.

SECT. 9. That the secretary of the commonwealth shall prepare a form of notice of the election to be held for the purpose of choosing members of the aforesaid convention, including such portions of this act as shall be necessary and proper for the information of voters and election officers at the said election, as to their respective rights and duties in relation thereto; which said form, so prepared, shall be transmitted by him to the sheriffs of the several counties, to be observed by them in making proclamation of the holding of said election in their respective jurisdictions.

SECT. 10. That the secretary of the commonwealth be authorized to obtain for said convention, prior to the meeting of the same, such publications relating to constitutional amendments and reform, and cause to be prepared such statistical information as may be convenient and useful to the convention in the performance of its duties; and the proper expense so incurred, not exceeding six hundred dollars, shall be paid at the treasury, upon settlement made in the office of the auditor general.

WILLIAM ELLIOTT,
Speaker of the House of Representatives.

JAMES S. RUTAN,
Speaker of the Senate.

Approved the eleventh day of April, Anno Domini one thousand eight hundred and seventy-two.

JNO. W. GEARY.

LEGAL GAZETTE.

Friday, December 12, 1873.

JOHN H. CAMPBELL,
EDITOR.

THE GREAT CASES.

We surrender nearly the whole of our space this week, to the opinions rendered by the Supreme Court of Pennsylvania, at Nisi Prius, and the Court of Common leas of Alleghany county, in the Convention cases—the most important that have ever occupied the attention of a judicial tribunal in this commonwealth. In the Philadelphia case, the election ordinance passed by the constitutional convention, was declared to be invalid, and an illegal assumption of arbitrary power upon the part of the convention. The Legislature was in effect, declared to be the supreme power of the State, capable in its omnipotence of calling into existence a constitutional convention, of limiting that inferior body to the consideration of such subjects as in its wisdom it might deem proper to permit, and notwithstanding the fact that the people (who *heretofore* have been considered *above* the Legislature) by their approval expressed in a legal way—at the polls—signified their desire to have a convention, of still further controlling, and limiting that convention in such manner as it might deem fit.

In the Pittsburg case, an effort was made to have the acts of Assembly of 1871 and 1872, declared unconstitutional, on the ground that the constitution did not allow alterations in it to be made by means of a convention, and also to have certain acts of the convention declared illegal and invalid as contravening the acts of Assembly in question. Both efforts fortunately failed, the court declaring that a constitutional convention, when not limited by the people when they vote upon the question of calling it, has *an inherent right* to propose such an instrument for the consideration of the people as it may think proper.

We do not wish to be understood as questioning the honesty of the opinion delivered by the Supreme Court, for we undoubtedly believe that it was the decided and honest conviction of every judge upon the bench, but we do think, with all due respect to their judgmen that they are mistaken in their views of the law, and as one of our daily contemporaries remarked, we believe that the day will come when the very court of which they are now members, will declare exactly the reverse. However, it was not our intention to criticize the action of the court, but merely to call the careful attention of our readers to the great questions involved. We are glad to see that the chief justice, who himself delivered the opinion, has published a letter, which we give below, in which he states that he is in favor of the new constitution. We are the more glad of it, because there is no man in the commonwealth, whom we more highly respect.

LETTER OF CHIEF JUSTICE AGNEW.

BEAVER, December 8, 1873.

SIR:—I find that my private opinions of the proposed new constitution, notwithstanding their frequent expression, are misunderstood. Knowing, as I do, how often the opinions of the judges are supposed by the public to reflect their private opinions, outside of the legal question decided, I feel it due to my convictions and to the cause of the new constitution to say I shall support it. My opinion, delivered last week in Philadelphia, was upon the *power* of the convention, not the *merit* of its works. That opinion was the result of mature thought upon the powers of the people living under a constitution and a government of their own appointment, and that the rights, interest, and security of the people in a state of tranquility must necessarily forbid the exercise of their original powers, except in an authorized form, to collect the will of the body politic in its entirety.

As to the *merits* of the new constitution, I purposely avoided making up my mind until I had the whole work before me. A careful consideration of it convinces me it contains serious errors and defects, yet that as a whole its merits outweigh its demerits; that these merits are general, contained in a great body of amendments which cannot be reproduced except by another convention, not likely to assemble in my lifetime, while the demerits are particular and special, and can be removed by the process of legislative amendments. Some of the errors are flagrant, and some of the defects patent, and were there no means of curing them, I might vote against the whole.

General amendment can be had only through a convention. Such a convention is of rare occurrence, and does not arrive until the wrongs or radical defects of the government force the people to call one. From 1790 to 1837 was an interval of forty-seven years. The interval from 1837 till 1872 was thirty-five years. It would be in vain to expect at the hands of two successive Legislatures the article on legislation, the change in the mode of passing bills, the articles on private corporations and on elections, and perhaps some other amendments. To lose these would be a great loss. But errors and defects that need correction are not general, but particular, and will soon display themselves in the practical workings of the new constitution; and these *can* be remedied. The force of public opinion will compel legislative action, and the necessary changes be adopted.

The principle of my action as a citizen, then, is this: If I do not vote for the new constitution I shall get nothing. If I vote for it I shall obtain the good, and the bad will necessarily bring about future amendment. The good is general, and cannot be had without a new convention; the bad is particular, and can be cured through the Legislature. It requires divine power to create a body and breathe life into it; but the knife of a skilful surgeon can cut off excrescences, or cut out diseased flesh, leaving nature to renew herself by means of her own processes.

Hence, it seems to me to be the part of wisdom to accept the new constitution, and trust to time and public sentiment to cure the errors and supply the defects. The means of so doing can be readily had in a joint commission of the two houses, or a commission of a few of the best men in the State to report amendments to the Legislature for its adoption. In this way a full and perfect body of amendments can be submitted hereafter to the people.

Yours, &c.,
DANIEL AGNEW.

Hon. WM. H. ARMSTRONG, Chairman.

THE BAR AND THE NEW CONSTITUTION.

Throughout the State, the members of the legal profession seem to be generally taking a warm interest in favor of the constitution. One hundred and sixty lawyers of Pittsburg, comprising nearly the whole bar of Alleghany county, have issued a card in its support. In Schuylkill county, the judges and nearly every lawyer of the county, are in favor of it. So it is in many other counties of the State. The lawyers of Berks county recently passed the following resolution:

Resolved, That we recognize in this instrument a combination of wholesome restrictions of corporate and legislative powers, and wise and well considered provisions, for the security of the public moneys, the protection of popular rights, and assurance of individual responsibility, and that we cordially recommend it to the support of the people of this county, irrespective of party predilections, and will use our best endeavors, in common with all friends of good government, to secure its adoption.

That in view of the anticipated opposition to the new constitution from the larger cities, incited by corrupt combinations, we earnestly urge upon our fellow-citizens of all parties the importance, as well as the necessity, of attending the election, so as to insure its ratification beyond peradventure; that the members of the association be requested to append their names hereto upon the minutes, and that the action of this meeting be published in the several newspapers of the city and county.

HENRY RHOADS,	HENRY VAN REED,
J. S. LIVINGOOD,	WM. M. HIESTER,
J. D. DAVIS,	E. M. CLYMER,
A. G. GREEN,	SAMUEL L. YOUNG,
D ERMENTROUT,	F. LEAF SMITH,
A. K. STAUFFER,	H. H. SCHWARTZ,
RICHMOND L. JONES,	E. H. SHEARER,
AUG. S. SASSAMAN	D. E. SCHROEDER,
WM. M. GOODMAN,	F. M. BANKS,
LEVI B. SMITH,	EDWIN SHALTER,
LEW. WANNER,	HENRY M. KEIM,
CHARLES F. EVANS,	J. N. ERMENTROUT,
WM. L. GUINTHER,	F. H. GARRIGUES,
E. M. LEVAN,	M. L. MONTGOMERY,
MATTHIAS MENGEL,	FRANK R. SCHELD,
J. LAWRENCE GETZ,	WM. B. SCHORNER,
JOEL B. WANNER,	HIESTER CLYMER,
A. B. WANNER,	WHARTON MORRIS,
J. G. HAWLEY,	J. GEO. SELTZER,
JOHN RALSTON,	WILLIAM P. BARD,
J. WARREN TRYON,	J. H. JACOBS,
HORACE A. YUNDT,	C. H. SCHAEFFER,
LOUIS RICHARDS,	J. ROSS MILLER,
H. MALTZBERGER,	P. D. WANNER,
G. M. ERMENTROUT,	GEO. F. BAER,
H. W. BLAND,	H. C. G. REBER,
GARRET B. STEVENS,	HORACE ROLAND,
J. A. O'REILLY,	S. M. MEREDITH,

DAN. H. WINGARD.

The lawyers of Lycoming county, have pronounced openly in favor of it. At a meeting held on Tuesday evening last, in Wilkesbarre, Hon. Garrick M. Harding (a republican in politics), president judge of Luzerne, presided, and a paper signed by the judges, and nearly every lawyer of that great county, was read. In *almost every county of the State*, the bar is largely in favor of the new constitution. In Philadelphia, Horace Binney, the oldest and one of the most talented members of the bar, heads a long list of names in favor of the instrument, and so the bar, which generally represents the wishes of the intelligent part of the community, sets its emphatic seal of approval upon the work of the convention.

Supreme Court of Penna, at Nisi Prius.

IN EQUITY.

FRANCIS WELLS et al. v. JAMES BAIN et al., EDWIN H. FITLER et al.

JOHN H. DONNELLY v. EDWIN H. FITLER et al.

The constitutional convention of Pennsylvania before adjourning, passed an "ordinance," regulating the time and manner of holding the election for voting upon the proposed new constitution prepared by them. The ordinance provided *inter alia*, for the appointment of election commissioners for the city of Philadelphia, who were to conduct the election in that place, in accordance with the regulations laid down for their guidance in the ordinance. The regulations being contrary to the general election laws of the commonwealth, as applicable to Philadelphia, an injunction was sought for to restrain the commissioners, and the officers appointed by them, from conducting the election, and to restrain the city officials from furnishing blanks, &c., to the commissioners, or otherwise expending the city moneys for the expenses of said commissioners. The Supreme Court at Nisi Prius granted the injunction, holding as follows:

1. The constitutional convention was the off-spring of *law*, which law was the only form in which the Legislature, *the body invested with the powers of government*, could act, and thereby its (the Legislature's), own consent be given and revolution avoided.
2. The law being the instrument of delegation, the act of Assembly or warrant to the delegates from the people (*i. e.*, the members of the convention) was the only chart of their powers.
3. The delegates possess no inherent power, and when convened by law at the time and place fixed in it, sit and act under it, as their *letter of attorney* from the people themselves.
4. The act of Assembly of April 11th, 1872, which provided "for calling of a convention to amend the constitution," gave the convention no power to frame the ordinance in question, which is, therefore, illegal and void.
5. The court has jurisdiction to restrain invasions of right without authority under the existing laws, and therefore has jurisdiction of this case.

Opinion by Agnew, C. J. Delivered December 5th, 1873.

Since the Declaration of Independence in 1776, it has been an axiom of the American people, that all just government is founded in the consent of the people. This is recognized in the second section of the declaration of rights of the constitution of Pennsylvania, which affirms that the people "have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper." A self-evident corollary is, that an existing lawful government of the people cannot be altered or abolished unless by the consent of the same people, and this consent must be legally gathered or obtained. The people here meant are the whole—those who constitute the entire State, male and female citizens, infants and adults. A mere majority of those persons who are qualified as electors are not the people, though when authorized to do so, they may represent the whole people.

The words "in such manner as they may think proper," in the declaration of rights, embrace but three known recognized modes by which the whole people, the State, can give their consent to an alteration of an existing lawful frame of government, viz.:

1. The mode provided in the existing constitution.

2. A law, as the instrumental process of raising the body for revision and conveying to it the powers of the people.

3. A revolution.

The first two are peaceful means through which the consent of the people to alteration is obtained, and by which the existing government consents to be displaced without revolution. The government gives its consent, either by pursuing the mode provided in the constitution, or by passing a law to call a convention. If consent be not so given by the existing government the remedy of the people is in the third mode—revolution.

When a law becomes the instrumental process of amendment, it is not because the Legislature possesses any inherent power to change the existing constitution through a convention, but because it is the only means through which an *authorized* consent of the whole people, the entire State, can be lawfully obtained in a state of peace. Irregular action, whereby a certain number of the people *assume* to act for the whole, is evidently revolutionary. The people, that entire body called the State, can be bound as a whole only by an act of authority proceeding from *themselves*. In a state of peaceful government they have conferred this authority upon a part to speak for the whole only at an election authorized by law. It is only when an election is authorized by law, the electors, who represent the State or whole people, are bound to attend, and if they do not, can be bound by the expression of the will of those who do attend. The electors who can pronounce the voice of the people are those alone who possess the qualifications sanctioned by the people in order to represent them, otherwised they speak for themselves only, and do not represent the people.

The people, having reserved the right to alter or abolish their form of government, have, in the same declaration of their rights, reserved the means of procuring a law as the instrumental process of so doing. The twentieth section is as follows:

"The citizens have a right, in a peaceable manner, to assemble together for their common good, *and to apply to those invested with the powers of government* for redress of grievances *or other proper purposes*, by petition, address or remonstrance."

If the Legislature, possessing these powers of government, be unwilling to pass a law to take the sense of the people, or to delegate to a convention *all* the powers the people desire to confer upon their delegates, the remedy is still in their own hands; they can elect new representatives that will. If their representatives are still unfaithful, or the government becomes tyrannical, the right of revolution yet remains. To what extent the Constitution of the United States controls this it is unnecessary now to inquire.

It is not pretended that the late convention sat as a revolutionary body, or in defiance of the existing government, and it did not proceed in the mode provided for amendment in the constitution, that being a legislative proceeding only. It was, therefore, the offspring of *law*. It had no other source of existence. The process was an application or petition to the Legislature to call a convention; the passage of a law to gather the sense of the people on the *question* whether a convention should be called; an election authorized by this law to take the sense of the whole people on this question, and, finally, the passage of a law to call the convention and define its powers and duties. A law is the only form in which the Legislature, the body invested with the powers of government, can act, and thereby its own consent be given and revolution avoided. The people having adopted a proceeding by law, as the means of executing their will, having acted under it and chosen their delegates by virtue of its authority, submitted themselves to it, as their own selected and approved means of carrying out peacefully their purpose of amendment. The law, being thus the instrument of their own choice to express their will, necessarily became the channel of their authority. Having furnished no other means of arriving at their will, it is the only channel through which it has been conveyed. The law, therefore, being the instrument of delegation, the warrant to the delegates from the people becomes the only chart of their powers. The will of the people has been expressed in no other form, and the powers of the delegates, therefore, come in no other wise.

It will not do to assert that the whole original power of the people was conferred by the election. This election itself was a part of the instrumental process of the law, the means provided by this very law, of selecting the delegates. The law was the warrant for their election, and expressed the very terms chosen and adopted by the people, under which *they* delegated their power to these agents. The delegates possess no inherent power, and when convened by the law at the time and place fixed in it, sit and act under it, as their letter of attorney from the people themselves, and can know and discover the will of the people only so far as they can discern it through this the only warrant they have ever received to act for the people. If they claim through any other source, they must be able to point to it.

Outside of the law to take the sense of the people whether a convention should be called, and the law to call the convention, no other source has been or can be shown. To make this more distinct, let us suppose a voluntary election unauthorized by law, and delegates elected. It is plain a convention composed of such delegates would possess no power to displace the existing government, and impose a new constitution on the whole people. Those voting at the unauthorized election had no power to represent or to bind those who did not choose to vote. A majority of the adult males having the qualifications of electors can bind the whole people only when they have authority to do so.

To make this still more plain. Suppose a constitution formed by a volunteer convention, assuming to represent the people and an attempt to set it up and displace the existing lawful government. It is clear that neither the people as a whole nor the government having given their assent in any binding form, the executive, judiciary and all officers, sworn to support the existing constitution would be bound, in maintenance of the lawfully existing institutions of the people, to resist the usurpation, even to the whole extent of the force of the State. If overpowered, the new government would be established not by peaceful means, but by actual revolution.

It follows, therefore, that in a state of peace a law is the only means by which the will of the whole people can be collected in an authorized form, and the powers of the people can be delegated to the agents who compose the convention. The form of the law is immaterial in this question of derivative authority. It may be a law to confer general authority or one to confer special authority. It may be an invitation in the first place, as was the act of 1789 under which the convention of 1790 was covened, and an authority to the people to meet in primary assemblies to select delegates, and confer on them unrestricted powers; or it may be a law to take the sense of the people on the question of calling a convention, and then a law to make the call and confer the powers the people intend to confer upon their agents. The power to pass the law carries with it of necessity that to frame and declare the terms of the law. The terms of delegation, which the people themselves declare, when acting under and by virtue of the law which they have called to their aid, is the instrumental process of conferring their authorities and reaching their purpose of amendment, become of necessity the terms of their own will. All outside of this channel is revolutionary, for it has neither the consent of the government nor of the people who have called the government to their aid and acted through it. The process of amendment being through the instrumentality of legislation, these laws must be enacted in the forms of the constitution and be interpreted by the rules which govern in the interpretation of laws.

The next inquiry is—What powers of the people were conferred upon the late convention? A change in the fundamental relations of the people and of that sacred compact which they have instituted to guard and protect their own rights and interests is one of vast, indeed most solemn import: for to impose a new constitution without authority, or to usurp powers not delegated, may lead to bloodshed and ruin. The power to act then should be clearly conferred. The sacred fire from the altar of the people's authority cannot be snatched by unhallowed hands.

The present inquiry is not how much power *may* be conferred by law, but *what* power was conferred on this convention? A *law* must be passed according to the forms of the constitution. One of these is that no bill shall contain "more than one subject, which shall be clearly expressed in the title." The title of the act of June 2d, 1871, is "An act to authorize a popular vote upon the *question of calling* a convention to amend the constitution of Pennsylvania." The text of the act is "That the *question of calling* a convention to amend the constitution of the commonwealth be submitted to a vote o the people at the general election, to be held," &c. The one subject of both title and text is the *question* of *calling* a convention. That *question* was *authorized* to be submitted to a popular vote. In that election each elector expressed his individual opinion on *that* question, and that alone, by voting "for a convention" or "against a convention." This *question* was answered in the affirmative by a majority of votes, and the people, answering the Legislature, said, "You may call a convention." This was all the vote expressed. Each vote expressing the opinion of the elector on that *question*, the majority expressed no more, for the majority was composed of the sum total of the votes on that side. Thus an analysis of the act, both in its title and its text, demonstrates that the vote was not a delegation of power, except to the Legislature. There is no principle of sound interpretation which can extend the voice of the elector or the sum total of those voices, beyond the question each was called to answer. The result of that vote therefore, was that the Legislature might call a convention. It was not in itself a call, nor did it declare when, how, or on what terms the call should be made. That, the very answer to the question proposed to the electors, necessarily left to those who asked their judgment on the propriety of making the call.

It was not even a mandate, further than the moral force contained in an expressed desire of the people. It is very evident, had the matter dropped there, and the Legislature had made no call, no convention and no terms would ever have existed. Not a line, nor a word, nor a syllable in this act expresses an intent of the people to make the call themselves, or on what terms it shall be made, or what powers should be conferred. Did the people by this act, without an expressed intent, and by mere inference, intend to abdicate all their own power, their rights, their interests, and their duty to each other in favor of a body of mere agents, and to confer upon them, by a blank warrant, the absolute power to dictate their institutions, and to determine finally upon all their most cherished interests? If the argument be admitted for an instant that because nothing was said in this law on the subject of *delegation*, therefore, greater powers were conferred than were granted in the subsequent act of 1872, then all power belonging to the people passed, and they did grant by it the enormous power stated. Then, by a covert intent, hidden in the folds of this act, the people delegated power to repeal all laws, abolish all institutions, and drive from place the Legislature, the governor, the judges, and every officer of the commonwealth, without submitting the work of the delegates to the ratification of the people. If by an ordinance under a power derived from this act of 1871, the delegates can set aside the lawfully existing election laws for Philadelphia, where shall their power end? Can they draw money from the treasury to pay their own salaries? Can they seize and condemn a hall for their own use under the power of eminent domain? It is not possible, by any sound rule of interpretation, natural or civil, we can attribute

to the act of 1871, such an enormous, fearful, portentious delegation of power, founded on a vote upon the mere *question* of calling a convention. The result of the vote on this question declared the sense of the greater number of electors, that a convention might be called. But how called? It was not itself a call. It left that to those invested with the powers of government. In and of itself it conferred no authority upon the delegates, but left that to a subsequent act. The call proceeding from the Legislature was necessarily by means of a *law*, for in no other form can the legislative will be expressed. When the people called in legislative aid to procure the call of a convention, they knew, therefore, that a *law* could be the only instrumental process the Legislature could give; and a law being invoked, they know that the power to legislate carried with it the power to frame the terms of the law. They knew still more, when they accepted the law as the means of making the call, that *they* adopted its terms by acting under it. When, therefore, they, in 1872, elected delegates under the act of 1872. they elected them under the terms and provisions of that law, and none other, for there was no other law under which an authorized and binding election was or could be had. The people themselves, therefore, ratified and adopted the terms of the act of 1872, as the terms on which they delegated their powers to those elected under it. The delegates so elected are clearly estopped, by the record itself, from denying the terms under which they hold their seats, for they hold them under the act of 1872, and no other. The entire process of raising a convention and conferring upon it the powers of the people, was a matter of law, in a state of peace, under the forms of the constitution, through which the consent both of the people and of the existing government was given to prevent the convention from being, or becoming a revolutionary body.

Accordingly, the act of April 11th, 1872, is entitled "An act to provide for *calling a convention* to amend the constitution." The text of the act is, "that at the general election to be held, &c., there shall be elected by the qualified voters of the commonwealth, *delegates*, to a convention to revise and amend the constitution of the State," &c. The act then provides for the election, the assembling of the delegates, their powers and duties, and the submission of the constitution or amendments agreed upon to a vote of the people for adoption or rejection. When the people voted under this law, did they not vote for delegates upon the express terms that they should submit their work to the people for approval? Did not every man who went to the polls do so with the belief in his heart that, by the express condition on which his vote was given, the delegates could not bind him without his subsequent assent to what the delegates had done? On what principle of interpretation of human action can the servant now set himself up against the condition of his master and say the condition is void? Who made it void? Not the electors; they voted upon it. The people required the law, as the act of the existing government, to which they had appealed under the bill of rights, to furnish them legal process to raise a convention for revision of their fundamental compact, and without which legal process the act of no one man could bind another. This law, being unrepealed, and being acted upon by the people, became their own delegation of authority—the chart of the delegates to guide and control them in the duties they were elected to perform as the servants of the people. Without this legislation the convention had not existed; and to exist on terms not found in or contrary to the law, is to seek for a grant of powers to be found nowhere else, except in a state of revolution, and, therefore, do not exist in this peaceful process of amendment.

The absolute necessity of the convention to claim the protection of the act of 1872 is seen in another view. Of the one hundred and thirty-three members of this body, less than one hundred in number were elected by the people. Some never received a single vote, but sat by the appointment of men themselves not elected by the people at large. It is not meant to discuss the wisdom or the merits of the so-called limited system of voting, by which a majority of the electors are prevented from voting against persons seeking to represent them; but the purpose now is to show that without the authority of this very act of 1872, more than thirty-three members of the body had no warrant whatever to represent the people. On what principle of right, dominion or power, had these persons any claim to exercise the power of the people, and by their votes, perhaps, to fix upon a people they do not represent, the most odious features of a proposed constitution? Is it not clear that their whole delegated power to speak and to vote for the people, comes from the force and effort of the statute? They have that, and none other.

In considering this question of delegated power some are apt to forget that the people are already under a constitution and an existing frame of government instituted by themselves, which stand as barriers to the exercise of the original powers of the people, unless in an authorized form. They glide insensibly into the domain of abstract rights, and clothe mere agents with primordial power. But delegated authority is *derived*, and those who claim it must show where and how they derived it. Three and a half or four millions of people cannot assemble themselves together in their primary capacity—they can act only through constituted agencies. No one is entitled to represent them unless he can show their warrant—how and when he was constituted their agent. The great error of the argument of those who claim to be the people, or the delegates of the people, is in the use of the word *people*. Who are the people? Not so many as choose to assembly in a county, or city, or a district, of their own mere will, and to say—We, the people. Who gave them power to represent all others who stay away? Not even the press, that wide-spread and most powerful of all subordinate agencies, can speak for them by authority. The voice of the people can be heard only through an authorized form, for, as we have seen, without this authority a part cannot speak for the whole, and this brings us back to a law as the only authority by which the will of the whole people, the body politic called the State, can be collected under an existing lawful government. To wander outside of this channel is to run in search of original powers, which, though possessed by the people, they have conferred in no other form. If the power be *delegated*, it must be seen in the derivation, otherwise it does not exist. If, then, the delegates elected by the people themselves, under the act of 1872, have greater powers than are contained in it, *when, where, and how* did they obtain them? It is not in the act of 1871, for that, as we have shown, decided but one question, and conferred but one power, to wit: That a convention might be called, and that the Legislature might call it. There is no other source to which this convention can appeal, and, not being found there it is found nowhere.

This brings us to an examination of the powers conferred by the act of 1872, as the dernier resort. The power claimed for the convention is, by ordinance, to raise a commission to direct the election upon the amended constitution, in the city of Philadelphia, and to confer power on this commission to make a registration of voters, and furnish the lists so made to the election officers of each precinct; to appoint a judge and two inspectors for each division, by whom the election thereon shall be *conducted*. This ordinance further claims the power to regulate the qualifications of the officers thus appointed to hold the election and to control the general returns of the election. It is clear, therefore, that the ordinance assumes a *present* power to displace the election officers now in office under the election laws for the city, to substitute officers appointed under the authority of the convention, and to set aside these election laws so far as relates to the qualification of the officers and the manner in which the general returns shall be made, and in other respects not necessary to be noticed. The authority to do this is claimed under the fifth section of the act of 1872, giving the convention power to *submit* the amendments, at such time or times, and in such manner as the convention shall prescribe, subject, however, to the limitation as to the separate submission of amendments contained in this act. It is argued that the manner of submission confers a power to *conduct the election* upon the *matter submitted*. To state the proposition is to refute it, for the manner of submitting the amendments is a totally different thing from conducting the election upon the submitted amendments. But it is argued that the fourth, fifth and sixth sections of the act are contradictory, unless the term manner shall be applied to the conducting of the election as well as to the manner of submitting the amendments. The very reverse is true. Each of the three sections has a different subject, and it is clearly provided for in its respective place. These three different subjects are: First, the power to propose amendments; second, the mode or manner in which these propositions shall be submitted, and third, the regulation of the election itself upon the propositions submitted. To be more specific, the fourth section confers the *power to propose* to the citizens for approval or rejection a new constitution or amendments to the present one, or specific amendments to be voted on separately. Then comes the fifth section, which deals not with the power to propose, but with the manner of submitting the thing proposed; that is, in whole or in parts. This is proved by the condition immediately annexed to the manner, to wit: *Subject*, however, to the limitation as to *separate submission* of amendments contained in this act, which was: "Provided, that one-third of all the members of the convention shall have the right to require the *separate submission to a popular vote* or any change and amendment proposed by the constitution." The word *manner* is one of large signification, but one thing is clear—it cannot exceed the subject it qualifies or belongs to. The incident cannot be extended beyond its principal. What then does the word manner qualify or pertain to in this section? Clearly it is the submission—"Shall *submit* the *amendments*" "in such *manner* as the convention shall prescribe, subject to"—subject to what?—the limitation as to the *separate submission* of amendments. Can language be clearer to express the mode of submitting or placing the amendments before the people for their adoption or rejection?

Now we come to the 6th section, which begins a different subject. "The *election* to decide for or against the adoption of the new constitution, or specific amendments, *shall be conducted* as the *general elections* of this commonwealth are *now by law conducted*." Thus the Legislature said to the convention in these three sections—You shall have power to propose your work in three forms; you shall have power to determine the time and the manner in which these propositions shall be submitted; but the elections by the citizens shall be conducted as the law itself directs as to general elections. The 6th section, as to how the election on the propositions submitted shall be conducted is mandatory, and is so for the best of reasons—it is the only legally authorized means of taking the sense of the people upon adoption of which can bind the whole people. In this way only can a majority of voters, who are not a majority of the people, bind them as the body politic or State. The Legislature intended that the election should be conducted by known officers legally elected, and should be governed by a known system of laws with which the people are familiar, and thereby that they should both know and respect the authority under which the election should be held. No implication can be drawn from the word "manner" to contradict the plain and positive enactment that the election shall be conducted according to the laws governing general elections. It would violate the plainest rules for the interpretation of statutes to make the merest inference stand higher than an intent expressed in distinct language. It is, therefore, clear to our minds that the ordinance relating to the election in the city of Philadelphia is flatly opposed to the act of 1872, and is therefore illegal and void. The prospective validation in the 52d section of the schedule only betrays the doubt the convention itself had, of the validity of the ordinance in this respect.

The next question is one of great importance, but stands on a very different footing from that upon the ordinance—I mean

the alleged refusal of the convention to submit the judiciary article separately to a vote of the people. The convention was clothed with express power to act upon the question of submitting the amendments in whole or in part. It is a deliberative body, having all the necessary authority to make rules for its own procedure, and to decide upon all questions falling within the scope of its authority. The power over the manner of submitting amendments is expressly conferred in the 5th section. It is true the law gives to one-third of all the members a right to require a separate submission of any amendment. But while this right is awarded to a minority of the body, it is one upon which the convention itself must act, and it must act according to its own rules of procedure. The question of a separate submission being one committed to the whole body, of which the requiring third is itself a part, it must be presumed that the decision of the body as a whole was rightly made, and either that the request was not made by a full one-third of all the members, or, if made by one-third, it was not in a regular or orderly way. It would be a violent presumption to suppose that the body would wilfully disregard their own oaths as well as a full and orderly request. And if they did this wrong, no appeal is given to the judiciary, and the error can be corrected only by the people themselves, by rejecting the work of the convention. If the people, notwithstanding, chooses to ratify their work, with them lies the consequence. Mere errors of procedure will then be of no avail. The convention having in that matter acted within the scope of its undoubted power, we must take its decisions as final, and leave correction to the power to which it belongs.

Not to omit to notice the arguments drawn from precedents, we think none referred to throw much light on the general question in these cases—this power of the convention to pass the ordinance setting aside the election laws governing the city of Philadelphia and substituting provisions of its own. Even the proceedings in 1789 in our own State, furnish a precedent of but little service. There the Legislature not only invited the action of the people in primary assemblies, but in advance committed to their hands all the authority legislation can confer to act in those assemblies. The convention was summoned without restriction, and acted without trammel, while the people reserved no power of ratification, and subsequently disposed of all questions of power by living under and acting upon the constitution, thereby ratifying the work of the convention in the most efficacious manner. The question before us is, can the convention, before they either proclaim a constitution themselves, if they have the power, or before any ratification, if they have not, pass an ordinance to repeal an existing system of law on a particular subject. This is a question of power, not of wisdom. However wise the substitution of their own election machinery for that provided by law for this city may be, the question is not for us. We can decide only the question of power. At last, therefore, we must come to the decision on principle and in the light of reason, having a due regard to the rights, interests, welfare and peace of a people living under a recognized government of their own choice, and seeking to amend it in a peaceful way, and to such extent as they may deem salutary and wise.

The question of jurisdiction has been reserved for the conclusion. The first remark to be made is, that all the departments of government are yet in full life and vigor, not being displaced by any authorized act of the people. As a court we are still bound to administer justice as heretofore. If the acts complained of in these bills are invasions of rights without authority, we must exercise our lawful jurisdiction to restrain them. One of our equity powers is the prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community or the rights of individuals. Page v. Allen, 8 P. F. Smith, and the authorities cited by counsel are precedents sufficient to justify the exercise in this case. Here the court is asked to restrain a body of men attempting to proceed contrary to law — to set aside the lawful election system of the city, and substitute an unlawful system in its place. Their acts are not only contrary to law, but are prejudicial to the interests of the community, by endangering the rights of all the electors, through means of an illegal election held by unauthorized officers. In Patterson v. Barley, 10 P. F. Smith, 54, the aid of the court was asked not to prevent acts contrary to law, but to strike down the only lawful system of election in the city, and thereby to disfranchise all its citizens, for all other election laws had been actually repealed. We said then it was more than doubtful how far private citizens can call for an injunction beyond their own invaded rights, or ask to restrain a great system of law in its public aspects. In this case we are called upon, not to strike down, but to protect a lawful system, and to prevent intrusion by unlawful authority. If this ordinance is invalid, as we have seen, it is as to the city elections, the taxes of the citizens will be diverted to unlawful uses, the electors will be endangered in the exercise of their lawful franchise, and an officer necessary to the lawful execution of the election law be ousted by unlawful usurpation of his functions.

The convention is not a co-ordinate branch of the government. It exercises no governmental power, but is a body raised by law, in aid of the popular desire to discuss and propose amendments, which have no governing force so long as they remain propositions. While it acts within the scope of its delegated powers it is not amenable for its acts, but when it assumes to legislate, to repeal and displace existing institutions before they are displaced by the adoption of its propositions, it acts without authority, and the citizens injured thereby are entitled, under the declaration of rights, to an *open* court and to redress at our hands.

In conclusion, we regret that the nature of the case requires prompt, instant action, and that the circumstances under which we act demand a written expression of our views. We gladly would have had more time for discussion among ourselves, and for the preparation of the opinion. As it is, we have given to the subject all our most anxious thoughts and labor, and have arrived at the best conclusions honest convictions can reach.

FORMAL DECREE OF THE COURT.

Wells v. Bain et al., Fitler et al. And now, December 5th, 1873, this case having come on to be heard before the Hon. Isaac G. Gordon, sitting at Nisi Prius, with the aid of the chief justice and all the other judges of the Supreme Court, called in to sit with him as assessors, and having been duly considered by all the said judges, it is now ordered and decreed that a special injunction be issued out of the said court to the said defendants, Edwin H. Fitler, Edward Browning, John P. Verree, Henry S. Hagert and John O. James, commissioners appointed in an ordinance made by the convention to propose amendments to the constitution of this commonwealth, and done on the 3d day of November last, enjoining and strictly prohibiting them as such commissioners from directing or in any manner controlling an election to be held under the said ordinance in the said city of Philadelphia, on the 16th day of this December, and especially enjoining and prohibiting them from appointing judges and inspectors to hold the said election in the several districts in the said city, and from making a registration of voters and furnishing the list thereof to the election officers; and a special injunction is issued to the said defendants, James Bain, Alexander McCuen and Thomas Locke, commissioners of the said city of Philadelphia, enjoining and prohibiting them from appropriating, using or expending any money or property of the said city in and about preparing for and conducting the election aforesaid, in so far as the said defendants, E. H. Fitler, Edward Browning, John P. Verree, Henry S. Hagert and John O. James, propose to direct and control the said election and to appoint the officers thereof, or otherwise to manage the same. These injunctions to continue until final hearing or further order of the court. Bail in $5,000 to be given by the complainants before issuing the injunctions.

Donnelly v. Fitler et al. Decree the same as above, so far as relates to Fitler et al. Bail in $2,000.

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Cemetery Lot.—Enclosed Lot, No. 483.—Section E.—Monument Cemetery.—Estate of Hannah Jackson, dec'd.

Orphans' Court Absolute Sale.—No 2321 South street. Genteel Three story Brick Dwelling, with back buildings and Side Yard. Lot 23 x 60 feet.—Estate of Mary Shaw, dec'd.

Orphans' Court absolute Sale.—South street. Desirable Building Lot, at N. E. cor. Twenty-fourth street, 20 feet on South street, by 60 feet deep on Twenty-fourth street. Same Estate.

Orphans' Court Absolute Sale.—No 521 S. Twenty-fourth street. Neat Three-story Brick Dwelling, with back buildings, above South street. Lot 23 x 43 feet. Same Estate.

Orphans' Court Absolute Sale.—East Dauphin street. Two-story Brick house, between Cedar and Memphis streets, Nineteenth Ward. Lot 18 x 80 feet. Estate of Hugh McKeown, dec'd.

Executors' Sale.—No. 2205 Holman street, Neat Three-story Brick Dwelling, near York street, Nineteenth Ward. Lot 13 x 86 feet. Estate of Hannah Jackson, dec'd.

Sale to Close an Estate.—No. 2123 Sharswood street. Neat Three-story Brick Dwelling, Twenty-ninth Ward. Lot 14 x 49 feet. Estate of Robert Harrington dec'd.

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Ridge avenue, adjoining the above—2 Two-story Stone Dwellings. Same Estate.

Ridge avenue, adjoining the above—Lot. Same Estate.

Twelfth. (South,) No. 1007—Three-story Brick Dwelling.

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REAL ESTATE SALE, DECEMBER 23d.

Will include—

Darby road, near Sixty-third—2½-story frame Dwelling. Orphans' Court Sale—Estate of James McLaughlin, dec'd.

Sepviva and Turner, N. E. corner, near the Second and Third Streets Passenger Railway Depot—Three-story Brick Store and Dwelling. Assignee's Peremptory Sale—Assigned Estate of Christian Freyer and Oliver Benner.

Sepviva, adjoining the above—8 Genteel Three-story Brick Dwellings. Same Estate. Will be sold separately.

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Will include—

Lancaster Turnpike—Large Lot. Orphans' Court Sale—Estate of Samuel Hutchinson, dec'd.

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PHILADELPHIA, November 21, 1873.

Will be sold at public auction at the Philadelphia Depot of the Quarter Master's Department (Schuylkill Arsenal), commencing on Wednesday, January 7th, 1874, at 10 o'clock, A. M., under the direction of Captain John F. Rogers, M. S. R., United States Army, a quantity of damaged and irregular army clothing and materials, consisting in part of 4,000 flannel shirts, 31,000 yards ¾ sky blue kersey, 58,000 yards ¾ blue wool flannel, 8,000 yards 6-4 blue wool flannel, 4,400 yards ¾ white wool flannel, 8,000 yards ¾ gray twilled flannel, 19,000 yards linings, 32,000 yards black alpaca, and various other articles, including a quantity of woollen, cotton, linen and other cuttings; and also about 20,000 feet of old lumber, sash, doors, &c., and an old frame tent-loft building, consisting of about 41,000 feet of lumber, sash, &c.

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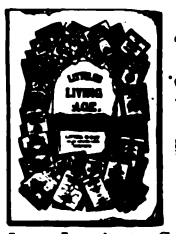

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THE

SUPREME COURT OF PENNSYLVANIA, AT NISI PRIUS;

THE

DISTRICT COURT;
COURTS OF
COMMON PLEAS,
QUARTER SESSIONS,
OYER AND TERMINER,
AND ORPHANS' COURT
OF PHILADELPHIA.

AND IN THE COURTS OF THE

THIRD,
EIGHTH,
NINTH,
ELEVENTH,
TWELFTH,
TWENTY-SIXTH,
TWENTY-EIGHTH
AND TWENTY-NINTH
JUDICIAL DISTRICTS
OF PENNSYLVANIA;

Originally reported in the LEGAL GAZETTE, from July 2d, 1869, to January 5th, 1872, inclusive.

BY JOHN H. CAMPBELL.

VOLUME I.

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Supreme Court of Pennsylv'a.

HAGEMAN et al. v. SALISBERRY et al.

1. The waiver of inquisition in a judgment note or bond is a part of the record of the judgment.
2. Buehler v. Rogers, 18 P. F. S. 9, and Hope v. Everhart, 20 P. F. S. 231, distinguished.—*P. L. J.*

Error to the District Court of Allegheny county.

Opinion by MERCUR, J. Delivered November 10th, 1873.

The case has been twice argued. It has received that consideration to which it was entitled. Seven errors have been assigned, but the whole case depends upon whether the waiver of inquisition is a part of the record of the judgment.

The bond contains an express waiver of inquisition, and of condemnation of all real estate which may be taken in execution issued on any judgment obtained thereon. This waiver is a part of the condition. It precedes the warrant which authorizes an attorney to confess judgment. All the terms and conditions are part and parcel of one and the same instrument. The obligation is an entirety. The warrant of attorney is an authority to confess judgment upon the whole instrument. That undoubtedly means according to all of its terms, conditions and stipulations. They clearly express, and with equal force declare the sum to be paid, the waiver of inquisition, and the condemnation of the obligor's real estate.

Upon this instrument, so written, the judgment was recovered, and the inquisition and condemnation were waived. An declaration in the usual form was filed. An attorney appeared for the defendant, and executed a written confession of judgment. He therein declared that he did it by virtue of a warrant of attorney authorizing him thereto. In that confession, he recited substantially all the conditions of the obligation. With it he filed the original bond, showing full authority for his act. The prothonotary entered upon the docket the filing of the *narr.*, the appearance of the attorney, and his confession of judgment with the waiver of inquisition and condemnation. When the *fi. fa.* issued, the prothonotary endorsed thereon, "inquisition and condemnation waived."

Thus in *fact* the waiver of inquisition and condemnation was blended and interwoven with the record of the judgment. Was it not so in law?

The waiver was a part of the contract. As such it was as obligatory upon the maker as his agreement to pay the sum therein stipulated. He was bound to the fulfilment of all its terms. Suppose the instrument had not contained any warrant authorizing a confession of judgment, but was otherwise the same, with its waiver of inquisition and condemnation, and suit had been brought upon it; a full copy of the instrument had been set forth in the declaration, the original filed in the case and judgment taken thereon upon a verdict, could it be seriously contended that the waiver was not a part of the record of the judgment? The record of an action, in a court founded on common law, consists of the writ, declaration, pleas and judgment. Erb v. Scott, 2 Harris, 20. In case execution should be issued upon such a judgment, and land be levied upon, I cannot conceive it would be necessary to hold an inquisition thereon. If the legal effect of such a judgment, duly entered upon a verdict regularly obtained, would be to dispense with the holding of an inquisition, then like effect must be given to the record of this judgment, regularly entered upon a warrant of attorney. In contemplation of law, a judgment on warrant of attorney is as much an act of the court as if it were formally pronounced on *nil dicet* or a *cognovet*, and till it is reversed or set aside, it has all the qualities and effect of a judgment on verdict. Braddee v. Brownfield, 4 Watts, 474. The judgment by the prothonotary, under a power contained in the instrument, is a judicial act, and may be entered by him under the act of 1806, or may be confessed by an attorney independently of that act. Cook v. Gilbert, 8 S. & R. 568; Flanigen v. City of Philadelphia, 1 P. F. Smith, 491; St. Bartholomew's Church v. Wood, 11 P. F. Smith, 96. The rule may be so qualified by the authority of Banning v. Taylor, 12 Harris, 289, as to require the warrant of attorney to be filed with the appearance, in order to give full effect to the judgment, and to prevent the issuing of a certiorari to bring up the warrant, upon a suggestion of diminution of record. In the case now under consideration that contingency does not arise.

When a judgment is recovered according to the terms and conditions of a written obligation for the payment of money, and these terms and conditions expressly either limit the lien of any judgment that may be recovered upon it, or which waive the benefit of all laws exempting property from levy and sale on any execution; or which waive the right of inquisition upon the delinquent's real estate, and in the entry of the judgment this is set forth upon the docket, it must be held to be a part of the record of the judgment. Hence it was ruled in Stanton v. White, 8 Casey, 358, that effect should be given to a stipulation in bond and warrant of attorney, restricting the lien of the judgment to be entered thereon to certain designated lands. So in a pending suit, if judgment is confessed and entered in pursuance thereof, the terms and conditions of the confession enter into and form a part of the record of the judgments, modifying and qualifying its effect.

In Coleman v. Coleman, 7 Harris, 100, it was held that an agreement, and the entry of judgment thereon, in a pending action of partition, stipulating that certain ore banks and mine hills should remain undivided, became the judgment of the court. By that judgment and decree, said Mr. Justice Woodward, in giving the opinion of the court, the covenant was inwrought into the titles of the parties, so that it should remain firm and stable forever.

The cases of Buehler v. Rogers, 18 P. F. Smith, 9, and Hope v. Everhart, 20 P. F. Smith, 231, have been cited as establishing the doctrine that the inquisition is no part of the record of the judgment. The first of these is clearly distinguishable from the present case, in that there was no agreement either before or at the time of the rendition of the judgment, to waive the inquisition. The allegation was that an inquisition had been held by the sheriff, but the *fi. fa.* and return thereon could not be found, and it was uncertain upon what land the writ had been levied. The case of Hope v. Everhart also differs. There the judgment was entered by the prothonotary under the act of 1806, without the intervention of an attorney. The reasoning of Mr. Justice Williams is predicated mainly upon that act, and the duty and power of the prothonotary under it. The case wholly lacked the superadded appearance of an attorney for the defendant, and his confession of judgment therefor, expressly waiving the inquisition and condemnation. That the authority of an attorney is more extensive in Pennsylvania than in other countries, and that his act binds the client, is recognized by numerous cases. Coxe et al. v. Nicholls, 2 Yates, 546; Reinholt v. Alberti, 1 Binn. 469; Lynch et al. v. Commonwealth, 16 S. & R. 368; Wilson v. Young, 9 Barr, 101; Cyphert v. McClune, 10 Harris, 195; Flanigen v. City of Philadelphia, 1 P. F. Smith, 491. If a judgment be confessed by an attorney, neither his authority nor the regularity of the judgment can be inquired into in a collateral action. Where he appears without authority and confesses judgment, the remedy is against him, or in a proper case the court in which it was entered may open the judgment. Cyphert v. McClune, *supra*; Evans v. Meylert, 7 Harris, 402. The prothonotary, who is the maker and keeper of the records, acts under the supervision of the court. His record is the record of the court made by the proper officer, and another court cannot say whether the record made by the proper officer was properly made or not. The court of which he is the officer has the sole jurisdiction to examine this, and to correct it if found wrong. Hoffman v. Coster, 2 Whar. 452.

While it is contended that a sale under this *fi. fa.* is bad, yet it is conceded if it had been made upon a *ven. exp.*, it

would be good. We are unable to see much force in the distinction, as the record shows the waiver. In either case the judgment would have supported the execution, and the record would have shown the authority to sell. There is nothing in the case going to show fraud in the plaintiff in the judgment, nor to impeach the title of the defendants below as good faith purchasers. The very able argument of the counsel for the defendant in error has failed to satisfy us, that the title acquired by a good faith purchaser upon the faith of the records shall not be sustained. We think the learned judge erred in admitting the evidence contained in the first and second assignments of error, as well as in affirming the point presented in the fourth. The court should have affirmed the point covered in the fifth and seventh assignments. We discover no other error in the record.

Judgment reversed, and a *venire facias de novo* awarded.

Supreme Court of Pennsylv'a.

PETERS AND WIFE v. ULMER AND WIFE.

The defendant in a slander suit may plead not guilty as well as justification.—*P. L. J.*

Error to the District Court of Allegheny county.

Opinion by SHARSWOOD, J. Delivered November 21st, 1873.

The first assignment of error is, that the court below refused to allow the defendant to plead "not guilty," as well as justification, and in ordering the defendant to withdraw the plea of "not guilty." The ground upon which this order was made appears to have been that the pleas were inconsistent. Under the statute of 4 Anne, c. 16, s. 4, Roberts' Digest, 42, which first permitted a defendant, with the leave of the court, to plead as many several matters as he should think necessary for his defence—it was the practice at first for the court to refuse leave when the proposed pleas were inconsistent, but in modern practice such pleas, notwithstanding the apparent repugnancy between them, are permitted. 1 Troubat & Haley, Part 1, p. 470. Thus, to go no further, what seems to be more inconsistent than to an action upon a bond to plead *non est factum* and payment—to deny the execution of the bond by the defendant, and yet to allege that he had paid it? The only exception which appears to be recognized is the general issue and tender, and there is a good reason perhaps for not allowing these to be pleaded together; for if a verdict were found for the defendant on the general issue, this incongruity would appear upon the record, that nothing was done, though the defendant had admitted on the record, by pleading the tender, that something was done. Maclellan v. Howard, 4 Term Rep. 194. In Kerlin v. Heacock, 3 Binn. 215, the short entry of "not guilty with leave to justify," was considered as in fact several pleas of not guilty and a justification, and no remark was made by the court as to their inconsistency. In truth they are not inconsistent. The defendant in slander may believe and allege that he never used the words imputed to him, but as human testimony is fallible and uncertain, he may well justify himself by adding, if the plaintiff succeeds in proving that I did say the words, they were true. Against an unscrupulous plaintiff of bad character—especially since the act of Assembly allowing him to be a witness in his own behalf—it may be the only safe line of defence. The discretion, vested in the court by the statute of Anne to give or refuse leave to put in more than one plea, is clearly a legal discretion, not to be exercised unless good reason exists. Where, as here, it was refused to allow an amendment of the pleadings, it was error under the act of March 21st, 1806, s. b. 4 Smith, 329. In Smith's Administrator v. Kessler, 8 Wright, 142, where, after a plea of payment, the defendant was refused leave to put in a plea of non-assumpsit, this court reversed the judgment.

Nor can we see that the case is helped by the rule of the court below relied on by the defendant in error. That rule was evidently intended to abolish the loose mode of pleading "not guilty with leave to justify," which had been condemned by this court in Kerlin v. Heacock, and to compel a defendant to set out in a formal plea of justification what matter he intended to rely on as such. That, indeed, was an action of trespass *de bonis asportatis*; but the same reason applies in libel and slander. The defendant is entitled to have the matter formally spread upon the record—the accusation which he may be called on to meet, if it be of an indictable offence.

Upon the state of the pleadings, after the withdrawal of the plea of *not* guilty, the second and fourth assignments cannot be sustained. The third assignment is to the refusal of the court to award a peremptory non-suit. If it was an error it is clearly not reviewable here.

Judgment reversed, and *venire facias de novo* awarded.

W. D. Moore, Esq., for plaintiff in error.

Court of Common Pleas of Philadelphia County.

GIVIN v. GREEN.

Sur rule for a new trial upon an issue *devisavit vel non*, the court *held*:

1. Where the subscribing witnesses to a will cannot be found after diligent search made, proof of their signatures, or the signature of the testator, will be admitted.
2. It is for the jury to make the comparison of handwriting, not an expert.

Sur rule for new trial.

Opinion by PAXSON, J. Delivered December 13th, 1873.

This was a feigned issue to determine the validity of a paper writing purporting to be the last will and testament of Abigail Storer, deceased.

Upon the trial the case was narrowed down to a mere question of forgery. The jury found a verdict for the plaintiff, thus sustaining the will.

The third and fifth reasons assigned by the defendant in support of his rule may be considered together. They allege that the court erred in dispensing with the testimony of the subscribing witnesses, and in permitting the signature of the testatrix to the alleged will to be proved by other than the subscribing witnesses.

The general rule undoubtedly is, that in order to establish the validity of a will, the subscribing witnesses must be called, if living and within the jurisdiction of the court. In either of the latter contingencies proof must be made of the handwriting of the deceased, or absent subscribing witness.

In this case the plaintiff was unable to find either of the subscribing witnesses, or to obtain any trace of them. Under such circumstances to exclude proof of the signature of the testratrix would be to shut out all proof of the execution of the will, and to prevent the parties interested therein from taking any benefit under it. This cannot be the law. It is in the daily experience of every professional man that important legal papers are constantly being witnessed by obscure persons who have no fixed residence, and whom it may be next to impossible to trace after a number of years have elapsed.

It would be equally vain to require proof of the handwriting of an absent subscribing witness, whom the parties have been unable to trace, or as to whom they could obtain no information whatever. In Greenleaf on Evidence, § 572, and in Starkie on Evidence, 377, it is held, that when a subscribing witness cannot be found after diligent inquiry, or is a fictitious person, the signature of the maker of the instrument may be proved by witnesses who have knowledge of his handwriting. See also Cunliff v. Sefron, 1 East, 183, where the same principle is expressly decided.

The only remaining question upon this point is, whether due diligence had been used by the plaintiff in her search for the subscribing witnesses.

The rule is thus briefly stated in Greenleaf: "The degree of diligence for the subscribing witnesses is the same which is required in the search for a lost paper, the principle being the same in both cases. It must be a strict, diligent, and honest inquiry and search, satisfactory to the court under the circumstances of the case."

The will of Mrs. Storer is dated in 1861. Inquiry was made upon several occasions in the vicinity where she resided at that time, for the subscribing witnesses, but no one there had ever heard of them. The directory, for several years about that time and later was examined, and every person whose name corresponded with that of either of the subscribing witnesses was called upon, and inquiry made as to whether he had witnessed such a will, without success. The latter mode of search was resorted to upon three different occasions, and appeared to have been thorough. It is difficult to see what more the plaintiff could have done. The proof of diligence was satisfactory to the court at the time, and a re-examination of the law and the facts has not changed my view.

The fourth reason alleged is error in admitting in evidence the will of 1846. In support of the allegation of forgery the defence offered evidence of the declarations of the testatrix at various times prior to her death, that she had never made a will. To rebut this evidence the plaintiffs proved counter-declarations of the testatrix that she had made a will. In addition the plaintiff produced a paper purporting to be a will of Mrs. Storer, dated in 1846, and which plaintiff swore was handed to her by Mrs. Storer herself, with the statement that it was her (Mrs. Storer's) will. I do not see any error in the admission of this paper. It was strictly in rebuttal.

The sixth reason alleges that the court erred in charging the jury that the testimony of the expert called by the defendant "was not to be regarded by the jury, but that comparison of handwriting was the test, and that they were the exclusive judges thereof."

I did not charge precisely as stated in this reason. I did say that it was for the jury to make the comparison of handwriting, and not for an expert; but I also said that as the expert had been allowed without objection to testify to his belief as to the signature from a comparison of it with the test papers, they should regard his testimony so far as it aided them in determining the question referred to, but that they should not allow it to control their own independent judgment. That this ruling was right under the authority of Travis v. Brown, 7 Wright, 9, there can hardly be a question.

The remaining reasons are the usual formal ones. This case involves character as well as property. When that is the case the verdict of the jury upon the facts should not be disturbed without weighty reasons. Such reasons do not exist in this case.

Rule discharged.

Aaron Thompson and *Thomas Latimer, Esqs.*, for rule.

William L. Hirst, and *W. E. Whitman, Esqs.*, contra.

BOYLE v. HAUGHEY.

Stocks attached in the name of the husband was claimed by the wife, who upon the trial, was called as a witness to prove that the stock was paid for out of her own separate earnings. The court excluded her testimony. *Held*, not to be error.

Sur rule for new trial.

Opinion by PAXSON, J. Delivered December 13th, 1873.

Certain shares of stock in a building association, standing in the name of the defendant, were attached as his property. Subsequently the wife of the defendant was allowed by the court to come in and defend, upon her allegation that the stock referred to was her property, and paid for out of her separate earnings. Upon the trial of the case her counsel called her as a witness, and offered to prove the above facts by her. The court excluded her testimony, and this is now assigned as error.

The act of 15th of April, 1869, which provides that the parties to a civil proceeding may be examined as witnesses, contains the express provision that "said act shall not alter the law as now declared and practiced in the courts of this commonwealth, so as to allow husband and wife to testify against each other."

Musser v. Gardner, 16 P. F. S. 242, and Rowley v. McHugh, Id. 269, were cited in support of the competency of the wife as a witness. In the latter case an action of ejectment had been brought by husband and wife for land sold under a judgment against her husband. It was held that the husband had no interest in maintaining the title of his vendee, and that in such case the wife testifies not against her hus-

band, but in her own behalf. In the case first named the husband sold the personal property of the wife; she brought replevin, to which suit he was not a party, and it was held she was competent to testify for herself under act of Assembly referred to. Thompson, C. J., in delivering the opinion of the court, says: "The husband was no party, and that he might possibly be called on at some time or other to answer on an implied warranty of title to property he had sold, and now claimed by the wife, was too remote and contingent to bring her within the prohibition of the statute from testifying against her husband."

The cases referred to differ materially from the one under consideration. In the latter the husband is a party and may appear and plead to the attachment, in which case an issue must be formed as to him. The shares in the building association, which are the subject of controversy, stand in his name, and are *prima facie* his property. The wife claims to be the owner thereof, and to withdraw them from the grasp of the execution creditor of the husband. This is setting up an adverse title. She cannot do this by her own testimony as against her husband, or his execution creditor, who claims by and through him. It comes within the direct prohibition of the statute.

Rule discharged.

BARRY v. McAVOY.

Demurrer sustained by reason of essential facts not being averred.

Demurrer to bill.

Opinion by PAXSON, J. Delivered December 13th, 1873.

The defendant demurs to the plaintiff's bill, and assigns as cause of demurrer that "the plaintiff does not aver that he has the right and privilege of the alleged drain or water-course, or that the same is reserved through the premises of the defendant."

This demurrer is well taken. The plaintiff wholly omits to aver that he has any right to the drain which he charges the defendant is about to obstruct. Nor does he state any fact from which such right can necessarily be inferred.

The demurrer is sustained.

Samuel Wakeling, Esq., for demurrer.

Geo. F. Borie and *C. F. Erichson, Esqs.*, for plaintiff.

TWENTY-SIXTH JUDICIAL DIST.

Court of Common Pleas of Wyoming County.

IN EQUITY.

MEYHART et al. v. SUPERVISORS OF FORKSTON et al.

1. The act of 31st March, 1864, authorizing Courts of Quarter Sessions, after ascertaining the amount of indebtedness of any district or township, "by writ of mandamus to direct the proper officers to collect by special taxation an amount sufficient to pay the same," does not authorize a resort to unseated lands as a proper subject of taxation for such purpose.
2. Nor can such lands be sold for non-payment of poor taxes assessed thereon.

A special injunction was granted by the court, restraining the county treasurer from selling the unseated lands of the plaintiffs for certain special taxes, claimed to have been duly assessed thereon, by the supervisors of Forkston township, in pursuance of a writ of mandamus ordered by the court directing them to collect, by special taxation, an amount sufficient to pay the previously ascertained indebtedness of the said township, and also from selling the same for poor taxes charged thereon. The supervisors were required to answer the plaintiffs' bill complaining of these taxes, and on answer being filed, the case was referred to R. R. Little as master, and was argued upon the bill and answer.

SYNOPSIS OF THE MASTER'S REPORT.

The questions in this case are raised by the bill and answer, and are, 1. Whether resort may be had to the unseated lands of the plaintiffs for the "special taxes" mentioned in the bill.

2. Whether such resort may be had for the poor taxes.

The first question involves a construction of the act of 31st March, 1864, giving power to the Court of Quarter Sessions, "after ascertaining the amount of indebtedness of any particular district or township, by a writ of mandamus, to direct the proper officers to collect by special taxation an amount sufficient to pay the same."

This act is silent both with reference to subjects of taxation, and means, or process of collection, or enforcing payment. These, then, must be implied, and the authority for such implication must be found in pre-existing law, for it is not claimed that any subsequent statute supplies the deficiency, a tax law defining the subjects of taxation, but providing no means or process for enforcing payment, would be of little utility. To make this one available we must find authority for implying both. Undobtedly the Legislature, in employing the words "to collect by special taxation," had in contemplation *some* subjects of taxation, and *some* process of collection. What subjects, and what process? I answer, the ordinary subjects of taxation for township purposes, and the ordinary process of collecting the taxes. These are found specified in the act of 15th April, 1834, from sections 25 to 36, both included, Dunlop's Dig. 560, *et seq.* In reference to the proper subjects of such taxation, if we were required to look no further than the list of such subjects recited in this act, no question of difficulty would be presented, because the words "real estates" in that list are broad enough to include unseated as well as seated lands. But the means provided by the same act for enforcing payment show quite clearly that the former could not have been in legislative contemplation. This process of collection is, 1. A general warrant from the supervisors (or overseers of the poor, as the case may be) to a collector, "therein authorizing him to demand and receive from every *person*, in such duplicate named, the sum wherewith such *person* stands charged."

2. In case of neglect or refusal to pay, the collector is required to obtain a warrant from some justice of the peace of the proper county, authorizing him to levey the tax by distress and sale of the *goods* of the delinquent, or in default of such goods, to take his *body*, &c. These sections of the act of 1834 make the township taxes a *personal* charge merely. They afford no recourse to land, seated or unseated. True, "real estate" is named as one of the subjects of taxation, "upon the basis of the last adjusted valuation for county purposes," &c., but the taxes when assessed, are charged to the *person*, and are collected from the person, or from personal property of the delinquent, or of the occupant, except in the single case mentioned in the subsequent act of 1844, provided that seated land having neither occupant nor personal property upon it sufficient for payment of the tax, may be resorted to as unseated, for such taxes as may be lawfully collected therefrom.

But the process of sale of unseated lands for certain specified taxes, is a *special*, not an ordinary, or general process for the collection of ordinary taxes. The authority for such process is found in the act of 1802, 3 Smith's Laws, 515-16, and the act of 30th March, 1811, Dunlop's Dig. 238. And the proceedings under these acts have special reference to the collection of *road* taxes, and these only. The supervisors are required to issue to the county commissioners certified transcripts of the *road taxes* due on unseated lands; whereupon the commissioners are required to issue their order to the county treasurer for the amount *thereof*, and also to transmit copies *thereof* to the said treasurer, who is required to enter *them* in a book to be kept for that purpose. Thenceforth the proceedings are the same as in cases of sale for county taxes as prescribed by the acts of 1804 and 1815.

The only *township* taxes that these acts of Assembly charge upon unseated lands are *road* taxes, *eo nomine*. By the subsequent act of 8th May, 1854, resort was given to unseated lands for school taxes assessed thereon, but these are not strictly township taxes. It was not enough that these acts made such lands *a legitimate subject of taxation* for the specified purpose. Being unproductive, and without occupants, no resort could be had to the person, as in cases of assessment of seated or productive lands, and it therefore became necessary to provide some means, or process, by which the land itself might be resorted to for the collection of the taxes. The process so provided is in the nature of a proceeding *in rem*, and it must not be dispensed with, for property must not be taken without "due process of law."

Taxes upon unseated lands are not a personal charge. For the proceedings against these tracts I find no warrant in either of the statutes cited. The taxes in question being other than road taxes, every step in these proceedings has been without legal authority.

I am of opinion, therefore, that the phrase "by special taxation to collect an amount," &c., in the act of 1864, under which the mandamus in this case was awarded, should be construed as if that section formed a part of the general township tax law of 1834, before cited, that the Legislature must be presumed to have had in contemplation the same subjects of taxation and the same process of collection, viz., by general warrant from the supervisor to the collector, and by special warrant against delinquents authorizing the collector to sieze and sell their personal property, or, in default thereof, to take the body. This construction would seem to be a natural and a reasonable one, and fully supported by the langauge of Mr. Justice Agnew in the case of Chalker v. Ives, 5 P F. Smith, 83, giving a construction of the bounty act of the same year. If more than this was intended by the act providing for this special taxation, then, certainly more should have been expressed.

Of the character of the indebtedness, for payment whereof this special tax was ordered, nothing is shown—whether it be in judgment for damages resulting from official negligence, for arrears of expenses incurred in maintaining the poor, or otherwise, does not appear—nor is it believed to be material, for the tax in question is not a road tax, and we have seen that for township purposes resort is given to unseated lands only for such taxes.

We have seen that the proceeding against unseated lands is not a common, or general, but a peculiar and exceptional and limited one, in its application to township affairs, to a single specified tax. In the entire absence of any words in this act of 1864 implying an extension of this peculiar process to taxation for the payment of township indebtedness, a presumption that such was the legislative intention would be a very strained and unnatural one.

These are sufficient reasons why road taxes should be charged upon this species of property; but very cogent reasons are mentioned by Chancellor Kent in his Commentaries, vol. 2, p. 331, *et seq.*, why no other local taxes should be so charged. In the light of this authority it may well be doubted whether the subsequent act of 1854, giving a resort to unseated lands for school taxes, was not an injudicious exercises of legislative power. However this may be, I am of opinion that where such resort is not given either in express terms, or by such necessary implication as to remove the question entirely beyond the domain of mere conjecture, it cannot properly be allowed.

2. The reasons already given apply with equal force to the question in reference to the poor taxes complained of in the plaintiffs' bill.

I therefore recommend a decree making the injunction perpetual, &c.

R. R. LITTLE, Master.

To this report exceptions were filed by F. Ansart, Jr., Esq., and after argument before Elwell, P. J., the report was confirmed.

W. E. & C. A. Little and *F. C. Ross*, attorneys for plaintiffs.

F. Ansart, Jr., Esq., attorney for defendants.

JUST PUBLISHED.

Just as we are going to press, we find upon our table a pamphlet containing a stenographic report of the proceedings, arguments and decision, in full, in the great convention case of Wells et al v. The Election Commissioners, in the Supreme Court. It is a most valuable publication, and should be in the possession of every lawyer. It is published by Messrs. King & Baird, at the reasonable price of $1.00. We shall take occasion to refer to it at greater length when we have more time.

LEGAL GAZETTE.

Friday, December 19, 1873.

JOHN H. CAMPBELL,

EDITOR.

THE NEW CONSTITUTION ADOPTED.

Never before in the history of this great State, has there been such an emphatic endorsement by the people of any measure, as there was upon last Tuesday, when by over 150,000 majority the new constitution was adopted. The most sanguine friends of the instrument did not even dream that the popular approval would be exhibited in such an unmistakable light. Philadelphia, which was confidently claimed by the opponents of the constitution as the stronghold of their vote, leads off with 34,000 majority *in favor* of reform. And one of the most cheering signs of all is, that the canvass has been almost entirely divested of a party aspect. The bar, the press, and the people generally throughout the commonwealth, fought side by side, irrespective of party, to bring about the grand reform, and now when the victory is achieved, and when all good citizens are congratulating each other, truly can it be said that neither Republican nor Democrat can boast that his party alone accomplished the good work. Both alike can lay claim to a share in the glory, and point with pride to the fact that in the contest no party was known. Those who doubt the inherent strength of republican institutions, those who despair of the ultimate success of the people in governing themselves, those who dread that this great country will become the prey of Cæsarism, can take a lesson from the spectacle afforded by our constitutional election. A people, apparently bound hand and foot by greedy politicians, corrupt rings and gigantic corporations, burst with one effort all their fetters, and stand forth free and untrammelled, no longer the servants but the masters. Can it be longer doubted that the inherent good sense of the great mass of the people will preserve the republic against all opposition.

To us personally the result of the election is a matter of the highest gratification. Taking part in the convention, voting for nearly all the measures proposed by the new constitution, and earnestly endeavoring with all our humble ability to advocate the adoption of, and to furnish during the canvass all the information possible concerning, the great work submitted to the people, it affords us the greatest delight that the popular vote is such a demonstrative one. Believing as we do that the new constitution, though not absolute perfection, is yet the best instrument of the kind ever yet proposed to any people, we are glad it has been adopted by such an overwhelming vote. Our hope, expressed in our issue of two weeks ago, that we would be able to announce its adoption by over 100,000 majority, has been fully realized, and we are satisfied.

THE NEW CONSTITUTION.

Owing to the length of the opinions published last week in the convention cases, we were compelled to crowd out a number of interesting items concerning the new constitution. Lest our friends may think we have forgotten them, we hasten to acknowledge the receipt of sundry documents sent to us.

From York we have received a paper containing an able address to the electors of the county, signed by Hons. Thomas E. Cochran, John Gibson and William McClean, members of the convention. We regret we have not the space to reprint it in our columns.

From Schuylkill, we have received a copy of the address delivered by Hon. Joel B. McCamant, a member of the convention from that county. It was delivered at Pottsville, upon the third inst., and reflects great credit upon its author.

From Dauphin, some one forwarded to us a copy of a "letter from Hon. Wayne MacVeagh, to certain citizens of Chester county, expressing his views upon the subject of the new constitution."

From Alleghany, the Hon. T. H. Baird Patterson was kind enough to send us an advance copy of Judge Stowe's opinion, as well as cheering news regarding the adoption of the constitution.

From various other quarters we have received letters, pamphlets, newspapers, etc., for all of which we return thanks to the senders.

DARTMOUTH COLLEGE CASE.

We have received a neat little pamphlet containing an address delivered before the literary societies of Hudson College, by Hon. James A. Garfield, of Ohio. It is entitled "The Future of the Republic; its Dangers and its Hopes," and among other things it treats of the application of the law laid down in the "Dartmouth College Case," to existing railway corporations. As the subject is one of great moment, we have thought it might be interesting to our readers to make the following extract.

"In the famous Dartmouth College Case of 1819, it was decided, by the Supreme Court of the United States, that the charter of Dartmouth College is a contract between the State and the corporation, which the Legislature cannot alter without the consent of the corporation; and that any such alteration is void, being in conflict with that clause of the Constitution of the United States which forbids a State to make any law impairing the obligation of contracts.

This decision has stood for more than half a century as a monument of judicial learning, and the great safeguard of vested rights. But Chief Justice Marshall pronounced this opinion ten years before the steam railway was born; and it is clear he did not contemplate the class of corporations that have since come into being. But, year by year, the doctrine of that case has been extended to the whole class of private corporations, including railroad and telegraph companies. But few of the States, in their early charters to railroads, reserved any effectual control of the operations of the corporations they created. In many instances, like that of the Illinois Central charter, the right to amend was not reserved. In most States, each Legislature has narrowed and abridged the powers of its successors, and enlarged the powers of the corporations; and these by the strong grip of the law, and in the name of private property and vested rights, hold fast all they have received. By these means, not only the corporations, but the vast railroad and telegraph systems have virtually passed from the control of the State. It is painfully evident from the experience of the last few years, that the efforts of the States to regulate their railroads, have amounted to but little more than feeble annoyance. In many cases the corporations have treated such efforts as impertinent intermeddling, and have brushed away legislative restrictions as easily as Gulliver broke the cords with which the Lilliputians attempted to bind him.

In these contests the corporations have become conscious of their strength, and have entered upon the work of controlling the States. Already they have captured several of the oldest and strongest of them; and these discrowned sovereigns now follow in chains the triumphal chariot of their conquerors. And this does not imply that merely the officers and representatives of States have been subjected to the railways, but that the corporations have grasped the sources and fountains of power, and control the choice of both officers and representatives.

The private corporation has another great advantage over the municipal corporation. The jurisdiction of the latter is confined to its own territory; but by the recent constructions and devices of the law, a private corporation, though it has no soul, no conscience, and can commit no crime, yet it is a citizen of the State that creates it, and can make and execute contracts with individuals and corporations of other States.

Thus, the way has been opened to those vast consolidations which have placed the control of the whole system in the hands of a few, and have developed the Charlemagnes and the Cæsars of our internal commerce.

In addition to these external conquests, the great managers have in many cases grasped the private property of the corporations themselves; and the stocks which represent the investment, have become mere counters in the great gambling houses of Wall street, where the daily ebb and flow of the stock market, sweeps and tosses the business and trade of the continent.

If these corporations were in reality private corporations, transacting only private business, the community might perhaps stand by in wonder and amazement at their achievements; but a great and vital public interest is involved in the system, an interest which effects the social and political organization in a thousand ways. Prominent among these is the public necessity for means of transportation.

Mr. Adams says that the estimated average amount transported by rail, had risen from $85 for each inhabitant in 1860, to $300 in 1870, and that the public are now paying to railroads for travel and transportation $450,000,000 per annum, an average of $12 per head for the whole population. The amount for the year 1872, is set down at $473,241,055. Poor's R. R. Manual for 1873, Introd., p. 25.

Two-thirds of this sum, he says, are paid for the actual work of transportation, and the remaining third "for the use of the capital and the risk involved in the business."

This latter sum is the tax on transportation, and is really a *tax* as though it were paid on the grand duplicate of the State; "in other words," quoting from Mr. Adams, "certain private individuals, responsible to no authority, and subject to no supervision, but looking solely to their own interests, or to those of their immediate constituency, yearly levy upon the American people a tax, as a suitable remuneration of their private capital, equal to one-half of the expenses of the United States Government, including interest on the national debt."

I do not say that this tax is excessive; perhaps it is not; but its rate is determined, and the amount levied and collected, not by the authority of the State, but by private parties, whose chief concern is to serve their own interests.

We have seen that the transportation tax is the amount paid to the companies for their investment. How much they shall invest, where, and under what limitations it shall be invested, has been wholly left to the companies themselves; but, whether they have invested their capital wisely or unwisely, however much the business may be overdone, the investors must be paid for the use of their capital, and that payment is made by the community.

In most of the States, railroads may be built in unlimited numbers, wherever five or ten men, who incorporate themselves under the general law, may choose to build them.

This has probably been allowed in the belief that free competition in building and operating roads would produce economy in the management and cheapness in transportation.

But this expectation has utterly failed. All railroad experience has verified the truth of Geo. Stephenson's aphorism, that "when combination is possible, competition is impossible." Great Britain has gone much farther into the study of this question than we have, and the result of her latest study is thus expressed in the London Quarterly Review of April last:

"By the common consent of all practical men, competition, the ordinary safeguard of the public in matters of trade, has ceased to offer the slightest protection (except in a few unimportant cases of rival sea traffic) against railway monopolies.

"In spite of the efforts of Parliament and parliamentary commissions, combinations and amalgamation have proceeded, at the instance of the companies, without check and almost without regulation. United systems now exist constituting by their magnitude and by their exclusive possession of whole districts, monopolies to which the earlier authorities would have been strongly opposed. Nor is there any reason to suppose that the progress of combination has ceased, or that it will cease until Great Britain is divided between a small number of great companies."

The article concludes with this striking paragraph:

"We have tried the *laisez faire* policy

and it has failed; we have tried a meddlesome policy and it has failed also. We have now to meet the coming day when all the railways, having completed their several systems, may, and probably in their own interests will combine together to take advantage of the public. In the face of this contingency we have simply to make our choice between two alternatives; either to let the State manage the railways, or let the railways manage the State."

It is easy to see that we are repeating the experience of Great Britain on a vast scale. We have doubled our miles of railway in the last eight years. In the last two years we have built and put into operation 14,206 miles of road—more than a quarter of all we had in January, 1871.

The cost of constructing the roads we are now operating was thirty-one hundred and sixty millions of dollars; and, during the year 1872, there were transported by rail more than two hundred million tons of freight. Poor's Manual for 1873, Int. pp. 25–27. The process of consolidation of our leading lines of road has been even more rapid than that of construction; and whatever dangers we may expect from the system are rapidly culminating to the point of full development. In antagonism to these and to similar combinations of capitalists, are the combinations of laborers in trades unions and labor leagues. The indications are abundant that we shall soon see set in full array a conflict between capital and labor—a conflict between forces that ought not to be enemies; for labor is the creator of capital, which is only another name for accumulated labor. It is the duty of statesmanship to study the relation which the government sustains and ought to sustain to this struggle, and to provide that it shall not be the partisan supporter of either combatant, but the just protector of both. The right to labor has not been sufficiently emphasized as one of the rights of man. The right to enjoy the fruits of labor has been better secured.

In view of the facts already set forth, the question returns; what is likely to be the effect of railway and other similar combinations upon our community and our political institutions? Is it true, as asserted by the British writer quoted above, that the State must soon recapture and control the railroads, or be captured and subjugated by them? Or do the phenomena we are witnessing indicate that general breaking up of the social and political order of modern nations, so confidently predicted by a class of philosophers whose opinions have hitherto made but little impression on the public mind? That you may not neglect this broader view of the question, I will quote a few paragraphs, written by Charles Fourier, sixty-six years ago—nearly a quarter of a century before the fire of the first steam-locomotive was lighted.

After tracing the course of civilization through its several phases of development, and declaring that it was then (1807) past the middle of its third phase, and moving towards its own destruction, he said:

"Civilization is tending towards the fourth phase, by the influence of joint stock corporations, which, under the cover of certain legal privileges, dictate terms and conditions to labor, and arbitrarily exclude from it whomever they please. These corporations contain the germ of a vast feudal coalition which is destined soon to invade the whole industrial and financial system, and give birth to a commercial feudalism. * * * These corporations will become dangerous and lead to new out-breaks and convulsions only by being extended to the whole commercial and industrial system. The event is not far distant, and will be brought about all the more easily from the fact that it is not apprehended. * * * Extremes meet; and the greater the extent to which anarchical competition is carried, the nearer is the approach to the reign of *universal monopoly*, which is the opposite excess. It is the fate of civilization to be always balancing between extremes. Circumstances are tending towards the organization of the commercial classes into federal companies, or affiliated monopolies, which, operating in conjunction with the great landed interest, will reduce the middle and laboring classes to a state of commercial vassalage, and by the influence of combined action, will become master of the productive industry of entire nations. The small operators will be forced indirectly to dispose of their products according to the wishes of these monopolists; they will become mere agents for the coalition. We shall thus see the reappearance of feudalism in an inverse order, founded on mercantile leagues, and answering to the baronial leagues of the middle ages. Everything is concurring to produce this result. * * We are marching with rapid strides towards a commercial feudalism, and to the fourth phase of civilization. Theorie des Quatre Movements et des Destinees Generales, Paris, 1808—Eng. Tr. (New York, 1857) pp. 198 and 207.

These declarations read something like prophecy, so far as they relate to the effects of combined corporations. New mechanical forces have hastened the development of corporations since Fourier wrote. We need not take alarm at his prophecy of the speedy decay of civilization; but the analogy between the industrial condition of society at the present time, and the feudalism of the middle ages, is both striking and instructive.

In the darkness and chaos of that period, the feudal system was the first important step towards the organization of modern nations. Powerful chiefs and barons entrenched themselves in castles, and, in return for submission and service, gave to their vassals rude protection and ruder laws. But as the feudal chiefs grew in power and wealth they became the oppressors of their people, taxed and robbed them at will, and finally in their arrogance, defied the kings and emperors of the mediæval states. From their castles, planted on the great thoroughfares they practiced the most capricious extortions on commerce and travel, and thus gave to modern language the phrase, "levy blackmail."

The consolidation of our great industrial and commercial companies, the power they wield and the relations they sustain to the State and to the industry of the people, do not fall far short of Fourier's definition of commercial or industrial feudalism. The modern barons, more powerful than their military prototypes, own our greatest highways, and levy tribute at will upon all our vast industries. And, as the old feudalism was finally controlled and subordinated, only by the combined efforts of the kings and the people of the free cities and towns, so, our modern feudalism can be subordinated to the public good, only by the great body of the people, acting through their governments by wise and just laws.

My theme does not include, nor will this occasion permit, the discussion of methods by which this great work of adjustment may be accomplished. But I refuse to believe that the genius and energy that have developed these new and tremendous forces, will fail to make them not the masters but the faithful servants of society. It will be a disgrace to our age and to us if we do not discover some method by which the public functions of these organizations may be brought into full subordination to the public, and that too without violence, and without unjust interference with the rights of private individuals. It will be unworthy of our age and of us, if we make the discussion of this subject a mere warfare against men. For in the e great industrial enterprises, have been, and still are engaged some of the noblest and worthiest men of our time. It is the system—its tendencies and its dangers—which society itself has produced, that we are now to confront. And these industries must not be crippled, but promoted. The evils complained of are mainly of our own making. States and communities have willingly and thoughtlessly conferred these great powers upon railways; and they must seek to rectify their own errors without injury to the industries they have encouraged.

Already methods are being suggested. Massachusetts is discussing the proposal to purchase and operate a portion of her railroad system, and thus bring the rest into competition with the State, as the representative of the people. It is claimed that the success of this plan has been proved by the experience of Belgium.

Another proposition is that the State purchase the roads and open them, like other highways to the free use of the public, subject to such regulations and toll as the safety of transportation and the maintenance of the system may require. This, it is claimed, would remove the stocks and bonds from the gambling operations of the markets, and place the levying of the transportation tax in the hands of the State, and under the control of those who pay.

Others again, insist that the system has overgrown the limits and the powers of the separate States, and must be taken in hand by the national government under that provision of the national constitution which empowers Congress "to regulate commerce among the several States." When it is objected that this would be a great and dangerous step towards political centralization—which many think has already been pushed too far—it is responded that as the railway is the greatest centralizing force of modern times, nothing but a kindred force can control it; and it is better to rule it than to be ruled by it. Other solutions have been proposed; but these are sufficient to show how strongly the current of public thought is setting towards the subject. Indications are not wanting that the discussion will be attended by passion, and by a full exhibition of that low, political cunning which plays with the passions and prejudices of men, and measures success by results, and not by the character of the means employed. I have ventured to criticise the judicial application of the Dartmouth College case; and I venture the further opinion that some features of that decision as applied to the railway and similar corporations must give way, under the new elements which time has added to the problem. But this must be done, not by denouncing judges who faithfully administer the law, but by such prudent changes in the law, and perhaps in our constitutions, as will guide the courts in future adjudications. One member of the court, Mr. Justice Duvall, dissented from the opinion of the court in the Dartmouth College case. Even Chief Justice Marshall, in pronouncing the opinion of the court, used expressions which would not at all apply to our railway companies. He said (4 Wheaton, 647): "These eleemosynary institutions do not fill the place which would otherwise be occupied by the government, but that which would otherwise remain vacant." There has been a growing dissent against the enlarged application of this principle. In a recent case—Washington University v. Rouse, 8 Wallace, 439—three justices, including the chief justice, dissented.

It depends upon the wisdom, the culture, the self-control of our people, to determine how wisely and how well this question shall be settled. But that it will be solved, and solved in the interest of liberty and justice, I do not doubt. And its solution will open the way to a solution of a whole chapter of similar questions that relate to the conflict between capital and labor."

United States Supreme Court.

ALLEN et al. v. UNITED STATES.

1. A demand by the United States for the proceeds of Indian trust bonds, unlawfully converted to their own use by persons who had illegally procured and sold them, and had afterwards became wholly insolvent, is a demand arising upon an implied contract, or one which may be so treated by a waiver of the alleged fraud in the conversion of the bonds.
2. It is, therefore, the proper subject of set-off by the United States in a suit by the general assignees in insolvency of the parties who had thus converted the bonds to their own use, for the recovery of the price of certain property which had formerly belonged to the insolvents, and by their said general assignees been sold to the United States.
3. The amount of the proceeds of the bonds, though not determined by judicial proceedings, was sufficiently liquidated to be at any time the subject of set-off, since it could be stated with certainty and interest be computed and added.
4. And even if, prior to the passage of the act of March 3d, 1863, amending the act establishing the Court of Claims, objection to the set-off existed in the fact that the demand of the United States was unliquidated (assuming that to have been the fact), none could exist subsequent to it; the fifth section of that act covering this class of demands.

December Term, 1873.

Appeal from the Court of Claims; the case being thus:

A statute of the United States, passed March 3d, 1797 (1 Stat. at Large, 515), enacts that,

"When any revenue officer or other persons hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent. . . . The debt due to the United States shall be first satisfied, and the priority hereby established

shall be deemed to extend to cases in which a debtor not having sufficient property to pay all his debts, shall make a voluntary assignment thereof . . as to cases in which an act of legal bankruptcy shall be committed."

So, too, a statute of March 3d, 1863, amending the act establishing the Court of Claims enacts:

"Section 3. That said court, in addition to the jurisdiction now conferred by law, shall also have jurisdiction of all set-offs, counter claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government, against any person making claim against the government in said court; and upon the trial of any such cause, it shall hear and determine such claim or demand both for and against the government and claimant," &c.

These statutes being in force, Russell, Majors and Waddell, partners in business being at the time wholly insolvent, executed and delivered, in January, 1861, to one Allen and a certain Street, two deeds of assignment, conveying all their property in trust for the benefit of their creditors. In November following, the claimants sold to the United States a portion of the property thus conveyed, consisting of wagons and oxen, for a sum exceeding $112,000. And the quarter master of the United States, who acted as agent of the government in the purchase, gave to them certificates that the bills were "correct and just, that the articles had been accounted for on his property return." Of the sum mentioned, only a part was paid; leaving a balance amounting to $71,491, of which payment was refused.

Hereupon Allen and Massey filed their petition in the Court of Claims, to obtain payment of that balance.

It appeared from the findings of the Court of Claims, that at the date of the assignments, Russell, Majors and Waddell were indebted to the United States in the sum of $870,000 or thereabouts, for certain Indian trust bonds belonging to the United States, which they had illegally procured and sold, and the proceeds of which they had applied to their own use, and it was by reason of this indebtedness that the payment to the claimants of the above mentioned balance was refused.

The Court of Claims held that the United States were entitled to priority of payment out of the proceeds of the property assigned by Russell, Majors and Waddell, under the trust deeds, and to set off so much of the indebtedness of that firm to them, as would be equal to the amount claimed and proved; and accordingly dismissed the petition. Hence the present appeal.

Mr. *James Hughes*, for the appellant.

The findings of the Court of Claims show affirmatively that the claim which was set off against the appellants' vouchers, was an unliquidated and disputed claim which the government had never established, nor prosecuted to judgment, against Russell, Majors & Waddell, the peculiar character of which was such, that it could not be paid and adjusted by the claimants acting as trustees under the assignment.

It was competent for the United States to waive its right of priority of payment under the deeds of assignment, and the voluntary purchase of the property and delivery of the formal vouchers sued upon, constitute such waiver.

Mr. *C. H. Hill*, (with whom were Mr. *G. H. Williams*, attorney general, and Mr. *W. McMichael*, assistant attorney general), contra.

Mr. Justice FIELD having stated the case, delivered the opinion of the court as follows:

Among the cases in which the United States are entitled, by act of March 3d, 1797, to priority in the payment of debts due to them over debts to other creditors, is the case where the debtor, not having sufficient property to pay his debts, makes a voluntary assignment of the property he has for their payment. Of the creditors of Russell, Majors and Waddell, the United States are therefore entitled to be preferred in the payment of their demand out of the proceeds of the property in the hands of the claimants, the property not being subject at the date of the assignments to any specific charge or lien. This preference the claimants cannot disregard in the distribution of the proceeds without making themselves personally liable for the amount payable on the demand of the United States. United States v. Clark, 1 Paine, 629. If they could recover the amount claimed in the present suit, they would be required immediately to pay it over to the United States on the debt of the assignors, after deducting the expenses of its collection. This is therefore a case in which the demand of the United States would be allowed as a set-off against the claim of the assignors, independent of the statute of March 3d, 1863, amending the act establishing the Court of Claims. The demand being for the proceeds of certain Indian trust bonds unlawfully converted by Russell, Majors and Waddell, to their own use, is one arising upon an implied contract, or may be so treated by the waiver of the alleged fraud in the conversion of the bonds. Although the amount of the proceeds has not been determined by judicial proceedings, it can be stated with certainty, and the interest can be added by computation. The demand is therefore the proper subject of set-off in a suit for the recovery by the claimants of the amount due upon a sale to the United States of property held by them under the deeds of assignment.

If the objection urged by counsel of the claimants to the allowance of the set-off, that the demand against Russell, Majors, and Waddell is unliquidated, would have been entitled to consideration, supposing such to be the character of the demand, independent of the statute mentioned, it is not entitled to any since the passage of that statute. The third section of the statute is broad enough to authorize the Court of Claims, in suits against the United States, to hear and determine demands of the government of every kind against the claimant, or those whom the claimant represents, whether liquidated or unliquidated, and to set off against the claim in suit the amount found in favor of the United States upon such hearings and determination.

There is nothing in the fact that the quarter master, who acted as agent of the United States in the purchase of the wagons and oxen from the claimants, gave to them certificates of the correctness of their bills, which constitutes in any respect a waiver on the part of the United States of their right of priority of payment, or even looks in that direction.

Decree affirmed.

Supreme Court of Illinois.

CHICAGO & N. W. R. R. Co. v. TAYLOR et al.

The deceased intestate was employed by the railroad company as station agent and switchman, and on a dark night, in going to turn a flying switch, he was run over by a train of cars and killed. The court found that he used proper care, but for the want of proper brakes on the cars, and the absence of necessary lights, which appellants were bound to supply, he came to an untimely death; that the death was caused by the negligence of the company; that appellants impliedly contracted with deceased that they would use due care in providing such machinery, apparatus and appliances, and other necessary means suitable and proper to the prosecution of the business in which their servants were engaged, so as to insure a reasonable degree of safety to life, and security against injury; that appellants not having fulfilled this contract, must be held liable to the consequences.—ED. LEGAL NEWS.

Appeal from Winnebago.

Opinion by BREESE, J. Delivered May 24th, 1873.

This was an action on the case brought to Winnebago Circuit Court by the administrators of Henry B. Taylor, deceased, against the Chicago & Northwestern Railway Company, to recover damages for the death of their intestate, alleged to have been caused by the negligence of defendants.

Under the plea of not guilty and a special plea, the company set up as a defence, the negligence of the deceased as the cause of his death; that the death was caused by the negligence of the fellow-servants of the deceased engaged in the same line of employment, and therefore the company were not responsible.

The jury, under instructions of the court, found for the plaintiffs and assessed the damages at five thousand dollars, on which the court on overruling a motion for a new trial, rendered a judgment.

To reverse this judgment, the defendants appeal.

It appears the deceased was employed by the company as station agent and switchman, at Harlem, a small station on the line of appellants' road, on the night of October 18th, 1870, and had been so employed for five years or more. The switch at that station is connected with the main track at one end only, so that only what is called "a flying switch" could be made by a train coming from the north. It was about ten o'clock at night, of a dark night in October, when the signal was given for the switch. It was so dark that platform cars could not be seen without a light. At this hour, four flat cars, each about four feet high, making a string nearly eight rods in length, were about to be run into Harlem station, by means of a "flying switch." The deceased was in the office, in the station house, listening for signals, when the signal for the "flying switch" was made. He seized his lantern and mail bags, and with alacrity started to his post, on the run, as straight as he could go, for the switch. One Tuthill, a friend of deceased, who was in the office with him when the signal was given, followed him half way from the office to the railroad track, by which time the engine had passed and the brakeman came along with four flat cars and inquired where the agent was. Tuthill replied, he had gone out, or as Easton, another witness says, he had gone up to turn the switch, and asked the brakeman if he had not seen him. The brakeman said he had not. Tuthill then told him he had either run over him or knocked him off the track. Tuthill got the brakeman's lantern to look for the deceased, when he and Easton, another friend, got on the flat cars and rode back to the switch. There they got off and went down five or six rods from where the cars were, and found deceased lying along the side of the track, among the wood, with his face to the north.

We understand the manner of making a "flying switch" to be this: The cars intended to be switched are uncoupled from the main at the proper point by the brakeman, then the locomotive and cars attached start and pass the switch so far in advance of the cars to be switched, that after the engine and cars attached have passed the switch, the switch can be turned in time to receive the remaining cars, which must have momentum sufficient to pass them into the switch. There was wood loosely piled around the switch five or six feet high, and had been there for two or three days, which to get from the station house to the switch it was necessary to pass over, or go along the track. This accounts for deceased being on the track when he was struck, as testified by Tuthill. He died in about one hour after he was struck.

It is in proof there was but one brakeman and one lantern on these four flat cars, and it is further proved that but one of the cars had on a sufficient brake, and that was the car farthest off from the switch, and at the rear end of this car, still farther off, was the lantern and brakeman. It was a kind of night, as one of the witnesses, Disbrow, route agent of the Kenosha & Rockford Railroad, describes it, when smoke and steam settled down about the train, so that a person could not see where the train was, especially if it settled down on the north and west sides of the train.

Appellants make the point that they are not liable to their servants for injuries sustained by the negligence of fellow-servants engaged in the same line of employment.

This principle has been repeatedly recognized by this court, first in Hamer v. Ill. Cent. R. R. Co., 15 Ill. 550, the doctrine of *respondeat superior* not being applicable to cases of injuries sustained by one servant through the carelessness of another. In Ill. Cent. R. R. Co. v. Cox, 21 Ib. 20, the same ruling was made, and also in Mass v. Johnson, 22 Ib. 633, and in Ch. and Alton R. R. Co. v. Murphy, 53 Ib. 336; Ch. and Alton R. R. Co. v. Keefe, 47 Ib. 108.

Appellants insist the deceased was within the rule stated in these cases. It was his duty to turn the switch whenever cars were to be let from the main track to the side track, and had known for many years previously the manner in which it was done; that he knew he would be obliged to pass from the station house to the switch, and if he went upon

the track he might be injured by the carelessness of other servants of the company; that he knew perfectly well the manner in which the wood was piled along the side of the track, and having entire control of the station, could have changed the manner of throwing off the wood, and he must be presumed to have contracted with reference to the danger to which he would be exposed by the carelessness or negligence of those engaged with him in causing the trains to be switched from one track to another at that point.

We concur in much that is said by counsel on this point, but we do not think the case turns upon the principle of the cases cited, or is dependent upon it, but rather upon the doctrine affirmed in Ill. Cent. R. R. Co. v. Jewell, Admx., 46 Ill. 99; Schooner Norway v. Jenson, 52 Ib. 373; Chi. and N.W. R.R. Co. v. Jackson, 55 Ib. 492; and Perry v. Rickets, Ib. 234. The case of Ch. & N. W. R. R. Co. v. Sweet, Adm., 45 Ib. 197, may also be cited, the ruling idea in all which is admitting the principle that a common employer is not responsible to a servant for an injury caused by the negligence of his fellow-servants engaged in the same line of employment. It is nevertheless the duty of the employer to provide safe structures, competent employés, and engines, and all appliances necessary to the safety of the employed, and, as was said in Chi. B. & Q. R. R. Co. v. George, 19 Ib. 519, their duty to adopt such rules and regulations for running their trains as would ensure safety, and having adopted them, conform to them or be responsble for all consequences resulting from a departure from them.

It is in proof in this case, that no rules or regulations had been prescribed by this company, and no directions were given as to the care to be observed in making a "flying switch," an operation when made at night attended with more or less danger. One of the witnesses for the company, the conductor of this train, testified, he never saw any rules about "flying switches," and does not think anybody else ever did. Yet, in the next breath, he said, "We used three whistles as signals for the switch and one for the station." By this we understand it was by force of prescribed rule these signals were made, important to be made certainly, and so important a railroad company would be justly chargeable with negligence in not prescribing them and enforcing them. It is perfectly feasible to prescribe definite rules for making "flying switches," though they may be seldom made.

But, waiving this topic, an examination of the testimony shows that these flat cars, switched off on a dark night in October, were not provided with good and sufficient brakes, that, in fact, there was but one good brake on the four, and that at the far end of the hindmost car, at which point stood the brakeman with a lantern. Post, the brakeman, testifies, one brakeman could control four cars readily. By this he certainly means to be understood, if the cars were all fitted with brakes in good working order, for as it requires but about half a minute to set a brake, he could set all of them in two minutes. From his testimony, we infer he tried all the brakes, and found none to hold until he reached the one on the last car. He says there was a good brake on the second and on the fourth car, but a careful examination made by two of plaintiff's witnesses the next morning after the accident, it appears there was but one. The others seemed to have been out of order for a considerable time. That it was appellant's negligence, the brakes were not in working order, cannot be denied. It was their duty to have sufficient brakes, and a failure in this regard was negligence.

Again, it was negligence of the company in not furnishing sufficient light on these cars. On the whole train, and it was a passenger train, there were but three lamps, possibly the engine driver had one, which would make four in all. Some of the witnesses for appellees familiar with the station where the accident happened, testify that they usually expected to see a brakeman on the front car at the first brake on the car, and a light with him. One of them, Fabrick, testified he did not recollect of ever seeing a "flying switch" made in the night time without the brakeman being on the front car with a light, and Tuthill and Easton testify in the same way, and are not contradicted. That the brakeman was not negligent or careless in taking the position he did on the rear car, is very apparent, for the reason it was the only car which had a good and sufficient brake. He could not in any other position, control the cars. He could, it is true, have left his lantern on the front end of the front car, but he could not safely do that, for in a night so dark as that was, it was absolutely necessary for him, after detaching the forward car, to have a light to get safely back eight rods to the rear car, which alone had a brake. We can come to no other conclusion than this, that it was negligence in the company in not providing sufficient light on these cars. There can scarcely be a doubt, had there been a light on the front car, and a brake in working order, this accident would not have happened.

To make a "flying switch" is attended with danger, which could be obviated by extending the switch to the track at the south end. Constructing it and continuing it in a mode dangerous to those employed about it, imposed upon the company the duty of using every reasonable precaution against accident. In this case, the expenditure of a few dollars would in all probability have prevented this terrible accident.

As to the conduct of deceased, we perceive nothing in the record to charge him with a want of proper care. He had a right to expect the light was on the front car. It was on the rear car, eight rods off, and the front car in thick darkness. This car struck him. He was then in the attempt to perform a duty enjoined upon him. He proceeded with all proper caution, but for want of proper brakes on the car, and absence of necessary light, which appellants were bound to supply, he came to an untimely and violent death. The death was caused by the negligence of the company. Appellants impliedly contracted with deceased that they would use due care in providing such machinery, apparatus and appliances, and other necessary means, suitable and proper to the prosecution of the business in which their servants are engaged, so as to ensure a reasonable degree of safety to life and security against injury. We do not find that appellants have fulfilled this contract, and must be held liable for the consequences. When dangers are created by railroad corporations, it is their bounden duty to provide all reasonable protection against them.

We have examined the instructions given on both sides, and without going into a critical consideration of all of them, are of opinion they are substantially correct, and placed the law of the case fairly before the jury. The third count of the declaration was sustained by the proof, and instruction four complained of was applicable to that count.

On the whole record we think justice has been done, and the judgment should be affirmed.

Crawford & Marshall, attorneys for plaintiffs.

A petition for a rehearing in the above case was presented, and the following opinion filed on the 6th of November, 1873.

Opinion per *Curiam*.

A rehearing was granted on the petition of appellant, on the suggestion the court had overruled a point made on the hearing, and which would reverse the judgment. That point was the admission of hearsay testimony. We have examined this point and find no such testimony was admitted. The testimony admitted related to something which had occurred long before the accident, and was for the purpose of showing the engine driver was reckless. As all claim on this ground was abandoned by the plaintiff, he resting his case on the third count of the declaration, if there was error in admitting that testimony it did no harm. The opinion heretofore filed must stand as the judgment of the court.

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Goldbeck, Nos. 2814 and 2816—2 Two-story Brick Dwellings.

St. John, No. 632—Two-story Brick Building. Executors' Peremptory Sale—Estate of Nicholas Helverson, dec'd.

REAL ESTATE SALE, JANUARY 6th.

Will include -

Lancaster Turnpike—Large Lot. Orphans' Court Sale—Estate of Samuel Hutchinson, dec'd.

REAL ESTATE SALE, JANUARY 13th.

Will include—

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South, No. 816—Business Stand—Three-story Brick Store and Dwelling, with 3 Three-story Brick Dwellings in the rear, No. 811 Emeline street—2 fronts. Orphans' Court Sale—Estate of Emma Morony, a minor.

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THE

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THE

DISTRICT COURT;
COURTS OF
COMMON PLEAS,
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AND IN THE COURTS OF THE

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EIGHTH,
NINTH,
ELEVENTH,
TWELFTH,
TWENTY-SIXTH,
TWENTY-EIGHTH
AND TWENTY-NINTH
JUDICIAL DISTRICTS
OF PENNSYLVANIA;

Originally reported in the LEGAL GAZETTE, from July 2d, 1869, to January 5th, 1872, inclusive.

BY JOHN H. CAMPBELL.

VOLUME I.

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REFERENCES.—By kind permission we refer to the following:—Franklin S. Lane, Louisville, drew $13,000. Miss Hattie Banker, Charleston, $9,000. Mrs. Louisa T. Blake, St. Paul, Piano, $700. Samuel V. Raymond, Boston, $5,500. Eugene P. Brackett, Pittsburgh, Watch, $300. Miss Annie Osgood, New Orleans, $5,000. Emory L. Pratt, Columbus, Ohio, $7,000.

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Legal Gazette.

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United States Supreme Court.

NEW YORK CENTRAL R. R. CO. v. LOCKWOOD.

1. A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.
2. It is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.
3. These rules apply both to common carriers of goods and common carriers of passengers, and with especial force to the latter.
4. They apply to the case of a drover travelling on a stock train to look after his cattle, and having a free pass for that purpose.
5. *Query:* Whether the same rules would apply to a strictly free passenger.
6. *Held, arguendo*: That a common carrier does not drop his character as such merely by entering into a contract for limiting his responsibility.
7. That carefulness and fidelity are *essential duties* of his employment, which cannot be abdicated.
8. That these duties are as essential to the public security in his servants as in himself.
9. That a failure to fulfil these duties is "negligence;" the distinction between "gross" and "ordinary" negligence being unnecessary.

October Term, 1873.

In error to the Circuit Court of the United States for the Southern District of New York.

Opinion by BRADLEY, J.

The plaintiff in this case was a drover, injured while travelling on a stock train of the defendants, proceeding from Buffalo to Albany, and the suit was brought to recover damages for the injury. He had cattle in the train, and had been required, at Buffalo, to sign an agreement to attend to the loading, transporting, and unloading of his cattle, and to take all risk of injury to them and of personal injury to himself, or whoever went with the cattle; and received what is called a drover's pass—certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The agreement stated its consideration to be the carrying of the plaintiff's cattle at less than tariff rates. It was shown on the trial that these rates were about three times the ordinary rates charged, and that no drover had cattle carried on those terms; but all signed similar agreements to that which was signed by the plaintiff, and received similar passes. Evidence was given on the trial tending to show that the injury complained of was sustained in consequence of negligence on the part of the defendants or their servants, but they insisted that they were exempted by the terms of the contract from responsibility for all accidents, including those occurring from negligence, at least the ordinary negligence of their servants; and requested the judge so to charge. This he refused, and charged that if the jury were satisfied that the injury occurred without any negligence on the part of the plaintiff, and that the negligence of the defendants caused the injury, they must find for the plaintiff, which they did.

It is unnecessary to notice the subordinate points made, as we are of opinion that all the questions of fact were fairly left to the jury, and that the whole controversy depended on this main question of law.

It may be assumed *in limine* that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage.

As the duties and responsibilities of public carriers were prescribed by public policy, it has been seriously doubted whether the courts did wisely in allowing that policy to be departed from without legislative interference, by which needed modifications could have been introduced into the law. But the great hardship on the carrier in certain special cases, where goods of great value or subject to extra risk were delivered to him without notice of their character, and where losses happened by sheer accident without any possibility of fraud or collision on his part—such as by collisions at sea, accidental fire, &c.—led to a relaxation of the rule to the extent of authorizing certain exemptions from liability in such cases to be provided for, either by public notice brought home to the owners of the goods, or by inserting exemptions from liability in the bill of lading, or other contract of carriage. A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation; thus proportionally relieving the transportation of produce and merchandise from some of the burdens with which it is loaded.

The question is whether such modification of responsibility, by notice or special contract, may not be carried beyond legitimate bounds, and introduce evils against which it was the direct policy of the law to guard, whether, for example, a modification which gives license and immunity to negligence and carelessness on the part of a public carrier or his servants, is not so evidently repugnant to that policy as to be altogether null and void; or, at least null and void under certain circumstances.

In the case of a seagoing vessels, Congress has, by the act of 1851, relieved ship owners from all responsibility for loss by fire, unless caused by their own design or neglect; and from responsibility for loss of money and other valuables named, unless notified of their character and value; and has limited their liability to the value of ship and freight, where losses happened by the embezzlement or other act of the master, crew, or passengers; or by collision, or any cause occurring without their privity or knowledge; but the master and crew themselves are held responsible to the parties injured by their negligence or misconduct. Similar enactments have been made by State Legislatures. This seems to be the only important modification of previously existing law on the subject, which in this country has been effected by legislative interference; and by this, it is seen, that though intended for the relief of the ship owner, it still leaves him liable to the extent of his ship and freight for the negligence and misconduct of his employees, and liable without limit for his own negligence.

It is true, that the 1st section of the above act relating to loss by fire has a proviso, that nothing in the act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship owners. This proviso, however, neither enacts nor affirms anything. It simply expresses the intent of Congress to leave the right of contracting as it stood before the act.

The courts of New York, where this case arose, for a long time resisted the attempts of common carriers to limit their common law liability, except for the purpose of procuring a disclosure of the character and value of articles liable to extra hazard and risk. This they were allowed to enforce by means of a notice of non-liability, if the disclosure was not made. But such announcements as "all baggage at the risk of the owner," and such exceptions in bills of lading as "this company will not be responsible for injuries by fire, nor for goods lost, stolen, or damaged," were held to be unavailing and void, as being against the policy of the law. Cole v. Goodwin, 19 Wend. 257; Gould v. Hill, 2 Hill, 623.

But since the decision in the case of The New Jersey Steam Navigation Company v. Merchants' Bank, by this court, in January term, 1848 (6 How. 344), it has been uniformly held, as well in the courts of New York as in the Federal courts, that a common carrier may, by special contract, limit his common-law liability; although considerable diversity of opinion has existed as to the extent to which such limitation is admissible.

The case of the New Jersey Steam Navigation Company v. Merchants' Bank, above adverted to, grew out of the burning of the steamer Lexington. Certain money belonging to the bank had been entrusted to Harnden's express, to be

carried to Boston, and was on board the steamer when she was destroyed. By agreement between the steamboat company and Harnden, the crate of the latter and its contents were to be at his sole risk. The court held this agreement valid, so far as to exonerate the steamboat company from the responsibility imposed by law; but not to excuse them for misconduct or negligence, which the court said it would not presume that the parties intended to include, although the terms of the contract were broad enough for that purpose; and that inasmuch as the company had undertaken to carry the goods from one place to another, they were deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and were, therefore, bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation; and as the court were of opinion that the steamboat company had been guilty of negligence in these particulars, as well as in the management of the steamer during the fire, they held them responsible for the loss.

As this has been regarded as the leading case, we may pause for a moment to observe that the case before us seems almost precisely within the category of that decision. In that case as in this, the contract was general, exempting the carrier from every risk and imposing it all upon the party; but the court would not presume that the parties intended to include the negligence of the carrier or his agents in that exception.

It is strenuously insisted, however, that as negligence is the only ground of liability in the carriage of passengers, and as the contract is absolute in its terms, it must be construed to embrace negligence as well as accident, the former in reference to passengers, and both in reference to the cattle carried in the train. As this argument seems plausible, and the exclusion of a liability embraced in the terms of exemption on the ground that it could not have been in the mind of the parties, is somewhat arbitrary, we will proceed to examine the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence. In doing so we shall first briefly review the course of decisions in New York, on which great stress has been laid, and which are claimed to be decisive of the question. Whilst we cannot concede this, it is, nevertheless, due to the courts of that State to examine carefully the grounds of their decision, and to give them the weight which they justly deserve. We think it will be found, however, that the weight of opinion, even in New York, is not altogether on the side that favors the right of the carrier to stipulate "for exemption from the consequences of his own or his servants' negligence."

The first recorded case that arose in New York after the before-mentioned decision in this court, involving the right of a carrier to limit his liability, was that of Dorr v. The New Jersey Steam Navigation Company, decided in 1850, 4 Sandf. 136. This case also arose out of the burning of the Lexington, under a bill of lading which excepted from the company's risk "danger of fire, water, breakage, leakage, and other accidents." Judge Campbell, delivering the opinion of the court, says: "A common carrier has in truth two distinct liabilities—the one for losses by accident or mistake, where he is liable as an insurer; the other for losses by default or negligence, where he is answerable as an ordinary bailee. It would certainly seem reasonable that he might, by express special contract, restrict his liability as insurer; that he might protect himself against misfortune, even though public policy should require that he should not be permitted to stipulate for impunity where the loss occurs from his own default or neglect of duty. Such we understand to be the doctrine laid down in the case of The New Jersey Steam Navigation Company v. The Merchants' Bank, in 6th Howard, and such we consider to be the law in the present case." And in Stoddard v. The Long Island R. Co., 5 Sandf. 180, another express case, in which it was stipulated that the express company should be alone responsible for all losses, Judge Duer, for the court, says: "Conforming our decision to that of the United States, we must, therefore, hold: 1. That the liability of the defendants as common carriers was restricted by the terms of the special agreement between them and Adams & Co., and that this restriction was valid in law. 2. That by the just interpretation of this agreement the defendants were not to be exonerated from all losses, but remained liable for such as might result from the wrongful acts, or the want of due care and diligence of themselves or their agents and servants. 3. That the plaintiffs, claiming through Adams & Co., are bound by the special agreement." The same view was taken in subsequent cases (Parsons v. Monteath, 13 Barb. 353; Moore v. Evans, 14 Barb. 524), all of which show that no idea was then entertained of sanctioning exemptions of liability for negligence.

It was not until 1858, in the case of Wells v. N. Y. Cent. R. Co., 26 Barb. 635, that the Supreme Court was brought to assent to the proposition that a common carrier may stipulate against responsibility for the negligence of his servants. That was the case of a gratuitous passenger travelling on a free ticket, which exempted the company from liability. In 1862 the Court of Appeals, by a majority, affirmed this judgment (42 N. Y. 181), and in answer to the suggestion that public policy required that railroad companies should not be exonerated from the duty of carefulness in performing their important and hazardous duties, the court held that the case of free passengers could not seriously affect the incentives to carefulness, because there were very few such, compared with the great mass of the travelling public. Perkins v. N. Y. Cent. R. Co., 24 N. Y., 196, was also the case of a free passenger, with a similar ticket, and the court held that the endorsement exempted the company from all kinds of negligence of its agents, gross as well as ordinary; that there is, in truth, no practical distinction in the degrees of negligence.

The next cases of importance that arose in the New York courts were those of *drovers' passes*, in which the passenger took all responsibility of injury to himself and stock. The first was that of Smith v. N. Y. Cent. R. Co., 29 Barb. 132, decided in March, 1859. The contract was precisely the same as that in the present case. The damage arose from a flattened wheel in the car, which caused it to jump the track. The Supreme Court, by Hogeboom, J., held that the railroad company was liable for any injury happening to the passenger, not only by the gross negligence of the company's servants, but by ordinary negligence on their part. "For my part," says the judge, "I think not only gross negligence is not protected by the terms of the contract, but what is termed ordinary negligence, or the withholding of ordinary care, is not so protected. I think, notwithstanding the contract, the carrier is responsible for what, independent of any peculiar responsibility attached to his calling and employment, would be regarded as fault or misconduct on his part." * * The judge added that he thought the carrier might, by positive stipulation relieve himself to a limited degree from the consequences of his own negligence or that of his servants. But, to accomplish that object, the contract must be clear and specific in its terms, and plainly covering such a case. Of course, this remark was extra judicial. The judgment itself was affirmed by the Court of Appeals in 1862, by a vote of five judges to three. 24 N. Y. 222. Judge Wright strenuously contended that it is against public policy for a carrier of passengers, where human life is at stake, to stipulate for immunity for any want of care. "Contracts in restraint of trade are void," he says, "because they interfere with the welfare and convenience of the State; yet the State has a deep interest in protecting the lives of its citizens." He argued that it was a question affecting the public, and not alone the party who is carried. Judge Sutherland agreed in substance with Judge Wright. Two other judges held that if the party injured had been a gratuitous passenger, the company would have been discharged, but in their views he was not a gratuitous passenger. One judge was for affirmance, on the ground that the negligence was that of the company itself. The remaining three judges held the contract valid to the utmost extent of exonerating the company, notwithstanding the grossest neglect on the part of its servants.

In that case, as in the one before us, the contract was general in its terms, and did not specify negligence of agents as a risk assumed by the passenger, though by its generality it included all risks.

The next case, Bissell v. The N. Y. Cent. R. Co., 29 Barb. 602, first decided in September, 1859, differed from the preceding in that the ticket expressly stipulated that the railroad company should not be liable under any circumstances, "whether of negligence by their agents, or otherwise," for injury to the person or stock of the passenger. The latter was killed by the express train running into the stock train, and the jury found that his death was caused by the gross negligence of the agents and servants of the defendants. The Supreme Court held that gross negligence (whether of servants or principals) cannot be excused by contract in reference to the carriage of passengers for hire, and that such a contract is against the policy of the law, and void. In December, 1862, this judgment was reversed by the Court of Appeals, four judges against three (22 N. Y. Rep., 442). Judge Smith, who concurred in the judgment below, having in the meantime changed his views as to the materiality of the fact that the negligence stipulated against was that of the servants of the company, and not of the company itself. The majority now held that the ticket was a free ticket, as it purported to be, and, therefore, that the case was governed by Wells v. The Central Railroad Co.; but whether so, or not, the contract was founded on a valid consideration, and the passenger was bound to it even to the assumption of the risk arising from the gross negligence of the company's servants. Elaborate opinions were read by Justice Selden in favor, and by Justice Denio against the conclusions reached by the court. The former considered that no rule of public policy forbids such contracts, because the public is amply protected by the right of every one to decline any special contract, on paying the regular fare prescribed by law, that is the highest amount which the law allows the company to charge. In other words, unless a man chooses to pay the highest amount which the company by its charter is authorized to charge, he must submit to their terms, however onerous. Justice Denio, with much force of argument combatted this view, and insisted upon the impolicy and immorality of contracts stipulating immunity for negligence, either of servants or principals, where the lives and safety of passengers are concerned. The late case of Poucher v. N. Y. Cent. R. Co., 49 N. Y. 263, is in all essential respects a similar case to this, and a similar result was reached.

These are the authorities which we are asked to follow. Cases may also be found in some of the other State courts, which, by dicta or decision, either favor or follow more or less closely, the decisions in New York. A reference to the principal of these in the margin, is all that is necessary here. Ashmore v. Penn. R. Co., 4 Dutch. 180; Kinney v. Cent. R. Co., 3 Vroom, 407; Hale v. N. J. St. Nav. Co., 15 Conn. 539; Peck v. Weeks, 34 Conn. 145; Lawrence v. N. Y. R. Co., 35 Conn. 63; Kimball v. Rutland R. Co., 26 Vt. 247; Mann v. Birchard, 40 Vt. 332; Adams Exp. Co. v. Haines, 42 Ill. 89; Id. 458; Ill. Cent. R. Co. v. Adams Exp. Co., Id. 474; Hawkins v. Grt. West. R. Co, 17 Mich. 57; S. C., 18 Mich. 427; Balt. & O. R. Co. v. Brady, 32 Md. 333; 25 Md. 128; Laverny v. Union Transportation Co., 42 Mo. 270.

A review of the cases decided by the courts of New York shows that though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms. So that if we only felt bound by those precedents, we could, perhaps, find no authority for reversing the judgment in this case. But on a question of general commercial law, the Federal courts administering justice in New York have equal and co-ordinate jurisdiction with the

courts of that State. And in deciding a case which involves a question of such importance to the whole country; a question on which the courts of New York have expressed such diverse views, and have so recently and with such slight preponderancy of judicial suffrage, come to the conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law.

In passing, however, it is opposite to call attention to the testimony of an authoritative witness as to the operation and effect of the recent decisions referred to. "The fruits of this rule," says Justice Davis, "are already being gathered in increasing accidents, through the decreasing care and vigilance on the part of these corporations; and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contracts." Stinson v. N. Y. Central R. Co., 32 N. Y. Rep. 337.

We now proceed to notice some cases decided in other States, in which a different view of the subject is taken.

In Pennsylvania, it is settled by a long course of decisions, that a common carrier cannot, by notice or special contract, limit his liability so as to exonerate him from responsibility for his own negligence or misfeasance, or that of his servants and agents. Laing v. Colder, 8 Barr, 479; Camden and Amboy R. Co. v. Baldauf, 16 Penn. 67; Goldey v. Pennsylvania R. Co., 30 Penn. 342; Powell v. Penn. R. Co., 32 Penn. 414; Penn. R. Co. v. Henderson, 51 Penn. 315; Farnham v. Camden and Amboy R. Co., 55 Penn 53; Express Co. v. Sands., Id. 140; Empire Trans. Co. v. Wamsutta Oil Co., 63 Penn. 14. "The doctrine is firmly settled," says Chief Justice Thompson, in Farnham v. C. & A. R. Co., "that a common carrier cannot limit his liability so as to cover his own or his servants' negligence." 55 Penn. 62. This liability is affirmed both when the exemption stipulated for is general, covering all risks, and where it specifically includes damages arising from the negligence of the carrier or his servants. In Penn. R. Co. v. Henderson, a drover's pass stipulated for immunity of the company in case of injury from negligence of its agents, or otherwise. The court, Judge Read delivering the opinion, after a careful review of the Pennsylvania decisions, says: "This endorsement relieves the company from all liability for any cause whatever, for any loss or injury to the person or property, however it may be occasioned; and our doctrine, settled by the above decisions, made upon grave deliberation, declares that such a release is no excuse for negligence."

The Ohio cases are very decided on this subject and reject all attempts of the carrier to excuse his own negligence, or that his servants. Jones v. Voorhees, 10 Ohio. 145; Davidson v. Graham, 2 Ohio St. R. 131; Graham v. Davis, 4 Ohio St. 362; Wilson v. Hamilton, Id. 722; Welsh v. Pittsburg, Ft. W. & Chicago R., 10 Id. 75; Cleveland R. v. Curran, 19 Id. 1; Cincinnati, etc., R. v. Pontius, Id. 221; Knowlton v. Erie R., Id. 260. In Davidson v. Graham, the court after conceding the right of the carrier to make special contracts to a certain extent, says: "He cannot, however, protect himself from losses occasioned by his own fault. He exercises a public employment, and diligence and good faith in the discharge of his duties are essential to the public interests. * * *' And public policy forbids that he should be relieved by special agreement from that degree of diligence and fidelity which the law has exacted in the discharge of his duties." In Welsh v. Pittsb., Ft. W. & Chicago R., the court says: "In this State, at least, railroad companies are rapidly becoming almost the exclusive carriers both of passengers and goods. In consequence of the public character and agency which they have voluntarily assumed, the most important powers and privileges have been granted to them by the State." From these facts the court reasons that it is specially important that railroad companies should be held to the exercise of due diligence at least. And as to the distinction taken by some, that negligence of servants may be stipulated for, the court pertinently says: "This doctrine, when applied to a corporation which can only act through its agents and servants, would secure complete immunity for the neglect of every duty." Pp. 75, 76. And in relation to a drover's pass, substantially the same as that in the present case, the same court, in Cleveland, etc., R. v. Curren, 19 Ohio St. 1, held, 1. That the holder was not a gratuitous passenger. 2. That the contract constituted no defence against the negligence of the company's servants, being against the policy of the law, and void. The court refers to the cases of Bissell v. The New York Central R., 25 N. Y. 442; and of Penn. R. v. Henderson, 51 Penn. St. R. 315; and expresses its concurrence in the Pennsylvania decision. Pp. 12, 13. This was in December term, 1869.

The Pennsylvania and Ohio decisions differ mainly in this, that the former give to a special contract (when the same is admissible) the effect of converting the common carrier into a special bailee for hire, whose duties are governed by his contract, and against whom, if negligence is charged, it must be proved by the party injured; whilst the latter hold that the character of the carrier is not changed by the contract, but that he is a common carrier still, with enlarged exemptions from responsibility, within which the burden of proof is on him to show that an injury occurs. The effect of this difference is to shift the burden of proof from one party to the other. It is unnecessary to adjudicate that point in this case, as the judge on the trial charged the jury, as requested by the defendants, that the burden of proof was on the plaintiff.

In Maine, whilst it is held that a common carrier may, by special contract, be exempted from responsibility for loss occasioned by natural causes, such as the weather, fire heat, frost, etc. Fillbrown v. Grand Trunk R. Co., 55 Maine, 462, yet in a case where it was stipulated that a railroad company should be exonerated from all damages that might happen to any horses or cattle that might be sent over the road, and that the owners should take the risk of all such damages, the court held that the company were not thereby excused from the consequences of their negligence, and that the distinction between negligence and gross negligence in such a case it not tenable. "The very great danger," says the court, "to be anticipated by permitting them" (common carriers) "to enter into contracts to be exempt from losses occasioned by misconduct or negligence, can scarcely be overestimated. It would remove the principal safeguard for the preservation of life and property in such conveyances." Sager v. Portsmouth, 31 Maine, 228, 238.

To the same purport it was held in Massachusetts in the late case of School District v. Boston, etc., Railroad Co., 102 Mass. 552, where the defendant set up a special contract that certain iron castings were taken at the owner's risk of fracture or injury during the course of transportation, loading and unloading, and the court say: "The special contract here set up is not alleged, and could not by law be permitted to exempt the defendants from liability for injuries by their own negligence." P. 556.

To the same purport, likewise, are many other decisions of the State courts, as may be seen by referring to the cases cited in the margin, some of which were argued with great force and are worthy of attentive perusal, but, for want of room, can only be referred to here." Indianapolis R. v. Allen, 31 Ind. 394; Mich. South. R. v. Heaton, 31 Ind. 397, note; Flinn v. Phil., Wilm. & Balt. R., 1 Houston's Del. R. 472; Orndorff v. Edams Exp. Co., 3 Bush (Ky.) R. 194; Swindler v. Hilliard & Brooks, 2 Rich. (So. Car.) 286; Berry v. Cooper, 28 Ga. 543; Steele v. Townsend, 37 Ala. 247; Southern Express Co. v. Crook, 44 Ala. 468; Whitesides v. Thurlkil, 12 Sm. & Mar. 599; Southern Express Co. v. Moon, 39 Miss. 822; N. O. Mutual Ins. Co. v. Railroad Co., 20 La. Ann. 302.

These views as to the impolicy of allowing stipulations against liability for negligence and misconduct are in accordance with the early English authorities. St. Germain, in The Doctor and Student, Dial. 2, c. 38, pointedly says of the common carrier: "If he would per case refuse to carry it" (articles delivered for carriage) "unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like."

A century later this passage is quoted by Attorney General Noy in his book of Maxims as unquestioned law. Noy's Max. 92. And so the law undoubtedly stood in England until comparatively a very recent period. Sergeant Steven, in his Commentaries, vol. 2, p. 135, after stating that a common carrier's liability might, at common law be varied by contract, adds that the law still held him responsible for negligence and misconduct.

The question arose in England principally upon public notices given by common carriers that they would not be responsible for valuable goods, unless entered and paid for according to value. The courts held that this was a reasonable condition, and if brought home to the owner, amounted to a special contract, valid in law. But it was also held, that it could not exonerate the carrier if a loss occurred by his actual malfeasance or gross negligence. Or, as Starkie says, "proof of a direct misfeasance or gross negligence, is in effect an answer to proof of notice." Evid., vol. 2, p. 205, 6th Am. ed. But the term "gross negligence" was so vague and uncertain, that it came to represent every instance of actual negligence of the carrier or his servant, or ordinary negligence in the accustomed mode of speaking. Hinton v. Dibbon, 2 A. & E., N. Ser. 649; Wild v. Pickford, 8 M. & W. 460. Justice Story, in his work on bailments, originally published in 1832, says that it is now held, that in cases of such notices, the carrier is liable for losses and injury occasioned not only by gross negligence, but by ordinary negligence, or, in other words, the carrier is bound to ordinary diligence. Story on Bailments, sec. 571.

In estimating the effect of these decisions, it must be remembered that in the cases covered by the notices referred to, the exemption claimed was entire, covering all cases of loss, negligence, as well as others. They are, therefore, directly in point.

In 1863, in the great case of Peake v. The North Staffordshire Railway Co., 10 House of Lords Cases, 473, Mr. Justice Blackburn, in the course of a very clear and able review of the law on the subject, after quoting this passage from Justice Story's work, proceeds to say: "In my opinion, the weight of authority was, in 1832, in favor of this view of the law, but the cases decided in our courts between 1832 and 1854, established that this was not the law, and that a carrier might, by a special notice, make a contract limiting his responsibility even in the cases here mentioned, of gross negligence, misconduct, or fraud on the part of his servants, and, as it seems to me, the reason why the Legislature intervened in the railway and canal traffic act, 1854, was because it thought that the companies took advantage of those decisions (in Story's language) 'to evade altogether the salutary policy of the common law.'"

This quotation is sufficient to show the state of the law in England at the time of the publication of Judge Story's work; and it proves that at that time, common carriers could not stipulate for immunity for their own or their servants' negligence. But in the case of Carr v. Lancashire R. Co., 7 Excheq. R. 707, and other cases decided while the change of opinion alluded to by Justice Blackburn was going on (several of which related to the carriage of horses and cattle), it was held that carriers could stipulate for exemption from liability for even their own gross negligence. Hence the act of 1854 was passed, called the railway and canal traffic act, declaring that railway and canal companies should be liable for negligence of themselves or their servants, notwithstanding any notice or condition, unless the court or judge trying the cause should adjudge the conditions just and reasonable. 1 Fisher's Dig. 1,466. Upon this statute ensued a long list of cases deciding what conditions were or were not just and reasonable. The truth is, that this statute did little more than bring back the law to the original position in which it stood before the English courts took their departure from it. But as we shall have occasion to advert to this subject again, we pass it for the present.

(*Continued on page* 418.)

LEGAL GAZETTE.

Friday, December 26, 1873.

JOHN H. CAMPBELL,

EDITOR.

JUDGE NELSON.

Ex-judge Samuel Nelson, late associate justice of the Supreme Court of the United States, died suddenly at two o'clock Saturday afternoon, December 13th, at his residence in Cooperstown, N. Y. On Monday previous he complained of having taken a slight cold, and was confined to his room up to Friday afternoon, when he went down stairs and spent the evening in the parlor. The next morning he went down to breakfast and appeared as well as usual. While sitting in his chair in the afternoon listening to the reading of a letter by Mrs. Nelson, he made an inquiry in regard to it, and then without a word or sigh suddenly expired. So quiet was his death that it was supposed he had fainted, and not until the physicians pronounced him dead was the truth realized. Judge Nelson had just completed his eighty-first year, having been born on November 10th, 1792, at Hebron, Washington county, N. Y. Both his father, John Rodger Nelson, and his mother, Jane McCarter, were of Irish descent, their ancestors having emigrated from the North of Ireland to Salem, Washington county, about the middle of the eighteenth century. The deceased was sent to the district school at a very early age, and was prepared for college at a classical school in Salem, taught by Rev. Mr. Gross, and afterward at Granville Academy, the principal of which was Salem Towne, of spelling-book fame. He entered Middlebury College, Vermont, in 1811, and was graduated August, 1813. He studied law in Salem, under Messrs. Savage & Woods, both of whom were distinguished lawyers, Savage having been subsequently chief justice of this State, and Woods a judge in Madison county. In the year 1816, Mr. Woods removed to Madison county. Nelson accompanied him, and was admitted to the bar at the January term of the Supreme Court, in 1817. He soon located himself in Cortland village, Cortland county, where he practised his profession with great success. In 1820 he was appointed a presidential elector, and voted for the election of James Monroe for the second term. In 1821, he was appointed postmaster of Cortland village, and in the same year he was a delegate to the State convention for the revision of the constitution, when he advocated the abolition of the property qualification for voters. In April, 1823, he was appointed by Governor Yates, circuit judge, under the new constitution he had helped to frame, and he held this office for a period of eight years. The circuit comprised the counties of Otsego, Delaware, Chenango, Broome, Cortland, Tompkins, Tioga and Sullivan. On February 1st, 1831, he was appointed by Governor Throop, to the Supreme Court, succeeding Judge William L. Marcy, who was elected United States Senator. On August 31st, 1837, Governor Marcy appointed him chief justice of the State of New York, vice Judge Savage (his former preceptor) resigned. He held this position until 1845, when he was appointed by President Tyler, associate justice of the United States Supreme Court, succeeding Judge Thompson. In 1846, he was elected a delegate to the State constitutional convention, but took no active part in its deliberations. He received the degree of LL. D. from Middlebury College, Columbia College and Geneva College. The soundness of his decision against the fugitive slave law in the celebrated Dred Scott case, brought his name prominently and favorably before the public at that time. He was a member of the joint high commission that framed the Treaty of Washington, and was at all times the trusted and esteemed counsellor of different administrations, and on several occasions during the civil war rendered valuable services to the Union by his firmness and patriotism. President Lincoln and Mr. Seward frequently expressed their appreciation of Judge Nelson's services. At one time during the war Mr. Seward, with nearly all the diplomatic corps, visited Judge Nelson at his residence, at Cooperstown, ostensibly for recreation, but in reality it is known that certain important questions of international law and other public questions were submitted to him for his decision. He retired from the bench exactly a year ago, and was succeeded by Judge Ward Hunt. On his retirement all the leading members of the bar passed resolutions, in which high tribute was paid to the efficient services rendered by him during a long and honorable career in the administration of justice. Judge Nelson was twice married. First in 1819 to Miss Pamela Woods, oldest daughter of one of his preceptors, Judge Woods, of Madison county. She died in 1822. In 1825, he married Miss Catharine A. Russell, daughter of Dr. Russell, of Cooperstown, who with four children, two sons; and two daughters, survives him. United States Commissioner Kenneth G. White, is married to one of the daughters, and when in this city the late judge spent most of his time with Mr. White. The other daughter is the wife of Rev. Dr. Beech, of the Episcopal church in Twentieth street. One of his sons, Rensselaer Nelson, is judge of the United States District Court of Minnesota.

The funeral of Judge Nelson was held at Cooperstown, on Tuesday, December 16th. At a meeting of the New York bar, held the day previous in the United States Court room, New York, the following resolutions, presented by Mr. William M. Evarts, were unanimously adopted:

Resolved, That in the death of Judge Nelson the judiciary of the State and of the nation, the profession of the law throughout the country, and the people at large, have occasion to deplore a great public loss, while they all feel a profound and grateful sense of the value of his various public services, of the beneficent power and greatness of his life, and of the permanent honor to the country of his illustrious fame and example.

Resolved, That to us, who have been the near witnesses of Judge Nelson's long and constant activity in the highest sphere of judicial duty, and have enjoyed the advantage of close association with him in professional and social intercourse, his death brings the affliction of a personal and private grief, and we lament his loss as that of a father and a friend.

Resolved, That the members of the bar of this circuit desire to take a becoming part in the last offices of affection and respect to the memory of this great judge and eminent public servant by attendance at his funeral, and that a committee of twenty-one be appointed by this meeting to make arrangements to that end, and to invite the members of the State and Federal judiciary of this city and vicinity to join them in this demonstration of affection and reverence.

In pursuance to this resolution, Judge Woodruff made the following nominations: Charles O'Conor, Edward W. Stoughton, William M. Evarts, William L. Shipman, E. Pierrepont, Benjamin D. Silliman, Clarence A. Seward, William Tracy, Charles M. Keller, George Ticknor Curtis, Sidney Webster, Edward H. Owen, Joseph S. Bisworth, George Gifford, Stephen P. Nash, Charles Tracy, James C. Carter, Aaron J. Vanderpool, Thomas T. C. Buckley, James Thompson, Erastus C. Benedict, John K. Porter.

United States Circuit Court, N. D. New York.

COXE v. HALE.

1. A creditor, knowing his debtor to be insolvent, may prosecute his debt to judgment, issue execution, and levy on the property of his debtor, and afterwards have the debtor adjudicated bankrupt for allowing his property to be taken on the execution.
2. Where a bill is filed by an assignee without sufficient cause, yet if the circumstances surrounding the transactions complained of are not sufficiently clear to raise an imputation on the good faith of the assignee in prosecuting the suit, the cost will be charged against the estate of the bankrupt in his hands.

Opinion by WOODRUFF, J.

The bill herein is filed to set aside a deed executed by Eugene Eastman, a bankrupt, to the defendant Hale, his father-in-law, dated January 5th, 1870, conveying certain real estate (upon which Hale held three mortgages, previously given by Eastman to Hale, and to others, who had transferred to Hale), and to compel Hale to convey the premises to the assignee in bankruptcy free and clear of the mortgage encumbrances; also to compel Hale to pay over to the assignee all moneys paid to him by Eastman within six months next preceding the filing of the petition in involuntary bankruptcy, whereon Eastman was adjudged bankrupt; also to vacate, set aside and annul certain judgments recovered by Hale in suits commenced against Eastman on the 14th day of January, 1870, and the executions issued thereon and the levies made by the sheriff upon certain personal property of Eastman; also to exclude said Hale from proving in bankruptcy against the estate of said Eastman, the mortgage debts, or the judgment debts or any other debts whereon said payments were made. The ground upon which relief is prayed, is that the transactions sought to be impeached were done in fraud of the bankrupt law, and with the intent to secure said Hale an illegal preference over other creditors of the said bankrupt.

The bankrupt, in the year 1866, married the daughter of the defendant Hale. He was possessed of but little means, but had a trade consisting of some department of carriage making. In 1867 he commenced the business of carriage making at Oneida, but soon afterwards went to Conastota, where he purchased a carriage manufactory and continued to manufacture until January, 1870. His father-in-law advanced him $500 when he went to Oneida, and afterwards, from time to time advanced him money for his business, and in a few instances endorsed notes for him, which he also paid for him when due. He received a mortgage from him on the carriage manufactory, and also took an assignment of two other mortgages, which were on the same premises when his son-in-law purchased them. The latter met with a small loss of two hundred dollars, by fire, at Oneida, but this was more than made up by gifts from the father-in-law out of generosity or regard for his daughter, and desire to promote the prosperity of both. For the purchase of the factory, tools, material and unfinished work, and for carrying on the business, the advances of the defendant amounted, on the 5th of January, 1870, to a little over five thousand dollars, besides the mortgages and gifts before mentioned, and it is a significant fact, bearing on the question of Hale's belief in his son-in-law's solvency, that he endorsed notes for him in November and December, 1869, and on January 1st, 1870, in the apparent confidence in his solvency, which, in his testimony, he declares he felt. Hale resided at Norwich, forty or fifty miles from Conastota, and was very rarely at the residence of his son-in-law, and had no acquaintance with his business, except such as was derived from his son-in-law, and the apparent enlargement of his business, for which the advances were made by him. In the summer of 1869, he stated to his son-in-law that he had advanced more than he could conveniently spare, and desired him to make some repayment, and on the 9th of July, the son-in-law, having made a sale of cutters, desired the purchaser to pay the price to his father-in-law, which he agreed to do, and subsequently, in August and September, such payment was made, amounting to some three hundred and seven dollars.

On the 5th of January, 1870, Hale went to Conastota on a visit to his daughter, not having been there in over a year before. At that time, as he explicitly testifies, he did not know of any indebtedness of his son-in-law except to himself, and upon obligations endorsed by him, and had no suspicion his son-in-law did not have property sufficient to pay all he owed. While there, his son-in-law gave him a partial statement of his affairs, which showed him to be solvent, and did not show any other indebtedness except as above mentioned; and before he left, his son-in-law, who had expressed a desire to reduce his business and had offered the factory for sale, executed and delivered to him the deed mentioned in the complaint. Hale appears also to have been dissatisfied with the use his son-in-law made of one of the notes advanced to him, and as he says, was desirous of collecting something upon the indebtedness. After he left, and on the 14th of January, 1870, Hale directed suits to be brought for that purpose, and on the 4th of February, two judgments

were recovered for him by default, for an aggregate of over five thousand dollars, and executions were issued and levy made on the property of his son-in-law, which judgments, executions and levy are mentioned in the bill of complaint. On one of the executions the sheriff made some sales, but was stopped by an injunction out of the District Court in proceedings in bankruptcy. In fact, Eastman owed other debts to a considerable amount, and one or more judgments were recovered against him on confession, and when this came to the knowledge of Hale, he immediately offered to the other creditors to give up his judgments and any claim of property under the same, and come in with all creditors to share the estate equally; but the judgment creditor proceeded, by petition in the District Court, against Eastman. He was adjudged bankrupt, and the complainants were appointed assignees. Hale, on the demand of the assignees, offered to reconvey the factory, subject to the three mortgages, respecting the *bona fides* and validity of which no question is made. He presented formal proof of his debts, for which judgments had been recovered, and offered to relinquish the judgments and any claim of priority under them. He had not, in fact, received anything upon the executions, and certain moneys which the sheriff had received under one of the executions, was paid over to the complainants, the assignees, and the assignees proceeded to sell, and did sell, the tools, materials, carriages, stock in trade, and all the property of the bankrupt not exempt by law. The assignees then bring this suit against Hale, and seek to compel him to pay over to them the three hundred and seven dollars received by him the previous summer, to convey to him the factory freed and discharged from the mortgages, and to exclude him from any dividend out of the estate on the mortgage and judgment debts.

The complainants rely mainly upon the testimony of the bankrupt and of Hale, the father-in-law, and circumstances disclosed therein in connection with the facts above enumerated, as showing the transactions between them were a fraud upon the bankrupt law, because they were, on the part of Hale, with intent to procure a preference over other creditors when he believed, or had reasonable cause to believe, his son-in-law insolvent.

Other than the fact that Eastman was insolvent, within the meaning of the term insolvency, as defined in the law, that is, inability to pay his debts in due course of business, there is little, if anything, in the proofs, to overcome the positive testimony of both Hale and Eastman on the subject, and the testimony of both is positive and explicit in denial, that Hale at any time, down to his discovery that other creditors had recovered a judgment against Eastman, had any knowledge of such insolvency, and that Hale intended to secure a preference, or accepted any payment or conveyance or judgment with that purpose, or even with knowledge that they would so operate, is not possible, if it be true that he was not aware Eastman owed any one but himself. I shall not go into the evidence in detail, but its consideration leads me to these conclusions:

First. The payment for the cutters sold, made to the defendant, Hale, by Eastman's direction, was received by Hale in due course of business, without any belief in Eastman's insolvency, and without any reasonable cause for such belief; nor was it paid in contemplation of insolvency, nor paid or received with any intent to give or receive a preference over other creditors. The three hundred and seven dollars was, therefore, lawfully received by Hale, and he was entitled to retain it.

Second. The utmost value set upon the factory and the land whereon it stands, by any witness, is three thousand dollars. The complainants furnish no evidence whatever, that it was worth any more. The principal sum due on the three mortgages thereon, amount to two thousand six hundred dollars, and the unpaid interest at the time of the deed given to Mr. Hale, amounted to upwards of five hundred dollars, making the mortgage liens over three thousand one hundred dollars, which is more than the mortgaged premises were worth. There is no evidence, nor is there any claim, that mortgage debts were not due in good faith, free from any impeachment under the bankrupt law or otherwise; nor that the mortgage lien was not perfect for the amount due. The deed, therefore, gave to Hale, the father-in-law, no preference. It could give none. He was entitled, by virtue of his lien, to the whole property already. Even more; the gratuitous release of the inchoate right of dower by the wife of Eastman, was necessary to make the property worth the price, three thousand dollars, at which Hale received it; and although that right of dower was subordinate to the mortgages, a foreclosure would have been necessary to a compulsory extinguishment of the right. A foreclosure would have involved expense, necessarily reducing the net amount that could be realized on the debt. So that, in fact, the conveyance without foreclosure, operating to release the equity of redemption, so far from resulting in a preference to Hale over other creditors, had the effect of reducing the mortgage debt to a greater extent than was otherwise possible, and in that way tended to the benefit of Eastman and his other creditors. If, therefore, Hale had then known that Eastman was insolvent, it would be impossible to say that an acceptance of a conveyance of the equity of redemption, the property being, confessedly, worth less than the mortgage debt, could be or could have been intended to be a giving or an acceptance of a preference over other creditors. Upon such a state of facts they could derive no benefit from the property in any event, and the estate of the bankrupt would not be enhanced thereby.

The price agreed upon, and at which Hale agreed to take the property, being distinctly proved to be a fair price, it should be charged against the mortgage debt, and the defendant, Hale, allowed to prove against the bankrupt estate on account of that debt, only the balance due at the date of the deed, with interest thereon from that date.

The good faith of the defendant, Hale, was testified to by his response to the demand of the complainants that he give up the property. He offered to convey it to the assignee, reserving and retaining his mortgage lien. Upon the proofs, this would have been of no benefit to the estate, and it was declined, and by the same proofs, it follows, that Hale got no preference by the deed to him. He was only saved the expense of foreclosure. The complainants, or the creditors for whom they act, manifestly thought, that by a harsh application of the doctrine of merger of the lien in the legal title, they could succeed in avoiding the deed as an illegal preference, and then exclude the defendant from any enforcement of his original mortgage lien, and the mortgage debt from any participation in dividends out of the estate in the hands of complainants. On the question, whether, had they succeeded in setting aside the deed, it would have followed that the mortgagee must loose his lien, I do not find it necessary to express any opinion.

Third. As to the debts for which the defendant, Hale, obtained judgments, there is undoubtedly room for suspicion that before the father-in-law commenced the suits on the 14th of January, he doubted either the ability or the willingness of his son-in-law to pay what he owed. But this is not enough to forfeit his right to share in the estate. A creditor is not compelled to forbear suing his debtor on pain of losing his right to prove his debt, if his debtor should be adjudged a bankrupt within six months thereafter. Even where the debtor is known to be insolvent, if he has committed no act of bankruptcy the creditors are not remediless. They are not bound to lie by, instituting no suit, and, as the case may be, see their debtor wasting his property. They may sue, and by proceeding to judgment compel the debtor himself to apply to be decreed a bankrupt, or if he do not, but suffers his property to be taken on legal process in such manner as will operate to give priority, even to themselves, if carried into full execution, they may then allege this as an act of bankruptcy, and themselves demand that he be adjudged a bankrupt. It is by no means every recovery of judgment, even against a known insolvent, that amounts to the acceptance of a preference which will bar the proof of the judgment debt. If it were, then no creditor would be safe in suing his debtor whose solvency he had reason to suspect. He would be compelled to lie by, waiting in hope that his debtor will commit some act of bankruptcy, and be remediless until he does so. It is the prosecution *with intent* to secure a preference, and the using the judgment with *that intent*, or in such wise that the preference will be the necessary result, which makes the creditor liable to be barred the right to prove his debt.

True, it has been often said that the creditor must be deemed to intend the necessary result of his act. But where he believes himself to be the sole creditor, or where he prosecutes suit and thereby drives the debtor into an act of bankruptcy, this alone works no prejudice to the estate, and is not of itself the acceptance of a preference.

To sue, recover a judgment and levy an execution may often be the only means a creditor has of forcing his debtor into bankruptcy, and of thereby compelling the equal distribution of all his property among the creditors in the very manner the bankrupt law prescribes; and it would not only be absurd, but grossly unjust, to treat this as a forfeiture of the right to share in the estate, and leave the whole to be divided among others, less diligent to compel the debtor to do what is just, and what the law makes it his reasonable duty to do without such compulsion. Notwithstanding the suspicion, which is warmly insisted upon by the complainants, the proofs establish that Hale was not aware, until after his execution was levied, that Eastman owed other debts. If not, then he was not seeking to procure an advantage over other creditors. When he learned that other creditors were pursuing Eastman, he at once offered to give up any apparent advantage gained by his judgments and executions, and come in on an equal footing with others. He went further. These creditors having compelled Eastman to submit to an adjudication, grounded on the very fact that he had suffered his property to be taken on legal process, thus availing themselves of the very act which Hale, by lawfully prosecuting, had driven the debtor to do, he went to the assignee, and offered to relinquish all claim of advantage or priority under his judgments and executions, and tendered proof of his debts with a view to share *pro rata* only in the estate.

Even if his prosecution had been from the first with knowledge that Eastman owed others as well as himself, and was wholly insolvent, he had a right to prosecute his suits to judgment and levy. That would have created an act of bankruptcy on the part of Eastman. This being so, had Hale himself become the petitioning creditor, and sought the adjudication, it could not be doubted that he would be entitled to share in the estate. This would not be accepting a preference, or doing anything to defeat or prevent the operation of the bankrupt law, but the contrary. Other creditors having, notwithstanding his offer to give up all advantage by reason of his judgment and levy, made the latter the ground of an adjudication, as he might have done, he at once did all that was possible, to show that gaining a preference was not his purpose, as it was not the necessary result of what he had thus far done, by offering to the assignee the surrender of all such advantage or apparent advantage. To hold, that under such circumstances, he forfeited his right to share in the estate, would be to hold, in substance, that no creditor can safely sue his debtor and recover judgment and levy his execution, although his debtor has not until then committed any act of bankruptcy. He must leave his debtor in the uninterrupted enjoyment of his property, however insolvent he may be, in the hope that, by and by, he will commit some other act of bankruptcy upon which he can be proceeded against in the bankrupt court. Such is not the meaning, intent or effect of the bankrupt law. That law does not discourage vigilance nor activity in forcing debtors to appropriate their property to what they owe. It is when advantage is accepted or obtained with a view to a preference over other creditors, or in circumstances in which such preference is the result of what the creditor does or attempts to do, that the act becomes a fraud upon the law.

Dealing with this case, as I must upon the testimony, I must say, that here the defendant, Hale, has gained no preference over other creditors, and has not sought or attempted to gain one, and has done nothing to deprive him of the right to prove his debts, and share with other creditors in the estate of the bankrupt.

The bill of complaint was filed without sufficient cause, when the defendant had offered to do all and even more than he was bound in equity to do. But the circumstances were not so clear as to require any imputation upon the good faith of the assignees in the prosecution of the suit. The bill must be dismissed with costs, to be paid out of the estate in the hands of the assignees.

George W. Smith, Esq., for plaintiff.
Isaac S. Newton, Esq., for defendant.

(*Continued from page* 415.)

It remains to see what has been held by this court on the subject now under consideration.

We have already referred to the leading case of the N. J. Steam Nav. Co. v. Merchants' Bank, 6 How. 383. On the precise point now under consideration, Justice Nelson said: "If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents, in the transportation of goods, it should be required to be done, at least in terms that would leave no doubt as to the meaning of the parties."

As to the carriers of passengers, Mr. Justice Grier, in the case of Philadelphia and Reading R. v. Derby, 14 How. 486, delivering the opinion of the court, said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such a transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'" That was the case of a free passenger, a stockholder of the company, taken over the road by the president to examine its condition; and it was contended in argument, that as to him, nothing but "gross negligence" would make the company liable. In the subsequent case of The Steamboat New World v. King, 16 How. 469, which was also the case of a free passenger carried on a steamboat, and injured by the explosion of the boiler, Curtis, justice, delivering the judgment, quoted the above proposition of Justice Grier, and said: "We desire to be understood to reaffirm that doctrine, as resting not only on public policy, but on sound principles of law" P. 474.

In York Company v. Central Railroad, 3 Wall. 113, the court, after conceding that the responsibility imposed on the carrier of goods by the common law, may be restricted and qualified by express stipulation, adds: "When such stipulation is made, and it does not cover losses from negligence or misconduct. we can perceive no just reason for refusing its recognition and enforcement." In the case of Walker v. The Transportation Company, decided at the same term (3 Wall. 150), it is true, the owner of a vessel destroyed by fire on the lakes, was held not to be responsible for the negligence of the officers and agents having charge of the vessel; but that was under the act of 1851, which the court held to apply to our great lakes as well as to the sea. And in Express company v. Kountze Brothers, 8 Wall. 342, where the carriers were sued for the loss of gold-dust delivered to them on a bill of lading excluding liability for any loss or damage by fire, act of God, enemies of the government, or dangers incidental to a time of war, they were held liable for a robbery by a predatory band of armed men (one of the excepted risks), because they negligently and needlessly took a route which was exposed to such incursions. The judge, at the trial, charged the jury, that although the contract was legally sufficient to restrict the liability of the defendants as common carriers, yet if they were guilty of actual negligence, they were responsible; and that they were chargeable with negligence unless they exercised the care and prudence of a prudent man in his own affairs. This was held by this court to be a correct statement of the law. P. 353.

Some of the above citations are only expressions of opinion, it is true; but they are the expressions of judges whose opinions are entitled to much weight; and the last cited case is a judgment upon the precise point. Taken in connection with the concurring decisions of State courts before cited, they seem to us decisive of the question, and leave but little to be added to the considerations which they suggest.

It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and therefore, may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract.

We are unable to see the soundess of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God, or public enemies. The civil law excepts, also, losses by means of *any* superior force, and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company. whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risks of inevitable accidents in the carriage of his goods? Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made; is the company a public carrier as to the twenty parcels, and a private carrier as to the one?

On this point, there are several authorities which support our view, some of which are noted in the margin. Davidson v. Graham, 2 Ohio St. 131; Graham v. Davis & Co., 4 Ohio St. 362; Swindler v. Hilliard, 2 Rich. 286; Baker v. Brinson, 9 Rich. 201; Steel v. Townsend, 37 Ala. 247.

A common carrier may undoubtedly become a private carrier, or a bailee for hire, when, as a matter of accommodation, or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York city and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character.

But it is contended, that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions in his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers, the highest degree of carefulness and diligence is expressly exacted. In the one case, the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential duties* of his employment. And to assert that he may do so seems almost a contradiction in terms.

Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus in Dorr v. The N. J. S. Nav. Co., I Kern. 485, the court sums up its judgment thus: "To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals, or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."

Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And this reason is obvious enough—if they did not accept this, they must pay tariff rates. These rates were seventy cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2,000 pounds, making a charge of $14 for every animal carried, instead of the usual charge of $70 for a car load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are; and how necessary it is to stand firmly by those

principles of law by which the public interests are protected.

If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer choose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright, and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society, and the better administration of the laws had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule that he must be responsible at all events. Hence the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public and stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.

Hence, as before remarked, we regard the English statute, called the railway and canal traffic act passed in 1854, which declared void all notices and conditions made by common carriers, except such as the judge, at the trial, or the courts should hold just and reasonable, as substantially a return to the rules of the common law. It would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law instead of the individual judges. The decisions made for more than half a century before the courts commenced the normal course which led to the necessity of that statute, giving effect to certain classes of exemptions stipulated for by the carrier, may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect when not made under the fallacious notion that every special contract imposed by the common carrier on his customers must be carried into effect, for the simple reason that it was entered into, without regard to the character of the contract and the relative situation of the parties.

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid, so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part, when they asked to go still further, and to be excused from negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.

On this subject, the remarks of Chief Justice Redfield, in his recent collection of American Railway Cases, seem to us eminently just. "It being clearly established then," says he, "that common carriers have public duties which they are bound to discharge with impartiality, we must conclude that they cannot, either by notices or special contracts, release themselves from the performance of these public duties, even by the consent of those who employ them; for all extortion is done by the apparent consent of the victim. A public officer or servant, who has a monopoly in his department, has no just right to impose onerous and unreasonable conditions upon those who are compelled to employ him." And his conclusion is, that notwithstanding some exceptional decisions, the law of to-day stands substantially as follows: "1. That the exemption claimed by carriers must be reasonable and just, otherwise it will be regarded as extorted from the owners of the goods by duress of circumstances, and, therefore, not binding. 2. That every attempt of carriers, by general notices or special contract, to excuse themselves from responsibility for losses or damages resulting in any degree from their own want of care and faithfulness, is against that good faith which the law requires as the basis of all contracts or employments, and, therefore, based upon principles and a policy which the law will not uphold."

The defendants endeavor to make a distinction between gross and ordinary negligence, and insist that the judge ought to have charged that the contract was at least effective for excusing the latter.

We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party, and which he fails to perform, than of the amount of inattention, carelessness or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply "negligence." And this seems to be the tendency of modern authorities. 1 Smith's Lead. Cases, 6th Amer. ed.; Story on Bailments, § 571; Wyld v. Pickford, 7 M. & W. 460; Hinton v. Dibbin, 2 Q. B. 661; Wilson v. Brett, 11 M. & W. 115; Beal v. South Devon R. Co., 3 Hurlst. & Colt, 337; L. R., 1 C. B. 600; 14 How. 486; 16 How. 474. If they mean more than this, and seek to abolish the distinction of degrees of care, skill and diligence required in the performance of various duties, and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that "every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it." Art. 1382. Toullier, in his Commentary on the Code, regards this as a happy thought, and a return to the law of nature. Vol. 6, p. 243. But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice.

In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence. The question whether the company was guilty of negligence in this case, which caused the injury sustained by the plaintiff, was fairly left to the jury. It was unnecessary to tell them whether, in the language of law writers, such negligence would be called gross or ordinary.

The conclusions to which we have come are—

First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

Fourthly. That a drover travelling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire.

Judgment affirmed.

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Tatlow, No. 1805—Three-story Brick Dwelling.

Goldbeck, Nos. 2814 and 2816—2 Two-story Brick Dwellings.

St. John, No. 623—Two-story Brick Building. Executors' Peremptory Sale—Estate of Nicholas Helverson, dec'd.

REAL ESTATE SALE, JANUARY 13th.

Will include—

Market, No. 3501—Business Stand—Three-story Brick Store and Dwelling. Orphans' Court Sale—Estate of John Thornton, dec'd.

South, No. 816—Business Stand—Three-story Brick Store and Dwelling, with 3 Three-story Brick Dwellings in the rear, No. 811 Emeline street—2 fronts. Orphans' Court Sale—Estate of Emma Morony, a minor.

Thirty-fifth and Lancaster avenue, N W corner—Three-story Brick Dwelling. Orphans' Court Sale—Estate of Samuel Hutchinson, dec'd.

Kimball, No. ——Three-story Brick Dwelling. Orphans' Court Sale—Estate of Summer A. Robinson, dec'd.

Fitzwater, No. ——Three-story Brick Dwelling. Same Estate.

Ridge avenue, Nos. 1351 and 1353—Business Stands—2 Three-story Brick Stores and Dwellings.

REAL ESTATE SALE, JANUARY 20th.

Will include -

Callowhill and Juliana, N. E. corner—2½-story Brick Lager Beer Saloon. Orphans' Court Sale - Estate of ——Knecht, dec'd.

Callowhill, No. 513 - 2½ story Brick Store and Dwelling. Same Estate.

Juliana, No. 405—Brick and Frame Carpenter Shop. Same Estate.

Juliana, Nos. 407, 409 and 411—3 Three-story Brick Dwellings. Same Estate.

Juliana, No. 413—Brick Shop and Large Stable. Same Estate.

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Orphans' Court Sale.—Eleventh street above Chestnut. Business Property—Three-story Brick Store and Dwelling, No. 37 S. Eleventh street. Lot 17 x 56½ feet. Estate of Mrs. Ann Pleasants. dec'd.

Orphans Court Absolute Sale.—Hazzard street. 3 Three-story Brick Houses, between Jasper and Emerald streets, 19th Ward, each lot 12 x 58½ feet. Estate of Amos Ellis, dec'd, in trust for B. Davis Ellis et al.

Orphans' Court Absolute Sale.—Haddington. Two-story Frame House, Adam street, east of Sixty-sixth street, and south of Haverford street, 24th Ward. Lot 50 x 90 feet. Estate of David Weir, dec'd.

Sale by Order of Heirs.—No. 1345 Lombard street. Desirable Three-story Brick Dwelling, with basement, has the conveniences. Lot 18 x 81 feet. East of Broad street. Estate of Archibald Catanach, dec'd.

Sale by Order of Heirs. No. 1531 Bainbridge street. Business Stand—Three-story Brick Store and Dwelling, adjoining the "Kater Market House." Lot 18 x 60 feet. Same Estate.

No. 2005 Federal street.—Three-story Brick Store and Dwelling, with bake oven, west of Twentieth street. Lot 16 x 85 feet. $75 ground rent.

Peremptory Sale by Order of the Court of Common Pleas. Estate of John Sidney Jones, a lunatic.—Business Property—Large Brick Building, No. 147 S. Second street, above Walnut street. Lot 21 x 95 10 12 feet. On Wednesday, January 14th, 1874, at 12 o'clock noon, will be sold at Public Sale without reserve, at the Philadelphia Exchange, a lot of ground with the building thereon erected, situate on the east side of Second street (No. 147), between Walnut and Chestnut streets, in the 5th Ward of the City; containing in front on Second street 21 feet, and extending in depth eastward of that width 95 feet 10 inches.

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